

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-41166

JERRY SCOTT CAMP, JR.,

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


O R D E R:

Jerry Scott Camp, Jr., Texas prisoner # 1645387, moves for a certificate of appealability (COA) to appeal the district court's denial of his pro se 28 U.S.C. § 2254 application as time-barred. In his § 2254 application, Camp challenged his 2010 conviction for murder and resulting sentence of life imprisonment on the grounds that: the State failed to produce material evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963); the trial court abused its discretion in admitting hearsay testimony at trial and evidence of an extraneous sexual assault offense at sentencing; the State presented false evidence at sentencing that he committed a sexual assault while on bond for his murder charge; and his trial counsel rendered ineffective assistance at sentencing by failing to object to that false evidence. Camp



argues in his COA motion that the limitations period should have been equitably or statutorily tolled due to his hand disability and the denial by State officials of his requests for legal assistance while he was housed at the Estelle Unit. Camp also moves for leave to proceed in forma pauperis (IFP) on appeal.

To obtain a COA, a prisoner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The COA applicant must demonstrate “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). When the district court has denied relief based on procedural grounds, a COA should be granted “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.” *Id.* Because Camp has not made the required showing, his motion for a COA is DENIED. Camp’s motion for leave to proceed IFP on appeal is likewise DENIED.



JAMES C. HO
UNITED STATES CIRCUIT JUDGE

9-27-19³
A

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

JERRY SCOTT CAMP, JR., #1645381	§	
VS.	§	CIVIL ACTION NO. 4:16cv165
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Jerry Scott Camp, Jr., a prisoner confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is challenging his Denton County conviction for the offense of Murder. The case was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation concluding that the petition should be denied. Petitioner has filed objections.

Magistrate Judge Nowak concluded that the petition is time-barred by the one year statute of limitations. 28 U.S.C. § 2244(d)(1). Petitioner was convicted after a jury trial on April 29, 2010. The judgment was entered on May 3, 2010. On November 10, 2011, the Second Court of Appeals affirmed the conviction. *Camp v. State*, No. 02-10-00252-CR, 2011 WL 5515487 (Tex. App. - Ft. Worth 2011, pet. ref'd). The Texas Court of Criminal Appeals refused his petition for a discretionary review on February 15, 2012. Petitioner's conviction became final on May 15, 2012, when the time for filing a petition for discretionary review expired. *See Roberts v. Cockrell*, 319 F.3d 690, 693-95 (5th Cir. 2003) (finality determined by expiration of time for filing further appeals). The present petition was due no later than one year later on May 15, 2013, in the absence of tolling provisions. Petitioner filed an application for a writ of habeas corpus in state court on April 17, 2013, which was denied by the Texas Court of Criminal Appeals on June 12, 2013. The state application was pending for fifty-seven

days; thus, the deadline for the present petition to be filed was tolled by fifty-seven days to July 11, 2013. The present petition was not filed, however, until February 26, 2016. The petition was filed approximately two and one-half years too later. Magistrate Judge Nowak thus concluded that the petition should be dismissed as time-barred.

In his objections, Petitioner stresses that he filed the petition late due to extraordinary circumstances. More specifically, he has been experiencing pain and the loss of the use of his hands for years. Petitioner's explanation is a plea for equitable tolling. The Supreme Court clearly and unequivocally held that the AEDPA's statute of limitations may be tolled for equitable reasons.

excl *Holland v. Florida*, 560 U.S. 631, 645 (2010). A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing. *Id.* at 649. In the present case, Petitioner has not shown that he has been pursuing his rights diligently. He filed the present petition two and one-half years too late. Also, his hand problems do not amount to extraordinary circumstances ^{Due to} (Petitioner is ~~not~~ entitled to equitable tolling.) It should be noted that Magistrate Judge Nowak fully discussed his claim of extraordinary circumstances in the Report and Recommendation and found that his explanation lacks merit. Petitioner's objections to the contrary are not persuasive.

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and Petitioner's objections are without merit. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. It is further

ORDERED that a certificate of appealability is **DENIED**. It is finally

ORDERED that all motions not previously ruled on are **DENIED**.

SIGNED this 21st day of November, 2018.

*Rec
11-28-19*

Amos Mazzant

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

B

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

JERRY SCOTT CAMP JR., #1645381

VS.

DIRECTOR, TDCJ-CID

§
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§
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§

CIVIL ACTION NO. 4:16cv165

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Petitioner Jerry Scott Camp Jr. filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

Petitioner is challenging his conviction from Denton County, Texas. The state trial court entered judgment on April 29, 2010, but did not file the judgment until May 3, 2010. *See* Dkt. #15-22 at 108. Petitioner appealed the judgment, which was affirmed on November 10, 2011, by the Second Court of Appeals of Texas. *See* Dkt. #15-1 at 16; *Jerry Camp, Jr. v. State*, Case No. 02-10-00252-CR (Tex. App. – Fort Worth 2011). Petitioner filed a petition for discretionary review, which the Texas Criminal Court of Appeals denied on February 15, 2012. *See* Dkt. #15-1 at 2. Petitioner did not file a writ of certiorari with the United States Supreme Court.

Petitioner filed an application for a state writ of habeas corpus on April 17, 2013, which was received on April 22, 2013. *See* Dkt. #15-22 at 6, 17; WR-79,610-01. The writ was denied without written order based on the findings of the trial court on June 12, 2013. *See id.* at 2.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

The AEDPA provides that the one-year statute of limitations period shall run from the latest of four possible situations: (1) the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review; (2) the date an impediment to filing created by the State is removed; (3) the date in which a constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; (4) or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). The AEDPA also provides that 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. *Id.* at 2244(d)(2).¹

In the present case, Petitioner is challenging his Denton County conviction. Petitioner filed a petition for discretionary review, which was denied on February 15, 2012. Thus, the conviction became final ninety days later when Petitioner's opportunity to file a writ of certiorari ended, on May 16, 2012. *Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003). Accordingly, the one-year limitations period started running on May 16, 2012, and the present petition was due no later than May 16, 2013. Petitioner did not file the instant petition until February 16, 2016—nearly three years beyond the limitations period. *See* Dkt. #1 at 11. Accordingly, the petition is time-barred, in the absence of tolling.

The provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a properly-filed application for state post-conviction or other collateral review is pending shall not be counted

¹The Fifth Circuit discussed the approach that should be taken in applying the AEDPA one-year statute of limitations in *Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998) and *Fields v. Johnson*, 159 F.3d 914 (5th Cir. 1998).

toward any period of limitation. Petitioner filed his application for a state writ of habeas corpus on April 17, 2013, one month before the one-year statute of limitations deadline of May 16, 2013. *See* Dkt. #15-22 at 17. The application was denied without written order based on the findings of the trial court on June 12, 2013. *See id.* at 2. Therefore, the state writ serves to toll the limitations period by less than two months. The federal petition remains time-barred in the absence of any other tolling provisions as it was still filed approximately two years and seven months past the limitations period.

The United States Supreme Court confirmed the AEDPA statute of limitations is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). “A habeas petitioner is entitled to equitable tolling only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 560 U.S. at 649). “Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.” *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The petitioner bears the burden of proving that he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

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). To qualify for such equitable tolling, the petitioner must present “rare and exceptional circumstances.” *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998). In making this determination, it should be noted 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 to equitably toll the statute of limitations. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir.

2000).

As a general rule, equitable tolling has historically been limited to situations where the petitioner “has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990). Furthermore, 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 (1996). Relevant herein, in the medical context, medical treatment, along with other factors, must render the petitioner unable to pursue his rights during the time period. *See generally Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999).

Petitioner argues that his petition is untimely due to a prolonged medical condition that left him unable to write. *See* Dkt. #1 at 10. The Court ordered Respondent to respond to Petitioner’s claims. In its response, Respondent argues that Petitioner has not shown exceptional circumstances existed to toll Petitioner’s claims. The Court agrees, and finds Petitioner’s alleged medical condition does not amount to “exceptional circumstances” sufficient to toll Petitioner’s claims. Petitioner’s first medical treatment notes are from March 22, 2013. Not only is this nearly eleven months into the limitations period, but the medical treatment notes only relate to Petitioner’s liver and abdomen. *See* Dkt. #2-7 at 1. There is no mention of an injury to Petitioner’s hands, or that he has an inability to write. *See id.*

Petitioner’s first treatment note relating to his hand is dated June 12, 2013, and states that

Petitioner reported beginning to use a hand splint on his right hand on or about May 1, 2013, (fifteen days before the deadline) and that he is unable to make a closed fist. *Id.* at 4. On October 22, 2013, a treatment note states that Petitioner is in occupational therapy for his hands. *Id.* at 8. The next treatment note, from December 30, 2014, states that Petitioner presented with “complaints of hand and finger pains for three years.” *Id.* at 9. Further notes indicate that occupational therapy has not improved the condition. *Id.* at 14. On June 8, 2015, a treatment note states that Petitioner reported injections into his hands working for a short period, and that he was told the condition required surgery. *See* Dkt. #2-8 at 8. Notwithstanding, the affected area’s range of motion was found to be “full,” and his joints to be stiff. *Id.* at 9. There are no treatment notes relating to his hand condition between this note and when Petitioner filed the instant § 2254 petition. Finally, there is no specific evidence Petitioner’s condition affected his ability to physically file his petition.

The initial mention of Petitioner’s hand injury occurred when the applicable limitations period had nearly ended. Further, treatment notes indicate Petitioner reported the hand injury had been ongoing since about December 2011. Yet, Petitioner does not allege having issues filing his state writ, and/or did not explain how he was able to otherwise file his state writ. There are also large periods of time in which the record is silent as to the severity or ongoing treatment Petitioner is receiving for his alleged hand issues. Petitioner alleges a debilitating hand injury that leaves him unable to write; however, there are multiple gaps in his treatment records, including a fourteen-month gap and an approximately eight-month gap between the last treatment note and Petitioner filing the instant petition. Finally, while Petitioner states that he could not write, Petitioner does not state he could not type. Both the state and instant petitions are type written, and Petitioner fails to allege, for example, that he required assistance to file his state or federal

petitions. For these reasons, the Court does not find Petitioner's § 2254 petition should be subject to equitable tolling. *See, e.g., Scott v. Kramer*, 2009 U.S. Dist. LEXIS 2114, *5-7 (E.D. Cal. Jan. 2, 2009) (finding a petitioner's hand injury that required surgery did not constitute extraordinary circumstances to warrant equitable tolling because petitioner did not show diligence, that his injury prevented him filing his petition, or demonstrated efforts to seek state or inmate assistance in preparing the action).

Petitioner has not otherwise made a showing that unconstitutional State action prevented him from seeking administrative or state or federal habeas corpus relief in a timely manner, or that he is asserting a newly recognized constitutional right. Furthermore, Petitioner has not shown any basis other upon which the limitations period should be equitably tolled.

In sum, Petitioner has made no showing that unconstitutional state action prevented him from seeking administrative or state or federal habeas corpus relief in a timely manner, or that he is asserting a newly recognized constitutional right. Nor has he shown that he could not have discovered the factual predicates of his claims through exercise of due diligence until a later time. Petitioner presents no evidence that he was induced or tricked by his adversary's misconduct, which caused him to untimely file his petition. Petitioner untimely filed his federal petition, and he fails to show that he is entitled to equitable tolling. Consequently, the § 2254 petition should be dismissed as time-barred.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Petitioner has not yet filed a notice of appeal, it is respectfully

recommended that the court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability 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 the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.”).

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a “substantial showing of the denial of a constitutional right” in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected constitutional claims on the merits, the petitioner must demonstrate “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the motion 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. *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Petitioner’s § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is recommended the court find Petitioner is not entitled to a certificate of appealability.

RECOMMENDATION

It is recommended the above-styled petition filed under 28 U.S.C. § 2254 be denied and the case dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).

SIGNED this 16th day of July, 2018.



Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE