

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 18-60846

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JESS LEE GREEN,

Petitioner-Appellant

v.

JOE ERRINGTON, Superintendent,

Respondent-Appellee

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Appeal from the United States District Court  
for the Southern District of Mississippi

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O R D E R:

Jess Lee Green, Mississippi prisoner # 144724, was charged in Cause No. 2007-11,197(3) with two counts of kidnapping, two counts of sexual battery, and one count of armed robbery. He was also charged in Cause No. 2007-11,198(3) with one count of kidnapping, one count of armed robbery, and one count of attempted sexual battery. Green pleaded guilty to all eight counts, and he was sentenced to serve 30 years of imprisonment on each count, with the sentences to be served concurrently.

Green filed a 28 U.S.C. § 2254 petition challenging only his convictions in Cause No. 2007-11,198(3). The district court dismissed the petition as time barred. Green now moves for a certificate of appealability (COA) to challenge the district court's decision.



A True Copy  
Certified order issued Aug 30, 2019

*Jyle W. Caylor*  
Clerk, U.S. Court of Appeals, Fifth Circuit

To obtain a COA, Green must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When, as here, the district court denies a § 2254 petition on procedural grounds without reaching the underlying constitutional claims, a COA should issue “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).

Because Green has not shown that reasonable jurists would debate the district court’s determination that his § 2254 petition was time barred, his motion for a COA is DENIED.

  
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STEPHEN A. HIGGINSON  
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

JESS LEE GREEN

PETITIONER

v.

CAUSE NO. 1:18CV181-LG-MTP

JACQUELINE BANKS,  
SUPERINTENDENT

RESPONDENT

**ORDER DENYING PETITIONER'S MOTIONS TO RECONSIDER**

BEFORE THE COURT are Petitioner's [20] Motion for Relief from Order Adopting Report and Recommendation and Final Judgment and [21] Motion for Relief from Order Denying Certificate of Appealability. The Court dismissed Petitioner's habeas petition and denied him a certificate of appealability because his habeas petition was untimely and he did not demonstrate that he was entitled to equitable tolling.

Post-judgment motions to reconsider are governed by Fed. R. Civ. P. 59(e).

A Rule 59(e) motion calls into question the correctness of a judgment. . . . This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. . . . Rather, Rule 59(e) serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence. . . . Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.

*Templet v. HydroChem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004) (internal citations and quotation marks omitted). The Fifth Circuit has instructed district courts considering Rule 59(e) Motions “to strike the proper balance between [two] competing interests” — “1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts.” *Id.* at 479.

Petitioner argues that the level of diligence this Court required for equitable tolling was too stringent and that the information that was lacking to support his request for tolling could be located somewhere in the state court record. He also argues that the Court should have allowed him to file an application for a certificate of appealability before denying a certificate of appealability. These vague arguments are insufficient to demonstrate that the Court committed a manifest error of fact or law, and Petitioner has not submitted newly discovered evidence. His Motions to Reconsider must be denied.

**IT IS, THEREFORE, ORDERED AND ADJUDGED** that Petitioner's [20] Motion for Relief from Order Adopting Report and Recommendation and Final Judgment and [21] Motion for Relief from Order Denying Certificate of Appealability are **DENIED**.

**SO ORDERED AND ADJUDGED** this the 2<sup>nd</sup> day of January, 2019.

*s/ Louis Guirola, Jr.*  
LOUIS GUIROLA, JR.  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

JESS LEE GREEN

PETITIONER

v.

CAUSE NO. 1:18CV181-LG-MTP

JACQUELINE BANKS,  
SUPERINTENDENT

RESPONDENT

**ORDER ADOPTING REPORT AND RECOMMENDATION  
AND GRANTING MOTION TO DISMISS**

BEFORE THE COURT is the [13] Report and Recommendation entered by United States Magistrate Judge Michael T. Parker. Judge Parker recommends that the respondent's [5] Motion to Dismiss be granted and that Jess Lee Green's petition for writ of habeas corpus be dismissed with prejudice as untimely. Green filed an objection to the Report and Recommendation, and the respondent filed a response to the objection. After reviewing the submissions of the parties, the record in this matter, and the applicable law, the Court finds that Judge Parker's Report and Recommendation should be adopted as the opinion of this Court, the respondent's Motion to Dismiss should be granted, and Green's petition should be dismissed with prejudice.

**BACKGROUND**

Green pled guilty to three counts of kidnapping, two counts of sexual battery, one count of attempted sexual battery, and two counts of armed robbery in the

Circuit Court of Jackson County, Mississippi.<sup>1</sup> On November 10, 2008, the Circuit Court sentenced Green to serve thirty years imprisonment for each count, with the sentences to be served concurrently without the possibility of parole or other early release. Green filed his first petition for post-conviction collateral relief on July 27, 2015, and the Circuit Court of Jackson County, Mississippi dismissed all of the claims asserted in the petition.<sup>2</sup> Green appealed, but the Mississippi Court of Appeals affirmed the dismissal of Green's petition. The Mississippi Supreme Court denied certiorari on May 10, 2018.

Green filed his second petition for post-conviction collateral relief on October 24, 2016. The Circuit Court dismissed the petition on September 25, 2017. Green signed his petition for writ of habeas corpus on May 22, 2018. The respondent filed the present Motion to Dismiss, arguing that Green's petition is untimely. Judge Parker recommends that the Motion to Dismiss should be granted.

## DISCUSSION

This case is governed by 28 U.S.C. § 2244(d)(1)(A), which imposes a one-year deadline for filing habeas petitions from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Since Green pled guilty, Mississippi law barred him from filing a direct appeal; thus, his conviction became final on November 18, 2008, the date when he

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<sup>1</sup> Green is only contesting three of these charges — one count of kidnapping, one count of armed robbery, and one count of attempted sexual battery — in his habeas petition. (Pet. 1, ECF No 1; Obj. 3, ECF No. 14.)

<sup>2</sup> All of Green's post-conviction petitions, including the present habeas petition, were filed pro se with the assistance of a lay advocate.

was sentenced. *See Doss v. Outlaw*, No. 1:13CV172-SA-JMV, 2014 WL 349487, at \*2 (N.D. Miss. Jan. 31, 2014) (citing *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003) (holding that a judgment becomes final “by the conclusion of direct review or the expiration of the time for seeking such review”)). As a result, Green was required to file his habeas petition on or before November, 18, 2009. He filed the instant habeas petition over eight years after this deadline.

Green does not dispute that his petition is untimely, but he argues that the limitations period should be tolled. Equitable tolling is available “only in rare and exceptional circumstances.” *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009). “[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 circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks and citation omitted).

Green first asserts that he is entitled to tolling due to mental impairment or incompetence. “Although mental illness may warrant equitable tolling, a petitioner (i) must make a threshold showing of incompetence and (ii) must show that this incompetence affected his ability to file a timely habeas petition.” *Jones v. Stephens*, 541 F. App’x 499, 505 (5th Cir. 2013). Green has testified by affidavit that he received mental health counseling as a child. He also states that he has undergone mental health treatment and taken psychotropic drugs several times as an adult. He has a tenth grade education. Green asks the Court to permit him to

conduct discovery so that he can obtain evidence in support of his claim of incompetence. The Fifth Circuit has explained:

Rule 6 of the Rules Governing § 2254 cases permits discovery only if and only to the extent that the district court finds good cause. Good cause may be found when a petition for habeas corpus relief establishes a *prima facie* claim for relief. Additionally, a petitioner's factual allegations must be specific, as opposed to merely speculative or conclusory, to justify discovery under Rule 6. Simply put, Rule 6 does not authorize fishing expeditions.

*Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000) (internal quotation marks and citations omitted). Green has not demonstrated good cause for conducting discovery, and he has not informed the Court of the nature of his mental condition or explained how that condition prevented him from timely filing his habeas petition. Therefore, his request for equitable tolling on this basis is without merit.<sup>4</sup>

Green also alleges that inadequate access to his case files prevented him from timely filing his petition. He claims that he was not able to obtain his case file from his former attorney until 2015, when he filed a complaint with the Mississippi Bar. However, Green has not provided any evidence of communications with his former attorney in an attempt to obtain the file or described his efforts to obtain the file from his attorney. As a result, even if the delay in obtaining the case file caused Green's untimely filing, he is not entitled to equitable tolling because he has not demonstrated diligence.<sup>5</sup>

Green further claims that he was prevented from timely filing his petition by inadequate access to legal materials during his incarceration. Green has not demonstrated diligence in attempting to obtain legal materials or explained how his

lack of access caused such a lengthy delay in filing his habeas petition. *See Krause v. Thaler*, 637 F.3d 558, 561 (5th Cir. 2011); *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999). Thus, Green is not entitled to tolling on this basis.

Finally, Green argues that the Court should toll the limitations period because he is actually innocent of the charges to which he pled guilty. “Claims of actual innocence must be based on new evidence, and the petitioner must show that ‘in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.’” *Shank v. Vannoy*, No. 16-30994, 2017 WL 6029846, at \*2 (5th Cir. Oct. 26, 2017) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013)). Green has not identified any new evidence of his innocence. Therefore, his request for tolling based on actual innocence is without merit.

#### **CONCLUSION**

Green’s habeas petition is untimely, and he has not demonstrated that he is entitled to equitable tolling. Therefore, the Report and Recommendation entered by Judge Parker is adopted as the opinion of this Court, the Motion to Dismiss filed by the respondent is granted, and Green’s habeas petition must be dismissed with prejudice.

**IT IS, THEREFORE, ORDERED AND ADJUDGED** that the [13] Report and Recommendation entered by United States Magistrate Judge Michael T. Parker is **ADOPTED** as the opinion of this Court.

IT IS, FURTHER, ORDERED AND ADJUDGED that the respondent's [5] Motion to Dismiss is **GRANTED**. Jess Lee Green's petition for writ of habeas corpus is **DISMISSED WITH PREJUDICE** as untimely.

SO ORDERED AND ADJUDGED this the 26th day of November, 2018.

s/ Louis Guirola, Jr.  
LOUIS GUIROLA, JR.  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

JESS LEE GREEN

PETITIONER

v.

CAUSE NO. 1:18CV181-LG-MTP

JACQUELINE BANKS,  
SUPERINTENDENT

RESPONDENT

**CERTIFICATE OF APPEALABILITY**

A final order adverse to the applicant having been filed in the captioned habeas corpus case, in which the detention complained of arises out of process issued by a state court or a proceeding pursuant to 28 U.S.C. § 2255, the court, considering the record in the case and the requirements of 28 U.S.C. § 2253, Rule 22(b) of the Federal Rules of Appellate Procedure, and Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, hereby finds that:

X A Certificate of Appealability should not issue. The applicant has failed to make a substantial showing of the denial of a constitutional right.

   A Certificate of Appealability should issue for the following specific issue(s):

SO ORDERED AND ADJUDGED this the 26th day of November, 2018.

*s/ Louis Guirola, Jr.*

LOUIS GUIROLA, JR.  
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION**

**JESS LEE GREEN**

**PLAINTIFF**

**v.**

**CAUSE NO. 1:18-cv-181-LG-MTP**

**JACQUELYN BANKS**

**RESPONDENT**

**REPORT AND RECOMMENDATION**

THIS MATTER is before the Court on the Petition of Jess Lee Green for Writ of Habeas Corpus [1] pursuant to 28 U.S.C. § 2254 and Respondent's Motion to Dismiss [5] pursuant to 28 U.S.C. § 2244(d). Having considered the parties' submissions and the applicable law, the undersigned recommends that Respondent's Motion to Dismiss [5] be granted and the Petition [1] be dismissed with prejudice.

**PROCEDURAL HISTORY**

On August 4, 2008, in the Circuit Court of Jackson County, Mississippi, Petitioner pled guilty to two counts of kidnapping, two counts of sexual battery, and one count of armed robbery in Cause No. 2007-11, 197(3). ([5-1]). That same day, Petitioner also pled guilty to one count of kidnapping, one count of armed robbery, and one count of attempted sexual battery in Cause No. 2007-11, 198(3). ([5-1]). On November 10, 2008, the state court sentenced Petitioner to serve thirty years in the custody of the Mississippi Department of Corrections for each of the eight counts, with the sentences to be served concurrently. ([5-2]).

On July 27, 2015, Petitioner filed a motion for post-conviction collateral relief in the Circuit Court of Jackson County. ([6-1] at 9-38).<sup>1</sup> On June 30, 2016, the trial court dismissed

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<sup>1</sup> Petitioner signed the motion for post-conviction collateral relief on July 22, 2015.

certain claims raised in the motion, but directed the State to provide more information. ([5-3]).

On July 25, 2016, after the State responded, the trial court dismissed the remaining claims. ([5-4]).<sup>2</sup> On October 24, 2016, Petitioner filed a second motion for post-conviction collateral relief. ([5-6] at 6-10). On September 25, 2017, the trial court dismissed the motion. ([5-7]).<sup>3</sup>

On May 22, 2018, Petitioner filed the instant Petition for Writ of Habeas Corpus [1].<sup>4</sup>

Thereafter, Respondent filed her Motion to Dismiss [5], asserting that the Petition was not timely filed and should be dismissed.

## ANALYSIS

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) specifies that a petitioner seeking federal habeas relief must file a federal petition within one year from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A); *Egerton v. Cockrell*, 334 F.3d 433, 435 (5th Cir. 2003). The Fifth Circuit clarified the law for purposes of determining when a state conviction becomes final pursuant to Section 2244(d)(1)(A) by holding that:

The language of § 2244(d)(1)(A) provides that a decision becomes final by the conclusion of direct review or the expiration of the time for seeking such review. We previously held that direct review includes a petition for writ of certiorari to the Supreme Court. Therefore, the conclusion of direct review is when the Supreme Court either rejects the petition for certiorari or rules on its merits. If the

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<sup>2</sup> Petitioner appealed the trial court’s decision, and on September 19, 2017, the Mississippi Court of Appeals affirmed the trial court’s decision. *See Green v. State*, 242 So. 3d 176 (Miss. App. 2017), *reg’d denied*, Feb. 6, 2018, *cert. denied*, May 10, 2018.

<sup>3</sup> On October 10, 2017, Petitioner appealed the trial court’s decision, and his appeal is currently pending before the Mississippi Court of Appeals. ([5-8]).

<sup>4</sup> The Petition was signed on May 22, 2018, and stamped filed on May 29, 2018. “Under the ‘mailbox rule,’ a prisoner’s federal habeas petition is deemed filed when he delivers the petition to prison officials for mailing to the district court.” *Coleman v. Johnson*, 184 F.3d 398, 401 (5th Cir. 1999). Weighing all doubts in Petitioner’s favor, the undersigned will use the earlier date of May 22, 2018.

conviction does not become final by the conclusion of direct review, it becomes final by the expiration of the time for seeking such review. We previously held that this includes the ninety days allowed for a petition to the Supreme Court following the entry of judgment by the state court of last resort. If the defendant stops the appeal process before that point, the conviction becomes final when the time for seeking further direct review in the state court expires.

*Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003).

Petitioner was sentenced on November 10, 2008, after entering a guilty plea. Under Mississippi law, there is no direct appeal from a guilty plea. *See* Miss. Code Ann. § 99-35-101. Thus, Petitioner's conviction became final—and the statute of limitations for federal habeas relief began to run—on November 10, 2008. Petitioner was required to file his federal habeas petition by November 10, 2009, unless he was entitled to statutory and/or equitable tolling. 28 U.S.C. § 2244(d)(1)(A). Petitioner filed his petition on May 22, 2018, more than nine years after his judgment became final.

### **Statutory Tolling**

Whether statutory tolling occurred during the period between the judgment becoming final on November 10, 2008, and Petitioner filing his federal Petition on May 22, 2018, is determined by reference to 28 U.S.C. § 2244(d)(2), which provides for tolling of the one-year limitation period during the time in “which a properly filed application for State post-conviction or collateral review” remains pending. As previously stated, Plaintiff signed his first motion for post-conviction collateral relief on July 22, 2015, and filed the motion on July 27, 2015. ([6-1] at 9-38). By the time Petitioner signed this motion, the time for filing a federal habeas petition had long since expired..

Thus, the motion for post-conviction collateral relief did not toll the limitation period. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (holding that a state habeas application did not toll the limitation period under § 2244(d)(2) because it was not filed until after the limitation

period expired); *Baldwin v. Parker*, 2006 WL 3858896, at \*3 (S.D. Miss. Dec. 28, 2006).

Accordingly, Petitioner did not benefit from statutory tolling under § 2244(d), and his federal habeas deadline remained November 10, 2009.

### **Equitable Tolling**

The decision to apply the equitable tolling doctrine to the one-year limitation period set forth in § 2244(d) rests within the sound discretion of the district court. *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). Generally, equitable tolling is appropriate only in “rare and exceptional circumstances.” *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Equitable tolling “applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.” *Ott v. Johnson*, 184 F.3d 510, 513 (5th Cir. 1999). Additionally, in order to establish that he is entitled to equitable tolling, Petitioner must demonstrate “that he has been pursuing his rights diligently . . . .” *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012). Courts should “examine each case on its facts to determine whether it presents sufficiently ‘rare and exceptional circumstances’ to justify equitable tolling.” *Fisher*, 174 F.3d at 713 (quoting *Davis*, 158 F.3d at 811). Petitioner, however, bears the burden of proving the existence of rare and exceptional circumstances which warrant equitable tolling. *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002).

In his Response [10], Petitioner argues that he is entitled to equitable tolling because he has diligently pursued his rights, he is mentally incompetent, and he had inadequate access to legal materials. Petitioner also argues that he is entitled to equitable tolling because he is actually innocent.

The record does not support Petitioner’s assertion that he pursued his rights diligently. After Petitioner was sentenced on November 10, 2008, he waited nearly seven years, or until

July 27, 2015, to file a motion for post-conviction collateral relief in state court. “[E]quity is not intended for those who sleep on their rights.” *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010). Petitioner asserts that “once a lay advocate was available” to him, he “has been unyielding in pursuit of his rights and justice.” ([10] at 4). He also asserts that he experienced a delay in obtaining his case file from his trial counsel and had inadequate access to a law library. However, a petitioner’s duty to diligently pursue his rights in federal court starts when his conviction becomes final, not when a “lay advocate” becomes available to him. Petitioner has failed to demonstrate that he made any effort to pursue his rights until years after the limitation period had expired. Petitioner’s extended period of inactivity does not constitute due diligence.<sup>5</sup>

Additionally, Plaintiff’s allegations regarding his mental incompetence does not entitle him to equitable tolling. In support of his mental incompetency claim, Petitioner submits an excerpt and affidavit from his first motion for post-conviction collateral relief, which the state court denied. ([10-1]; [6-1] 30-31; 39-41). In the motion, Petitioner argued that he was not competent to plead guilty because he received mental health treatment and was prescribed psychotropic drugs at different times in his life. Specifically, Petitioner alleged that he received mental health counseling when he was seven year old and received psychiatric treatment and medication in 2009, 2011, and 2013. *Id.*

 The Fifth Circuit has indicated that a mental impairment *might* support a claim of equitable tolling. *See Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999); *Wells v. King*, 2012

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<sup>5</sup> The undersigned also notes that Petitioner’s post-conviction collateral relief motion was denied on July 25, 2016, but he waited nearly two years, until May 22, 2018, to file his habeas petition. Petitioner filed a second post-conviction collateral relief motion, but the trial court determined it was successive and untimely and denied it on September 25, 2017, nearly eight months before Petitioner filed his habeas petition. ([5-7]). Additionally, “[a] motion denied as untimely cannot be considered ‘properly filed’ and cannot serve as a basis for tolling under 28 U.S.C. § 2244(d)(2).” *Young v. Terrell*, 2014 WL 5040792, at \*5 n.37 (E.D. La. Oct. 6, 2014).

WL 1906420, at \*2 (S.D. Miss. May 1, 2012). “However, Petitioner bears the burden of proving that his mental condition prevented him from pursuing his legal rights.” *Payne v. Director, TDCJ-CID*, 2015 WL 430380, at \*2 (E.D. Tex. Feb. 2, 2015) (citing *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000)). Petitioner has failed to meet this burden.

The allegations made in Petitioner’s post-conviction collateral relief motion do not demonstrate that Petitioner’s mental capacity prevented him from timely filing a habeas petition. In its order denying Petitioner’s motion, the trial court found that Petitioner “knowingly, voluntarily, and intelligently waived all his constitutional rights and knowingly entered his guilty plea, all under oath.” ([5-3] at 5). Moreover, Petitioner has failed to present any evidence demonstrating that his mental condition impaired his ability to timely file his federal habeas petition. *See Redding v. Thaler*, 2013 WL 490907, at \* 3 (N.D. Tex. Feb. 8, 2013) (“Allegations of mental illness will not support equitable tolling in the absence of evidence demonstrating that such condition or illness rendered the petitioner unable to pursue his legal rights in a timely manner.”); *see also Robinson v. Johnson*, 218 F.3d 744, 2000 WL 821450 (5th Cir. May 31, 2000); *Payne*, 2015 WL 430380, at \*2.

Petitioner has failed to demonstrate that he was prevented in some extraordinary way from asserting his rights and nothing in the record indicates the presence of rare and exceptional circumstances warranting equitable tolling.

Petitioner also argues that he is actually innocent. “The miscarriage of justice exception ‘applies to a severely confined category: cases in which new evidence shows it is more likely than not that no reasonable juror would have convicted [the petitioner].’” *Ross v. King*, 2013 WL 6048156, at \*3 (S.D. Miss. Nov. 15, 2013) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 384 (2013)). Petitioner must produce “new reliable evidence—whether it be exculpatory scientific

evidence, trustworthy eyewitness accounts, or critical physical evidence”—sufficient to persuade the Court that “no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *McQuiggin*, 569 U.S. at 386.

A habeas action is not a retrial, and Petitioner enjoys no presumption of innocence. In fact, actual innocence claims “‘come . . . before the habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt.’” *Bosley v. Cain*, 409 F.3d 657, 664 (5th Cir. 2005) (quoting *Schlup v. Delo*, 513 U.S. 298, 326 (1995)). The issue for this Court is not whether reasonable doubt may have existed if new information were presented to the jury, “but rather that no reasonable juror would have found the defendant guilty.” *Schlup*, 513 U.S. at 329.

Petitioner pled guilty to eight criminal counts, including kidnapping, sexual battery, attempted sexual battery, and armed robbery. ([5-1]). In support of his actual innocence claim, Petitioner submits an excerpt from his motion for post-conviction collateral relief. ([10-2] [6-1] at 34-35). This excerpt, however, contains no new evidence. The bases for the arguments raised in his motion for post-conviction collateral relief were known or should have been known to Petitioner at the time he entered his guilty plea and do not demonstrate that no reasonable juror would have found the defendant guilty.<sup>6</sup> Thus, Petitioner’s arguments fall far short of demonstrating actual innocence.

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<sup>6</sup> Petitioner now claims that he is actually and legally innocent. Regarding his armed robbery convictions, Petitioner argues that (1) “neither victim ever claimed to be robbed and neither claimed their phones were taken ‘at gun point;’ (2) “no money was alleged to have been taken;” and (3) “the only ‘weapon’ recovered in the case is a toy gun.” Regarding his kidnapping convictions, he argues that “even the police did not view these cases as kidnappings; rather they viewed the cases as carjackings . . . .” Regarding his attempted sexual battery and sexual battery convictions, he argues that “scientific testing” and “modern, advanced DNA testing” can prove his innocence.

## **CONCLUSION**

Petitioner's state court judgment became final on November 10, 2008. Based upon the one-year limitation period found in 28 U.S.C. § 2244(d)(1)(A), Petitioner was required to file his federal petition by November 10, 2009. Petitioner filed his petition on May 22, 2018. Petitioner has failed to meet his burden of proving that statutory or equitable tolling is appropriate. Accordingly, he cannot avoid the statutory bar of § 2244(d).

## **RECOMMENDATION**

For the reasons stated above, the undersigned recommends that Respondent's Motion to Dismiss [5] be GRANTED and that the Petition for Writ of Habeas Corpus [1] be DISMISSED with prejudice.

## **NOTICE OF RIGHT TO OBJECT**

In accordance with the Rules of this Court, any party, within fourteen days after being served a copy of this recommendation, may serve and file written objections to the recommendations, with a copy to the District Judge, the U.S. Magistrate Judge, and the opposing party. The District Judge at that time may accept, reject or modify in whole or in part, the recommendation of the Magistrate Judge, or may receive further evidence or recommit the matter to this Court with instructions. Failure to timely file written objections to proposed findings, conclusions, and recommendations contained in this report will bar an aggrieved party, except on the grounds of plain error, from attacking on appeal unobjected to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996).

This 20th day of September, 2018.

s/ Michael T. Parker  
United States Magistrate Judge