

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

KEITH STUART CUMBEE-PETITIONER

VS.

LORIE DAVIS, DIRECTOR-RESPONDENT

RULE 23 APPLICATION TO STAY

TO THE HONORABLE JUSTICE ALLOCATED TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (Rule 22):

Purpose. The petitioner asks the Court to stay lower court appeal of final judgment pending resolution of the "petition" in this matter. Rule 23.1.

Facts. Petitioner is a party to a "JUDGMENT" sought to be reviewed. Rule 23.2; 28 U.S.C. §2101(f). Said JUDGMENT is from the United States District Court for the Eastern District of Texas, Tyler Division, Civil Action No. 6:15cv1138 ("USDC"), Final Judgment, Dkt.36-1 ("Dkt." refers to USDC docket entries), and Memorandum Opinion and Order of Dismissal, Dkt.35-1, Cumbee v. Davis (E.D.Tex. Dec 12, 2017), copies attached as Exhibits A and B, respectively, dismissing Cumbee's 28 U.S.C. §2254 applications (AEDPA limitations).

Relief was first sought in the USDC. Rule 23.3. See Order, Dkt. 27-1, Cumbee v. Davis (E.D.Tex. Aug 3, 2017) petition Appendix B (interlocutory order denying Cumbee's Rule 60(b) motion, Dkt.12, and related motion to stay, Dkt.17). The Fifth Circuit dismissed the appeal moving for COA to challenge USDC interlocutory denials,

Cumbee v. Davis (5th Cir. Jne 7, 2018), Appeal No. 17-4086, petition Appendix A, which was filed when Cumbee's 28 U.S.C. §2254 application was pending, appeals notice before final judgment, dismissed for want of jurisdiction (because USDC entered JUDGMENT, above), and appealed to this Court.

Relief was next sought in the Fifth Circuit, in the appeal of the USDC JUDGMENT, Rule 23.3, wherein Cumbee moved for a stay in the appeals court since an additional USDC motion would serve no purpose and would be impractical at this stage of the proceedings. Cumbee moved to stay the appeal pending resolution of the petition herein, which stay was denied by memorandum, Cumbee v. Davis (5th Cir. Sep 12, 2018), Appeal No. 18-40534, copy attached as Exhibit C.

Therefore, relief sought is not available from any other court or judge, Rule 23.3, and stay is justified for the following reasons:

(1) USDC Rule 60(b) motion, Dkt.12, set out a clear prima facie case of appearance of impropriety (fraud-on-the-court), depriving Cumbee of fundamental constitutional rights, see the petition.

(2) USDC motion, Dkt.17, sought to stay habeas review pending resolution of the Rule 60(b) motion because, otherwise denies any opportunity for meaningful habeas review, due process violations described in the petition.

(3) Issues for review have pared down to uncomplicated matters of fundamental rights, denial of Legal Assistance, double conviction and double punishment, which are now before the Court. In light of the circumstances of the case and AEDPA's purpose, the stay should be granted, pending certiorari review by this Court.

(4) Petitioner seeks to stay Cumbee v. Davis, Fifth Circuit Appeal No. 18-40534, pending resolution of the petition in this case, otherwise unreasonably impinges Cumbee's right to relief, running the risk petitioner will forever lose his opportunity for meaningful habeas review so that fundamental constitutional violations will never be addressed, i.e., once Fifth Circuit denies COA, this Court may lose jurisdiction, as lower courts have ruled.

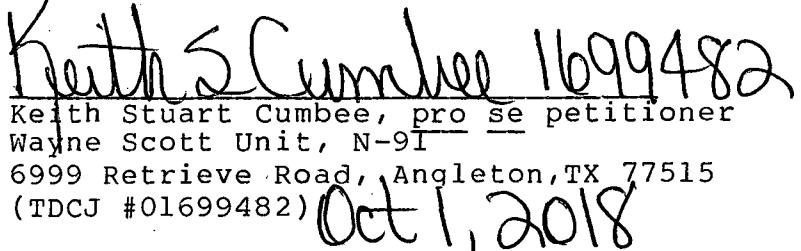
(5) A stay would be in keeping with purposes of AEDPA because petitioner seeks speedy relief of his actual innocence claim and dismissal for limitations without addressing fraud-on-the-court does not promote the goal that innocent persons should not be incarcerated. Further, addressing the Rule 60(b) motion before proceeding to habeas review promotes judicial efficiency in keeping with AEDPA's purpose, i.e., resolution of issues in the petition herein may obviate the need for further habeas review. Also, Cumbee is serving his sentence currently, so there is no delay in execution of the sentence, and affording unwarranted finality/legality does not promote AEDPA or constitutional values.

Law. Since petitioner is a party to the JUDGMENT, Rule 23.2 authorizes this application to stay presented to a Justice herein. See 28 U.S.C. §2101(f)(execution and enforcement of judgment or decree may be stayed to obtain writ of certiorari from this Court). USDC has authority to issue stays, Lands v. North American Co., 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936), were such stay would be a proper exercise of discretion, Clinton v. Jones, 520 U.S. 681, 706, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997). Stay

must be compatable with AEPDA's purpose, Rhines v. Webber, 544 U.S. 269, 276-277, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). Since there is no delay in execution of sentence and speedy but fair relief is sought, dismissal for limitations without first resolving fraud-on-the-court, so that the first time petition (based on innocence) can be properly resolved, frustrates AEDPA's primary purpose, that innocent persons should not be incarcerated. See McQuiggin v. Perkins, 133 S.Ct. 924, 1932-1933, 185 L.Ed.2d 2019 (2013). Lower court denial of stay is clear error, abuse of discretion, since petitioner established good cause for potentially meritorious claims and there is no indication petitioner is intentionally engaging in dilatory litigation tactics, and therefore, unreasonably impairs the prisoner's right to relief. See Rhines, 544 U.S. at 278. See also Evans v. Cain, 577 F.3d 620, 622-623 & n.1 (5th Cir. 2009)(per curiam). The circumstances of the case justify the stay, petitioner is in prison, with no motive to delay relief.

For the foregoing reasons, petition seeks a stay of Fifth Circuit Appeal No. 18-40534, Cumbee v. Davis, until this case is resolved.

RESPECTFULLY SUBMITTED,

  
Keith Stuart Cumbee, pro se petitioner  
Wayne Scott Unit, N-91  
6999 Retrieve Road, Angleton, TX 77515  
(TDCJ #01699482) *Oct 1, 2018*

CERTIFICATE OF COMPLIANCE WITH RULE 33.2

By my signature above, I certify this motion complies with type-volume, type-face, type-style requires; 4 pages, monospaced, using Courier 10 point.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

KEITH STUART CUMBEE

§

v.

§

CIVIL ACTION NO. 6:15cv1138

DIRECTOR, TDCJ-CID

§

FINAL JUDGMENT

The above-styled application for the writ of habeas corpus having come before the Court for consideration, and a decision having been duly rendered, it is hereby

**ORDERED** that no relief is granted to the Petitioner and the above-entitled and numbered cause of action is **DISMISSED WITH PREJUDICE**.

So ORDERED and SIGNED this 19th day of December, 2017.

  
JOHN D. LOVE  
UNITED STATES MAGISTRATE JUDGE

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

KEITH STUART CUMBEE §  
v. § CIVIL ACTION NO. 6:15cv1138  
DIRECTOR, TDCJ-CID §

MEMORANDUM OPINION AND ORDER OF DISMISSAL

The Petitioner Keith Cumbee, proceeding *pro se*, filed this petition for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. The parties have consented to allow the undersigned United States Magistrate Judge to enter final judgment in accordance with 28 U.S.C. §636(c). A Report was inadvertently issued recommending disposition of the case, but because the parties have consented, a report and recommendation is not necessary. *See* 28 U.S.C. §636(b)(1)(B), (C). It is therefore **ORDERED** that the Report of the Magistrate Judge (docket no. 34) is **WITHDRAWN** and the following is substituted therefor.

**I. Background**

Cumbee states and his attached court records show that on January 3, 2006, he pleaded guilty to aggravated assault and received deferred adjudication. The State later moved to proceed to adjudication, and on February 18, 2011, Cumbee pleaded true to the State's allegations and was sentenced to 12 years' imprisonment. On March 18, 2011, Cumbee pleaded guilty to possession of marijuana and was sentenced to 15 months in prison.

Cumbee did not appeal any of these court proceedings. On November 7, 2011, he signed a state habeas corpus application complaining that he received ineffective assistance of counsel from William Baade, his attorney in the original deferred adjudication proceeding. This application was

denied without written order on the findings of the trial court without a hearing on March 21, 2012. (Docket no. 19-1, pp. 2-17).

On September 18, 2013, Cumbee filed a second state habeas application again complaining that he received ineffective assistance from Baade in the deferred adjudication proceeding. This application was dismissed as successive on January 8, 2014 (docket no. 19-4, pp. 2-49).

On December 4, 2014, Cumbee filed his third state habeas application. This application complained that he received ineffective assistance of counsel from Austin Reeve Jackson, his attorney in the revocation proceeding, and that the prosecutor and trial court committed error in the revocation proceeding. This habeas application was dismissed as successive on February 18, 2015. Cumbee signed his federal habeas corpus petition on November 30, 2015.

In his federal petition, Cumbee asserts that he received ineffective assistance of counsel during the revocation proceeding in various particulars. In an attached document styled “2254-Attachment, 3rd Petition Information,” (docket no. 1, p. 15), Cumbee summarizes his third state habeas application, stating that in this application, he complained that one of the grounds for the revocation of his deferred adjudication probation was that he had delivered marijuana to another person. He was later charged in a separate offense for this same delivery of marijuana. Although Jackson represented him in the revocation proceeding, Cumbee states that Jackson was not appointed to represent him on the marijuana charge until a few weeks later; thus, he believes that he pleaded true to the marijuana delivery charge at the revocation proceeding while not represented by counsel. In his third state habeas petition, Cumbee argued as follows:

Applicant argues that at the time of his revocation hearing he had an additional charge pending in the same court for another felony charge. Applicant’s lawyer allowed to enter into a plea of true to the pending charge while knowing he was not represented by counsel therein. Applicant states that his lawyer failed to inform him that should he enter a plea of true to the pending charge, that his plea would be used as evidence against him in the upcoming hearing and with such this cannot be construed as effective representation in any form and violates this applicant’s right to the Sixth Amendment.

Applicant proffers that at the time of his revocation of deferred adjudication proceeding, there were also additional charges pending against him within this same court. And that the state violated his constitutional rights by allowing him and coercing him to enter into a plea of true on that charge while knowing he was not represented by counsel on the separate charge and that by doing so deprived this applicant of his right to remain silent and not be a witness against himself. The State is aware that it is the right of any defendant to be represented by counsel at every stage of the judicial process. Herein, the revocation and the pending charge was [sic] both filed in the Seventh Judicial District Court of Smith County, and there is no way the court can claim ignorance herein.

In a memorandum in support of his federal habeas petition, Cumbee argued that Jackson abandoned his duty of loyalty, failed to investigate the law and facts, failed to prepare for trial, and failed to explain the details of the case and the law to his client. He contends that Jackson failed to communicate that he was without counsel for the January 13, 2011 charge of possession of marijuana and the State intended to seek a second conviction for this offense under another cause number in a March 2011 hearing, failed to raise a defense of lack of due diligence on the part of the State in revoking his probation, failed to object to the amended motion to revoke, failed to notify Cumbee of his right to separate counsel before entering his judicial confession when he, Jackson, was not Cumbee's attorney on the marijuana charge, failed to seek discovery or view scientific evidence or test reports concerning the marijuana charge, and committed errors which in cumulative effect violated Cumbee's Sixth Amendment rights.

Next, Cumbee asserts that the prosecutor and the judge failed to execute their duties with regard to Cumbee's right to a fair trial. He maintains that the state's attorney coerced a judicial confession from him while knowing he was not represented by counsel and that the State prosecuted the case twice and the judge allowed this second prosecution.

## **II. Proceedings on Limitations in the Federal Petition**

In response to a question on the standard §2254 habeas form concerning the statute of limitations, Cumbee stated as follows:

Had attacked judgment of conviction related to first lawyer Brandon Baade and now with proof of constitutional violations attacking second lawyer Austin Reeve Jackson. It is applicant's firm belief they cannot be attacked together. Two lawyers.

Two proceedings. Two separate issues, no collateral from one to the other, got final ruling on Reeve Jackson 3/12/15 and moved on to this petition.

After review of the pleadings and exhibits, the Court determined that Cumbee's petition could be barred by the statute of limitations. In the interest of justice, however, the Court directed that Cumbee be given an opportunity to explain why his petition should not be barred by the statute of limitations. Day v. McDonough, 547 U.S. 198, 210, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006).

In his response to this order, Cumbee states that he pleaded true in the deferred adjudication revocation proceeding and then was appointed the same attorney and pleaded guilty to the possession of marijuana offense. He states that he knew something was wrong and protested but was told that the alternative was long incarceration. Cumbee asserts that "it took me quite a while to obtain records and realize exactly what was done."

Cumbee again states that he pleaded guilty to the revocation of probation in February of 2011, including a plea of true to the allegation that he had delivered marijuana, but counsel was not appointed on the marijuana charge until March 2, 2011. He contends that he pleaded guilty to the marijuana charge in February despite not having counsel. Cumbee maintains that he worked diligently to get the records from attorneys and the district clerk, and some of the records he received were incomplete. He states that the judgment he filed with his writ is missing the second page, and he does not know if any of his other records may have been missing pages.

According to Cumbee, his biggest hurdle was with his first attorney, Brandon Baade, and the State Bar of Texas. He asked for his records for ten months without receiving a reply, and then went to the State Bar and waited another nine or 10 months to no avail. He also had difficulty obtaining records from the county clerk, stating that he "did not get any real help with record until August 27, 2014."

In a separate document which Cumbee styles as a "Rule 60 motion," he states that he is not only challenging the February 18, 2011 revocation of his deferred adjudication, but also the March 18, 2011 marijuana conviction. He asserts that there was "fraud on the court" and that the

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successive prosecutions violated the Double Jeopardy Clause and the Due Process Clause. Cumbee explains that he was adjudicated guilty for the marijuana offense in February, with the sentence running concurrently to his assault conviction, and then found guilty again in a separate proceeding in March, receiving a concurrent 15 month state jail sentence.

### **III. The Respondent's Motion to Dismiss**

After reviewing Cumbee's response, the Court directed the Respondent to answer or otherwise plead to Cumbee's petition. The Respondent filed a motion to dismiss Cumbee's petition as time-barred. In this motion, the Respondent set out the time line, explaining that on January 3, 2006, Cumbee pleaded guilty to aggravated assault and received deferred adjudication. The State later moved to proceed to adjudication, and on February 18, 2011, Cumbee pleaded true to the State's allegations and was sentenced to 12 years' imprisonment. On March 18, 2011, Cumbee pleaded guilty to possession of marijuana and was sentenced to 15 months in prison.

The Respondent states that Cumbee did not appeal either of these convictions. He filed a state habeas petition challenging the revocation of his deferred adjudication probation on November 7, 2011, and this was denied without written order on the findings of the trial court without a hearing on March 21, 2012.

On September 18, 2013, Cumbee filed another state habeas application challenging the revocation of his deferred adjudication probation. This application was dismissed by the Texas Court of Criminal Appeals as successive on January 8, 2014. He filed his federal habeas petition on November 30, 2015.

Although Cumbee's petition ostensibly challenges only the February 2011 revocation proceeding, the Respondent interprets the petition as challenging three separate proceedings - the January 3, 2006 placement on deferred adjudication, the February 18, 2011 order adjudicating guilt, and the March 18, 2011 guilty plea to possession of marijuana. With regard to the original placement on deferred adjudication, the Respondent argues that an order placing an individual on deferred adjudication is a final order subject to the statute of limitations. This order became final

on February 2, 2006, giving Cumbee one year in which to seek federal habeas corpus relief. However, Cumbee did not file his first state habeas petition until well after this deadline passed, rendering his challenges to the deferred adjudication order barred by limitations.

With regard to the order adjudicating guilt in February of 2011, the Respondent states that Cumbee is entitled to 136 days of statutory tolling, from November 7, 2011, through March 21, 2012. According to the Respondent, this moved Cumbee's federal habeas filing deadline to Monday, August 6, 2012. However, he did not file his federal habeas petition until November of 2015, over three years later.

Turning to the possession of marijuana conviction from March of 2011, the Respondent states that Cumbee discharged the sentence for this offense on April 14, 2012, and thus was not in custody for this offense when he filed his federal habeas petition in November of 2015. The Respondent further avers that his claims concerning this conviction are unexhausted because Cumbee did not take a direct appeal nor seek state habeas corpus relief concerning this conviction, and that the claims concerning this conviction are barred by limitations because the conviction became final in April of 2011, some four and a half years prior to the filing of his federal habeas petition.

Although Cumbee argued that he had acted diligently but was unable to get copies of records, the Respondent asserts that delay in obtaining records from the state or from one's attorney does not warrant equitable tolling of the statute of limitations. The Respondent also contends that to the extent Cumbee argues actual innocence, he has not shown sufficient basis for excusing the limitations period and that Cumbee has not shown any other basis upon which the limitations period should be equitably tolled.

#### **IV. Cumbee's Response to the Motion to Dismiss**

Cumbee filed a motion for summary judgment and response to the motion to dismiss. In this motion and response, Cumbee states that he pleaded guilty to the marijuana charge in February of

2011 and was adjudicated guilty. He was then appointed counsel on this same charge and convicted in March, which he argues is double jeopardy.

Cumbee complains that the Respondent did not file an “answer,” as ordered by the Court. He contends that he is entitled to a copy of the state court records which the Respondent filed in this case.

Next, Cumbee asserts that he was in custody under the March 2011 marijuana charge at the time he filed his federal petition because that sentence was concurrent. He claims he presented both convictions for state review and thus exhausted his state remedies.

With regard to the statute of limitations, Cumbee argues that the denial of legal materials and access to court is ongoing. He states that he is entitled to equitable tolling of the limitations period because he has been diligent and that he is actually innocent of the 2006 aggravated assault charge because he was acting in self-defense. He also asserts actual innocence because he pleaded guilty to the marijuana charge in February of 2011 without representation by counsel. Cumbee also argues this guilty plea amounted to “fraud upon the court.”

#### **V. The State Court Records**

The state court records furnished by the Respondent show that Cumbee was indicted in cause no. 007-1820-03 on charges of aggravated assault with a deadly weapon. On January 3, 2006, Cumbee entered a negotiated plea of guilty, receiving deferred adjudication for a period of 10 years.

On February 14, 2011, the Court found that Cumbee had violated the terms of his community supervision, proceeded to final adjudication, and revoked Cumbee’s community supervision. After hearing evidence and the arguments of counsel, the Court sentenced Cumbee to 12 years in prison.

Cumbee did not file a notice of appeal, but sought habeas corpus relief on November 29, 2011. This state habeas application alleged that: Cumbee had received ineffective assistance in the original proceeding because there was no evidence of a deadly weapon and counsel did not challenge the indictment; there was no chain of custody, lab report, or photo of a weapon, yet counsel did not challenge the deadly weapon finding; the victim said that he never saw a weapon;

counsel instructed Cumbee to sign a document saying he had used a knife when no knife could be produced by the State; and for all these reasons, there should not have been an affirmative finding of a deadly weapon in the final judgment. This state habeas application was denied without written order on the findings of the trial court without a hearing on March 21, 2012.

On February 14, 2011, a judgment adjudicating guilt was entered. This judgment shows Cumbee was represented by Reeve Jackson. The motion to proceed to final adjudication alleged that Cumbee had violated the terms of his community supervision because in November of 2006, he delivered more than 50 but less than 2000 pounds of marijuana to an individual named Michael Beauchamp in Lee County, Alabama. The motion also alleged that Cumbee failed to perform the community supervision requirements of his probation.

On September 18, 2013, Cumbee filed his second state habeas application. In this application, Cumbee alleged that his attorney at the initial proceeding rendered ineffective assistance of counsel in a number of particulars, the second police report was written 10 days after the incident and contained a different version of the facts, the trial court committed error by allowing Cumbee to enter into a negotiated plea agreement without proper admonishments or waivers, and Cumbee is actually innocent. This second state habeas application was dismissed as successive on January 8, 2014. (Docket no. 19-4, p. 2).

Cumbee then filed his third state habeas application on December 9, 2014. In this application, Cumbee asserts that he received ineffective assistance of counsel from his attorney at the revocation proceeding in that counsel failed to object to the state's amendments of the motion to revoke, counsel allowed him to enter a plea of "true" to pending felony charges even though he was not represented by counsel on those charges, the trial court erred by allowing him to plead to those charges and thus enter an illegal judicial confession, and he was subjected to double jeopardy. This application was dismissed as successive on February 18, 2015 (docket no. 19-5, p. 1).

The final proceeding identified by Cumbee was the conviction for possession of marijuana, which occurred on March 18, 2011. He did not appeal this conviction, which became final on Monday, April 18, 2011. The limitations period for this conviction began to run at that time and expired one year later, on April 18, 2012. Cumbee signed his federal habeas petition on November 30, 2015, at which time the statute of limitations for all three of these proceedings had long since expired.

A. Lack of State Court Records

In his original federal habeas petition, Cumbee stated as follows in response to a question as to why his petition should not be barred by the statute of limitations:

Had attacked judgment of conviction related to first lawyer Brandon Baade and now with proof of constitutional violations attacking second lawyer Austin Reeve Jackson. It is applicant's firm belief they cannot be attacked together. Two lawyers. Two proceedings. Two separate issues, no collateral from one to the other, got final ruling on Reeve Jackson 3/12/15 and moved on to this petition.

The Court ordered Cumbee to show cause why his petition should not be barred by the statute of limitations. In response, Cumbee filed a "tolling affidavit" (docket no. 11). In this affidavit, Cumbee asserts that he had considerable difficulty in obtaining copies of the state court records. He contended that he worked diligently to obtain the records from attorneys and the district clerk, but in state prison, Cumbee asserts that he had no research assistance, no computer searches, no word processors, and no copies.

Furthermore, Cumbee complains that he has repeatedly requested copies of his records and received either nothing or partial records. He asserts that no one has ever sent him the second page of the judgments because "no one wants to be the one that turns over the records that show the errors."

After 10 months of asking for his records from Baade, Cumbee states that he went to the State Bar of Texas. He spent another 10 months trying to get help from the Bar but had to walk away empty handed. When he tried to get records from the county clerk, she would provide "a new

November 6, 2015, over three weeks before Cumbee signed his federal habeas petition. Cumbee's state habeas applications do not offer any valid basis for tolling the limitations period so as to bring his federal petition within the limitations period.

C. Actual Innocence and Equitable Tolling

Cumbee has not alleged, much less shown, a plausible claim of actual innocence so as to evade the limitations bar. The Supreme Court has held that "actual innocence, if proved, serves as a gateway through which the petitioner may pass whether the impediment is a procedural bar ... or, as in this case, expiration of the statute of limitations." McQuiggin v. Perkins, 133 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013). In this regard, the Supreme Court explained that tenable actual-innocence gateway pleas are rare; a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. Id., *citing Schlup v. Delo*, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (claim of actual innocence requires the petitioner to support his allegations of constitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence which was not presented at trial); *see also House v. Bell*, 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (emphasizing that the Schlup standard is "demanding" and seldom met).

In applying the exception to the state procedural bar, the term "actual innocence" is defined as "factual" as opposed to "legal" innocence. Actual innocence means that the person did not commit the crime, while legal innocence arises when a constitutional violation by itself would require reversal. Morris v. Dretke, 90 F.App'x 62, 2004 U.S. App. LEXIS 183, 2004 WL 49095 (5th Cir., January 6, 2004), *citing Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). In Morris, the Fifth Circuit observed that "because Morris is not arguing that he was not the person who committed the crime, the actual innocence exception is not available to him." Cumbee has offered nothing to suggest that he is actually innocent so as to pass through the gateway and avoid the operation of the statute of limitations.

Nor has Cumbee presented any other basis upon which the statute of limitations may be equitably tolled. The Fifth Circuit has held that the district court has the power to equitably toll the limitations period in "extraordinary circumstances." Cantu-Tzin v. Johnson, 162 F.3d 295, 299 (5th Cir. 1998). In order to qualify for such equitable tolling, the petition must present "rare and exceptional circumstances." Davis v. Johnson, 158 F.3d 806, 810-11 (5th Cir. 1998). In making this determination, the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, and unfamiliarity with the legal process are insufficient reasons for equitable tolling of the statute of limitations. Felder v. Johnson, 204 F.3d 168, 173 (5th Cir. 2000); *see also* Fisher v. Johnson, 174 F.3d 710, 713 n.11 (5th Cir. 1999).

The Supreme Court has stated that equitable tolling applies in federal habeas corpus challenges to state convictions, but that a petitioner may be entitled to such tolling only if he shows that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented timely filing. Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010).

Equitable tolling cannot be used to thwart the intent of Congress in enacting the limitations period. *See Davis*, 158 F.3d at 811 (noting that "rare and exceptional circumstances" are required). At the same time, the Court is aware that dismissal of a first federal habeas petition is a "particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." Lonchar v. Thomas, 517 U.S. 314, 324, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996).

The Fifth Circuit has explained that equitable tolling is not intended for those who "sleep on their rights." Coleman v. Johnson, 184 F.3d 398, 403 (5th Cir. 1999). This comports with the Supreme Court's holding that "reasonable diligence" is required for entitlement to equitable tolling. Holland, 560 U.S. at 653; *see also* Palacios v. Stephens, 723 F.3d 600, 604 (5th Cir. 2013). Although Cumbee argues that he exercised reasonable diligence, the record belies this claim. He

**ORDERED** that the Petitioner Keith Cumbee is **DENIED** a certificate of appealability *sua sponte*. Finally, it is

**ORDERED** that any and all motions which may be pending in this action are hereby **DENIED**.

So ORDERED and SIGNED this 19th day of December, 2017.

  
JOHN D. LOVE  
UNITED STATES MAGISTRATE JUDGE

EXHIBIT C

*United States Court of Appeals*

**FIFTH CIRCUIT  
OFFICE OF THE CLERK**

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE  
NEW ORLEANS, LA 70130

September 12, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-40534 Keith Cumbee v. Lorie Davis, Director  
USDC No. 6:15-CV-1138

The court has taken the following action in this case:

The motion to stay the proceedings in this court is denied. You are reminded that your motion for certificate of appealability with brief in support are due October 9, 2018. If you fail to comply your appeal will be dismissed without further notice.

Sincerely,

LYLE W. CAYCE, Clerk

Yvonne R. Washington

By:

Monica R. Washington, Deputy Clerk  
504-310-7705

Mr. Keith Stuart Cumbee  
Mr. Jon Rodney Meador

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED

KEITH STUART CUMBEE-PETITIONER

vs.

LORIE DAVIS, DIRECTOR-RESPONDENT

PROOF OF SERVICE

Petitioner certifies that on the 1st day of October, 2018, a true and correct copy of petitioner's Rule 23 Application to Stay, and Motion for Leave to Proceed In Forma Pauperis and this Proof of Service, were served upon opposing counsel, mailing the same, first class mail, postage prepaid, by deposit in the Wayne Scott Unit legal mail system, addressed to:

Hon. Attorney General of Texas, Jon R. Meador, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

Keith S Cumbee  
Keith Stuart Cumbee, Petitioner

UNSWORN DECLARATION

I certify under penalty of perjury that the forgoing is true and correct.

Executed on the 1st day of October, 2018.

Keith S Cumbee  
Keith Stuart Cumbee, pro se petitioner,  
a Texas inmate, TDCJ #1699482  
Wayne Scott Unit, N-91  
6999 Retrieve Road, Angleton, TX 77515