18-41152

Mr. Miguel Palacios Plata
#01710334
CID Ramsey Prison
1100 FM 655
Rosharon, TX 77583-0000

Appendix ~~A~~ B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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December 05, 2019

Mr. David O'Toole
Eastern District of Texas, Sherman
101 E. Pecan Street
Federal Building
Room 216
Sherman, TX 75090-0000

No. 18-41152 Miguel Plata v. Lorie Davis, Director
USDC No. 4:15-CV-805

Dear Mr. O'Toole,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Angelique B. Tardie

By: _____
Angelique B. Tardie, Deputy Clerk
504-310-7715

cc w/encl:
Ms. Gretchen Berumen Merenda
Mr. Miguel Palacios Plata

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-41152

MIGUEL PALACIOS PLATA,

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:

Miguel Palacios Plata, Texas prisoner # 1710334, seeks a certificate of appealability to appeal the dismissal as time barred of his 28 U.S.C. § 2254 application challenging his convictions on five counts of indecency with a child by contact and sentences of 16 years in prison on each count, four to run concurrently and the final one to run consecutively.

Palacios Plata does not challenge the district court's determination that his conviction became final in April 2013 and that he did not file a state habeas application or his § 2254 application within one year from that date. Instead, Palacios Plata argues instead that he is actually innocent as evidenced by text messages between the minor victim C.P. and her mother Natasha Plata

("Natasha"). Palacios Plata acknowledges that he had copies of and unsuccessfully attempted to introduce the text messages at trial.

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); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Where, as here, the district court denies habeas relief on procedural grounds, the movant must demonstrate that reasonable jurists would find it debatable whether the motion states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484.

While a freestanding claim of actual innocence is not cognizable in a § 2254 application, *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009), actual innocence of the crime of conviction, if proven, can serve as a gateway through which a prisoner may raise § 2254 claims despite the expiration of the limitations period, *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). Tenable claims of actual innocence are rare because the prisoner can meet the threshold requirement only if 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.* (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

A credible claim requires "new reliable evidence," such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," that was not presented at trial. *Schlup*, 513 U.S. at 324. The Supreme Court has not defined "new reliable evidence" for purposes of an actual innocence claim, and this court has not decided whether such a claim requires "newly discovered, previously unavailable evidence, or, instead, evidence that was available but not presented at trial." *Hancock v. Davis*, 906 F.3d 387, 389 & n.1 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2714 (2019); *see*

Fratta v. Davis, 889 F.3d 225, 232 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 803 (2019); *Tyler v. Davis*, 768 F. App'x 264, 265 (5th Cir.), *cert. denied*, 2019 WL 4923105 (U.S. Oct. 7, 2019) (No. 19-5189). However, this court has stated that "[e]vidence does not qualify as 'new' under the *Schlup* actual-innocence standard if 'it was always within the reach of [petitioner's] personal knowledge or reasonable investigation.'" *Hancock*, 906 F.3d at 390 (quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008)). The text messages on which Palacios Plata bases his actual innocence claim were "always within the reach of [Palacios Plata's] personal knowledge" because, as noted, they were in his and his attorney's possession at trial. *Id.* (internal quotation marks and citation omitted); *see Tyler*, 768 F. App'x at 265 (concluding that Tyler's evidence was not "new" because it "was known by and available to him and trial counsel at or before trial.").

For these reasons, reasonable jurists would not debate the district court's conclusion that the evidence is not "new" as required for an actual innocence claim under *Schlup*. *See Perkins*, 569 U.S. at 386; *Slack*, 529 U.S. at 484. Accordingly, Palacios Plata's motion for a COA is DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

MIGUEL PALACIOS PLATA, #1710334	§	
VS.	§	CIVIL ACTION NO. 4:15cv805
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Miguel Palacios Plata, 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 Collin County conviction for the offense of indecency with a child by contact (5 counts). 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 March 28, 2011. On August 8, 2012, the Fifth Court of Appeals affirmed the conviction. *Plata v. State*, No. 05-11-00483-CR, 2012 WL 3194304 (Tex. App. - Dallas 2012, pet. ref'd). The Texas Court of Criminal Appeals refused his petition for a discretionary review on January 16, 2013. *Plata v. State*, No. PD-1274-12 (Tex. Crim. App. 2013). Petitioner's conviction became final on April 16, 2013, 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 April 16, 2014, in the absence of tolling provisions. It was not filed until November 13, 2015. Petitioner did not file an application for a writ of habeas

corpus in state court until May 16, 2014. By then, the limitations period had already expired. The pendency of the state application did not effectively toll the deadline. Similarly, his subsequent state applications did not effectively toll the deadline. The petition was not filed timely.

In both his petition and objections, Petitioner argues that his petition should still be considered because he is actually innocent. The Supreme Court has held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . the expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). *See also Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2013). "To be credible, such a claim requires 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 - that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "[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.* at 329.

In the present case, Petitioner argues that text messages between the victim and her mother demonstrate "that a plan and conspiracy were being perpetuated against the Petitioner to falsely accuse him of the offenses ascribed to him" (Dkt. #17, page 6). However, he acknowledges that he and his trial attorney were in possession of the text messages and attempted to enter them into evidence at his trial. *Id.* As the text messages were available at the time of Petitioner's trial, he provides no "new evidence" of actual innocence. In his objections, Petitioner admits that he and his attorney were in possession of the text messages at the time of trial, which he stresses is the basis for his claim of actual innocence. However, a claim of actual innocence must be based on "new evidence." Petitioner has

not made the requisite showing. His petition is not saved by the actual innocence exception to the statute of limitations. The petition should be dismissed as time-barred.

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.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

MIGUEL PALACIOS PLATA, #1710334	§	
VS.	§	CIVIL ACTION NO. 4:15cv805
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

The Court having considered Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that the petition for a writ of habeas corpus is **DISMISSED** with prejudice.

SIGNED this 21st day of November, 2018.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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

MIGUEL PALACIOS PLATA, #1710334	§	
	§	
VS.	§	CIVIL ACTION NO. 4:15cv805
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Petitioner Miguel Palacios Plata, an inmate confined in the Texas prison system, filed the above-styled and numbered 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 cases 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 Collin County conviction and sentence for indecency with a child by contact, Case No. 199-82676-09. (Dkt. #1). On March 28, 2011, after finding Petitioner guilty on five counts, the jury sentenced him to sixteen years in prison for each count. The trial court ordered one of the sentences to run consecutively to the other four sentences. (Dkt. 24-20). The Fifth Court of Appeals affirmed his conviction on August 8, 2012. *Plata v. State*, No. 05–11–00483–CR (Tex. App.— Dallas 2012, pet. ref'd). Petitioner's petition for discretionary review was refused on January 16, 2013. *See* http://search.txcourts.gov/Case.aspx?cn=PD-1274-12&coa=coscca.

On May 16, 2014, Petitioner filed an application for state writ of habeas corpus, which the Texas Court of Criminal Appeals ("TCCA") dismissed as non-compliant pursuant to Texas Rules of Appellate Procedure Article 73.1 (Rule 73.1), on September 10, 2014. (Dkt. #25-5). On September 18, 2014, Petitioner filed another application for state writ of habeas corpus, which the TCCA also dismissed as non-compliant pursuant to Rule 73.1, on December 17, 2014. (Dkt. #25-8). Petitioner filed a third application for state writ of habeas corpus on February 19, 2016, which, like the previous writs, the TCCA dismissed as non-compliant pursuant to Rule 73.1, on May 4, 2016. Finally, on May 13, 2016, Petitioner filed his fourth state writ application, which the TCCA denied without a written order on July 27, 2016. (Dkt. #25-15).

Petitioner filed the instant § 2254 petition on November 13, 2015. (Dkt. #1).[1] Petitioner alleges he is entitled to relief on numerous grounds. The Director filed a response arguing the petition should be dismissed because the claims are time-barred. (Dkt. #23). Petitioner filed a reply. (Dkt. #26).

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. The law made several changes to the federal habeas corpus statutes, including the addition of a one year statute of limitations. 28 U.S.C. § 2244(d)(1). The AEDPA provides that the one year limitations period shall run from the latest of four possible situations: the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review; the date an impediment to filing created by the State is removed; the date on which a

[1]Although his Section 2254 petition was filed on November 19, 2015, Petitioner attests he placed his petition in the prison mailing system on November 13, 2015; thus, his petition is deemed filed on November 13, 2015, in accordance with the "mailbox rule." *See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998).

constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *Id.* at Section 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).[2] The Supreme Court held that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). It counseled that these rules govern "for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Id*; *Larry v. Dretke*, 361 F.3d 890, 893 (5th Cir. 2004). The Fifth Circuit interprets the words "properly filed" narrowly. *Lookingbill v. Cockrell*, 293 F.3d 256, 160 (5th Cir. 2002).

ANALYSIS

Petitioner is challenging his conviction and sentence. The appropriate limitations provision is 28 U.S.C. § 2244(d)(1)(A), which indicates Petitioner's statute of limitations started running when the conviction became final. The Fifth Court of Appeals of Texas affirmed Petitioner's conviction on August 8, 2012, and the TCCA refused his petition for discretionary review on January 16, 2013. Petitioner did not file a petition for a writ of certiorari. In interpreting Section 2244(d)(1)(A) in light of Supreme Court rules, the Fifth Circuit concluded that a state conviction "becomes final upon

[2]The 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).

direct review, which occurs upon denial of certiorari by the Supreme Court or expiration of the period for seeking certiorari." *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999). Under the Supreme Court Rules, Petitioner had ninety days from "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Because the TCCA refused his PDR on January 16, 2013, Petitioner's conviction became final ninety days later on April 16, 2013. *See Jackson v. Dretke*, 181 F. App'x 400, 410 (5th Cir. 2006) (conviction final ninety days after motion for rehearing denied) (not designated for publication). Accordingly, the present federal petition was due no later than April 16, 2014, in the absence of tolling provisions. Petitioner did not file the instant federal petition until November 13, 2015 – over a year beyond the limitations deadline.

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 toward any period of limitation. Petitioner filed his first three state writs of habeas corpus on May 16, 2014, September 18, 2014, and February 19, 2016. However, the TCCA dismissed each of these three writs pursuant to Texas Rules of Appellate Procedure Article 73.1, as non-compliant, (Dkt. ##25-5, 25-8, 25-12); thus, Petitioners first three state writs of habeas corpus did not serve to toll the AEDPA limitations period. *See Broussard v. Thaler*, 414 F. App'x 686, 688 (5th Cir. 2011) (state habeas application dismissed under Tex. R. App. P. 73.1 "was not 'properly filed' and did not toll the AEDPA statute of limitations."); *see also Davis v. Quarterman*, 342 F. App'x 952, 953 (5th Cir.

2009).[3] Petitioner filed a fourth state writ application on May 13, 2016, which the TCCA denied without a written order on July 27, 2016. However, because the state petition was not filed prior to the statutory deadline – April 16, 2014– it does not serve to toll the limitations period.[4] *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (state habeas application filed after the AEDPA limitations period expired do not toll the limitations period under § 2244(d)(2)). Therefore, the instant § 2254 petition remains time-barred in the absence of other tolling provisions.

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 he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

The Fifth Circuit has held the district court has the power to equitably toll the limitations period only 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), *cert. denied*, 526 U.S. 1074

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[3] Even had Petitioner's first state habeas writ been "properly filed" it would not have tolled the limitations period. Petitioner filed his first state writ on May 16, 2014, thirty days after the AEDPA limitations period had expired.

[4] The Court notes Petitioner did not file any of his four (4) state habeas writs prior to the AEDPA limitations deadline.

(1999). 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 do not constitute extraordinary circumstances. *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). 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 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). Additionally, the Fifth Circuit has held that "[e]quity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999). To obtain the benefit of equitable tolling, Petitioner must also establish he pursued habeas relief with "reasonable diligence." *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013); *Holland*, 560 U.S. at 653 (the diligence required for equitable tolling purposes is reasonable diligence).

Petitioner does not assert a newly-recognized constitutional right. Furthermore, Petitioner presents no evidence that he was induced or tricked by his adversary's misconduct, which caused him to untimely file his petitions. Instead, Petitioner claims he is actually innocent. The Supreme Court held that "actual innocence, if proved, serves as a gateway through which a prisoner may pass whether the impediment is a procedural bar, as in *Schlup* [*v. Delo*, 513 U.S. 298, (1995)], or *House*

[*v. Bell*, 547 U.S. 518 (2006)], or, as in this case, expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the Court cautioned, "tenable actual-innocence gateway pleas are rare," and for a petitioner to meet the threshold requirement, he must persuade 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.* The actual-innocence gateway should open only when a petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error. *Id.* at 401.

Petitioner claims he is actually innocent. *See* Dkt. #17. Petitioner argues that text messages between the victim and her mother demonstrate "that a plan and conspiracy was being perpetuated against the Petitioner to falsely accuse him of the offenses ascribed to him". *Id.* at 6. However, Petitioner acknowledges he and his trial attorney were in possession of the text messages and attempted to enter them into evidence at his trial. *Id.* A habeas petitioner, who seeks to overcome a procedural default through a showing of "actual innocence," must support his allegations with "new, reliable evidence" that was not presented at trial and must show that it was more likely than not that, in light of the new evidence, no juror, acting reasonably, would have voted to find the petitioner guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 326–27 (1995); *see also House v. Bell*, 547 U.S. 518 (2006) (discussing at length the evidence presented by the petitioner in support of an actual-innocence exception to the doctrine of procedural default under *Schlup*). As the text messages were available at the time of Petitioner's trial in March 2011, (*see* Dkt. #24-7 at 69-76), Petitioner provides no "new evidence" of actual innocence. This is insufficient to demonstrate eligibility to pass through the actual innocence gateway. *Perkins*, 569 U.S. at 386.

In sum, Petitioner fails to make a sufficient showing that unconstitutional State action prevented him from seeking state, or federal habeas corpus relief in a timely manner, or that he is asserting a newly recognized constitutional right. Plaintiff also fails to show 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 petitions. He fails to show "rare and extraordinary circumstances" that prevented him from timely filing. Petitioner also fails to show that he exercised due diligence, or that he is actually innocent. The 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 Section 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 this court, nonetheless, address whether Petitioner 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 COA should issue when the Petitioner 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.*

It is respectfully recommended that reasonable jurists could not debate the denial of Petitioner's Section 2254 petition, nor find 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, 120 S. Ct. at 1604). Accordingly, it is respectfully recommended that the Court find Petitioner is not entitled to a certificate of appealability.

RECOMMENDATION

It is recommended that the above-styled petition filed under 28 U.S.C. § 2254 be denied and that the case be 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 to fourteen days).

SIGNED this 12th day of October, 2018.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.