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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40534



A True Copy
Certified order issued May 31, 2019

Judy W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

KEITH STUART CUMBEE,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

ORDER:

In 2011, Keith Stuart Cumbee, Texas prisoner # 1699482, had his community supervision revoked based on his admission that he had possessed marijuana. The state trial court adjudicated him guilty of aggravated assault causing serious bodily injury with a deadly weapon and sentenced him to 12 years of imprisonment. Cumbee subsequently pleaded guilty to the substantive offense of possession of marijuana and was sentenced to a concurrent term of imprisonment of 15 months.

Cumbee now seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 habeas application as time barred. Cumbee has waived any challenge to the order deferring adjudication

on the aggravated assault charge and placing him on community supervision. See *Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

A COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where, as here, the district court’s denial of federal habeas relief is based on procedural grounds, this court will issue a COA “when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate whether the district court abused its discretion by raising the limitations issue sua sponte, see *Day v. McDonough*, 547 U.S. 198, 210 (2006), or would debate its denial of Cumbee’s Rule 60 motion, see *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005); *Fierro v. Johnson*, 197 F.3d 147, 153-54 (5th Cir. 1999). Nor would reasonable jurists debate the correctness of the district court’s determination that Cumbee had not shown that he was entitled to statutory or equitable tolling or that he could proceed on the basis of actual innocence. See *Slack*, 529 U.S. at 484-85; *McQuiggin v. Perkins*, 569 U.S. 383, 386, 397 (2013), *Holland v. Florida*, 560 U.S. 631, 645-49 (2010); *Krause v. Thaler*, 637 F.3d 558, 561 (5th Cir. 2011).

Because reasonable jurists would not debate the correctness of the district court’s determination that Cumbee’s § 2254 petition was untimely or its other procedural rulings, this court need not consider Cumbee’s substantive claims. See *Slack*, 529 U.S. at 484-85. Accordingly, Cumbee’s motion for a COA is DENIED. See *id.* His motion for leave to proceed in forma pauperis also is DENIED.

No. 18-40534

Signed: 5-31-2019

_____/s/ Catharina Haynes_____
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

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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

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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.

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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

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

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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;

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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).

VI. Legal Standards and Analysis

I. The Law on Limitations

The statute of limitations, set out in 28 U.S.C. §2244(d), reads as follows:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

This statute was enacted as part of the Anti-Terrorism and Effective Death Penalty Act on April 24, 1996. The Court will assume that Cumbee challenges all three of his proceedings and will discuss each in turn.

The first judgment which Cumbee challenges is his placement on deferred adjudication on January 3, 2006. The Fifth Circuit has held that orders of deferred adjudication are final judgments for purposes of the statute of limitations. Caldwell v. Dretke, 429 F.3d 521, 528-29 (5th Cir. 2005). Because Cumbee did not take a direct appeal of that order, his limitations period began to run when the order became final, on February 2, 2006, and expired one year later, on February 2, 2007.

The second proceeding of which Cumbee complains was the revocation of his deferred adjudication probation, which took place on February 14, 2011. Cumbee did not take a direct appeal, and the proceeding became final on Wednesday, March 16, 2011. His limitations period began to run on that date and expired one year later, on March 16, 2012.

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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

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excuse or something new that had never been sent before.” He states that he did not get any real help with the record until August 27, 2014.

Nonetheless, Cumbee insists that he has diligently pursued every step necessary to file his state and federal habeas applications. He claims he would have filed his federal petition timely but for the actions and inactions of the state agencies and officials, and that he is not at fault for the untimely filing.

Cumbee thus argues that the limitations period should be excused because he was unable to obtain copies of certain unspecified “records.” The Fifth Circuit has stated that in order to invoke §2244(d)(1)(B), the petitioner must show that he was prevented from filing a petition by state action in violation of the Constitution or federal law. Egerton v. Cockrell, 334 F.3d 433, 436 (5th Cir. 2003); Wickware v. Thaler, 404 F.App’x 856, 2010 U.S. App. LEXIS 25465, 2010 WL 5062314 (5th Cir. 2010). The Constitution does not automatically require that a prisoner be provided on request with a free copy of a transcript for purposes of seeking collateral review. Deem v. Devasto, 140 F.App’x 574, 2005 U.S. App. LEXIS 17287, 2005 WL 1953912 (5th Cir., August 16, 2005). In Crawford v. Costello, 27 F.App’x 57, 2001 U.S. App. LEXIS 25217, 2001 WL 1485838 (2nd Cir., November 20, 2001) the Second Circuit explained as follows:

Because there is no constitutional right to a trial transcript for collateral appeals, the state’s denial of his request for a transcript did not constitute a constitutional impediment sufficient to toll the statute of limitations. *See, e.g., United States v. MacCollum*, 426 U.S. 317, 323-24, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976); Crossley v. United States, 538 F.2d 508, 509 (2nd Cir. 1976). Nor did Crawford’s lack of transcript prevent him from filing a habeas petition. *See, e.g., Jihad v. Hvass*, 267 F.3d 803, 806 (8th Cir. 2001) (“[L]ack of access to a trial transcript does not preclude a prisoner from commencing post-conviction proceedings and therefore does not warrant equitable tolling.”)

Cumbee has not shown that his inability to obtain the records he believed necessary was an unconstitutional state-created impediment to his seeking state habeas corpus relief. In Crain v. Director, TDCJ-CID, civil action no. 6:11cv214, 2012 U.S. Dist. LEXIS 25388, 2012 WL 651730 (E.D.Tex., February 27, 2012), this Court stated that

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[t]he courts have held that problems associated with obtaining transcripts and trial records for preparing a habeas corpus petition do not amount to “state-created impediments,” setting off the commencement date of the limitations period. Lloyd v. Vannatta, 296 F.3d 630, 632–33 (7th Cir.2002); Randolph v. Taylor, 69 F.App’x 824, 2003 WL 21421712 (9th Cir., June 13, 2003); Miller v. Cason, 49 F.App’x 495, 2002 WL 31164208 (6th Cir., September 27, 2002); Crawford v. Costello, 27 F.App’x 57, 2001 WL 1485838 (2nd Cir., November 20, 2001); Cole v. Director, TDCJ, civil action no. 6:09cv128, 2009 WL 1468470 (E.D.Tex., May 26, 2009) (no appeal taken).

Thus, the fact that Cumbee experienced difficulty in obtaining the records he wanted does not provide a valid basis for tolling the statute of limitations.

Furthermore, Cumbee states in his tolling affidavit that he “did not get any real help with record until August 27, 2014.” (Docket no. 11, p. 6). Even if all of the time prior to that date were tolled and the limitations period commenced on that date, Cumbee’s federal habeas petition, which was signed on November 30, 2015, is still over three months outside of the one-year limitations period.

B. The Effect of the State Habeas Applications

Cumbee filed three state habeas corpus petitions, but he acknowledges and the state court records confirm that the first two of these petitions challenged the 2006 proceeding in which he was placed on deferred adjudication probation. These two petitions were filed on November 29, 2011, and September 18, 2013, both of which are well after the limitations period had expired for challenges to the 2006 proceeding. The Fifth Circuit has held that a state habeas corpus petition filed after the limitations period has expired does not revive any part of this period. Villegas v. Johnson, 184 F.3d 467, 472 (5th Cir. 1999) (expired limitations period cannot be revived by filing a state habeas petition).

Cumbee’s third federal petition was filed on December 9, 2014. This petition was dismissed as successive on February 18, 2015, after being pending for 71 days. Assuming - without deciding - that Cumbee’s limitations period began to run on August 27, 2014, and further assuming that the third state habeas petition filed on December 9, 2014, tolled this period until the petition was dismissed on February 18, 2015, this places the expiration of Cumbee’s limitations period at Friday,

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.

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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

slept on his rights and failed to exercise reasonable diligence, and as a result, is not entitled to equitable tolling of the statute of limitations. His petition should be dismissed on this basis.

VII. Conclusion

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(1)(A). A district court may deny a certificate of appealability *sua sponte* because the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before that court. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000).

The prerequisite for a certificate of appealability is a substantial showing that the petitioner has been denied a federal right. *Newby v. Johnson*, 81 F.3d 567, 569 (5th Cir. 1996). To do this, he must demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *James v. Cain*, 50 F.3d 1327, 1330 (5th Cir. 1995).

The Supreme Court has stated that when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the prisoner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484-85, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

In this case, reasonable jurists would not find it debatable whether the district court was correct in its procedural ruling that Cumbee's petition is barred by the statute of limitations. Cumbee is not entitled to a certificate of appealability and it is accordingly

ORDERED that the Respondent's motion to dismiss (docket no. 21) is **GRANTED** and the above-styled application for the writ of habeas corpus is **DISMISSED WITH PREJUDICE** as barred by the statute of limitations. 28 U.S.C. §2244(d). It is further

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

THE STATE OF TEXAS

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IN THE 7TH JUDICIAL

V.

DISTRICT IN AND FOR

KEITH STUART CUMBEE

SMITH COUNTY, TEXAS

STATE ID No.: TX07171313

JUDGMENT ADJUDICATING GUILT

Judge Presiding: **HON. KERRY L. RUSSELL** Date Judgment Entered: **02/18/11**

Attorney for State: **D. Matt Bingham/W. THARPE** Attorney for Defendant: **REEVE JACKSON**

Date of Original Community Supervision Order: **1/3/2006** Statute for Offense: **22.02**

Offense for which Defendant Convicted:
AGG ASSAULT CAUSES SERIOUS BODILY INJ WITH A DEADLY WEAPON

Date of Offense: **09/24/03**

Degree: **2nd Degree Felony** Plea to Motion to Adjudicate: **TRUE** Findings on Deadly Weapon: **YES [KNIFE]**

Terms of Plea Bargain: **N/A**

Date Sentence Imposed: **2/14/2011** Date Sentence to Commence: **2/14/2011**

Punishment and Place of Confinement: **12 Years TDCJ-ID**

THIS SENTENCE SHALL RUN: CONCURRENTLY

SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR **N/A**

Fine:	Court Costs:	Restitution:	Restitution Payable to:
\$0.00	\$563.00	\$5,811.07	<input checked="" type="checkbox"/> AGENCY/AGENT (see below) Smith County Collections Department 200 E. Ferguson, Suite 213 Tyler, TX 75702

Sex Offender Registration Requirements DO NOT apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was **Not Provided.**

Time Credited: **DAYS 65**

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

The Court previously deferred adjudication of guilt in this case. Subsequently, the Court heard the matter of Defendant's compliance with and obedience to the terms and conditions of the Court's Order of Deferred Adjudication of Guilt. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

- Defendant appeared in person with Counsel.
- Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

After hearing and considering the evidence presented by both sides, the Court **FINDS THE FOLLOWING:**

- (1) The Court previously found the Defendant to be qualified for community supervision;
- (2) The Court DEFERRED further proceedings, made no finding of guilt, and rendered no judgment;
- (3) The Court issued an order placing Defendant on community supervision for a period of **10 YEARS** years;
- (4) The Court assessed a fine of \$0.00;
- (5) While on community supervision, Defendant violated the terms and conditions of community supervision as set out in the Court's Original Judgment;

PARAGRAPHS I; III THRU VIII OF STATE'S APPLICATION TO REVOKE

THE STATE OF TEXAS

V.

KEITH STUART CUMBEE

STATE ID No.: TX07171313

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IN THE 7TH JUDICIAL

DISTRICT COURT

SMITH COUNTY, TEXAS

JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL

Judge Presiding: HON. KERRY L. RUSSELL Date Judgment Entered: 03/18/11

Attorney for State: D. Matt Bingham/W. THARPE Attorney for Defendant: JACKSON, AUSTIN REEVE

Offense for which Defendant Convicted:

POSS MARIJ >4OZ<=5LBS

Charging Instrument: INFORMATION Statute for Offense: 481.121

Date of Offense: 01/13/11

Degree of Offense: State Felony Plea to Offense: Guilty Findings on Deadly Weapon: N/A

Terms of Plea Bargain: 15 MONTHS STATE JAIL FACILITY & \$140 RESTITUTION

Plea to 1st Enhancement Paragraph: N/A Plea to 2nd Enhancement/Habitual Paragraph: N/A

Findings on 1st Enhancement Paragraph: N/A Findings on 2nd Enhancement/Habitual Paragraph: N/A

Plea on Jurisdictional Paragraph: N/A

Findings on Jurisdictional Paragraph: N/A

Date Sentence Imposed: 3/7/2011 Date Sentence to Commence: 3/7/2011

Punishment and Place of Confinement: 15 Months / State Jail Facility

THIS SENTENCE SHALL RUN CONCURRENTLY

SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A.

Fine: N/A Court Costs: \$608.00 Restitution: \$140.00 Restitution Payable to: AGENCY/AGENT (see below) Smith County Collections Department 200 E. Ferguson, Suite 213 Tyler, TX 75702

Sex Offender Registration Requirements DO NOT APPLY to the Defendant. TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was not provided.

Time Credited: 50 DAYS

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in Smith County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

Defendant appeared in person with Counsel.

Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea indicated above. The Court then admonished Defendant as required by law. It appeared to the Court that Defendant was mentally

APPENDIX F
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Provisions Involved

U.S.Const.: Art. I, §9, Cl.2.

The privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S.Const.: Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.Const.: Amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitutional Provisions Involved cont'd

U.S.Const.: Amend. XIV, §§1 and 5.

Section 1. All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.****

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statutes and Rules-Federal Statutory Provisions

28 U.S.C. §2253(a), (c)(1)(A),(2),(3).

28 U.S.C. §2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is had.****

(c)(1) Unless a circuit judge or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;****

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2254(a).

28 U.S.C. §2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States.

Federal Rules Involved

Fed.R.App.P. 5(a)(3).

Rule 5. Appeal by Permission

(b) Petition for Permission to Appeal.****(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

Fed.R.Civ.P. 1.

TITLE I. SCOPE OF RULES; FORM OF ACTION

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed.R.Civ.P. 60(b),(c),(d)(1),(3).

Rule 60. Relief from a Judgment or Order****

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING.
On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

-
- (1) mistake, inadvertence, surprise, or excusable neglect;
 - (2) newly discovered evidence that, with reasonable diligence,

could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;****

(3) set aside a judgment for fraud on the court.

Fed.R.Civ.P. 81(a)(4),(c)(1).

TITLE II. GENERAL PROVISIONS

Rule 81. Applicability of the Rules in General; Removed Actions

(a) APPLICABILITY TO PARTICULAR PROCEEDINGS.****

(4) Special Writs. These rules apply to proceedings for habeas

corpus and for quo warranto to the extent that the practice in those proceedings:

- (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and
- (B) has previously conformed to the practice in civil actions.****
- (c) REMOVED ACTIONS.

(1) Applicability. These rules apply to a civil action after it is removed from a state court.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS ("HABEAS RULES")

Habeas Rule 1.

Rule 1. Scope

(a) Cases Involving a Petition under 28 U.S.C. §2254. These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. §2254 by:

(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.

(b) Other cases. The district court may apply any and all of these rules to a habeas corpus petition not covered by Rule 1(a).

Habeas Rule 12.

Rule 12. Applicability of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.