No. 19-6133

Appendix – "A"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 23, 2020
DEBORAH S. HUNT, Clerk

LUIS GUILLEN,

Petitioner-Appellant,

v.

RUSSELL WASHBURN, Warden,

Respondent-Appellee.

ORDER

Before: SUTTON, Circuit Judge.

Luis Guillen, a pro se Tennessee prisoner, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 and moves this court for a certificate of appealability ("COA"). He also moves for leave to proceed in forma pauperis.

In 2012, a jury found Guillen guilty of aggravated rape and aggravated kidnapping. He was sentenced to thirty-five years in prison. The Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied permission to appeal on December 10, 2013. *State v. Guillen*, No. W2012-00826-CCA-R3-CD, 2013 WL 4007532 (Tenn. Crim. App. Aug. 2, 2013), *perm. app. denied* (Tenn. Dec. 10, 2013).

On February 20, 2014, Guillen filed a petition for relief from judgment, which the trial court denied. The Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied permission to appeal on May 19, 2017. *Guillen v. State*, No. W2016-00198-CCA-R3-PC, 2016 WL 6915579 (Tenn. Crim. App. Nov. 22, 2016), *perm. app. denied* (Tenn. May 19, 2017).

On July 31, 2018, at the earliest, Guillen filed the present habeas corpus petition by placing it in the prison mail. He claims that the evidence was insufficient to support his convictions, the

trial court erred by imposing an excessive sentence, and his trial counsel was ineffective in various respects.

The district court denied the petition and declined to issue a COA, reasoning that Guillen's petition was time-barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d) and that Guillen was not entitled to equitable tolling.

This court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the petitioner can satisfy § 2253(c)(2) by establishing 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).

The Antiterrorism and Effective Death Penalty Act imposes a one-year statute of limitations for filing habeas corpus petitions. *See* 28 U.S.C. § 2244(d)(1). The statute of limitations begins to run from the latest of four circumstances, one of which is "the date on which the [state court] judgment became final by the conclusion of direct review." 28 U.S.C. § 2244(d)(1)(A). The ninety-day period during which a petitioner may seek review of his conviction in the United States Supreme Court is included in the direct review process, such that the statute of limitations will not begin to run until that time has expired. *Lawrence v. Florida*, 549 U.S. 327, 333 (2007). The running of the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

Under § 2244(d)(1)(A), the one-year statute of limitations would have begun to run on March 11, 2014, the day after the last day on which Guillen was permitted to file a petition for a

writ of certiorari in the United States Supreme Court after the Tennessee Supreme Court denied permission to appeal on December 10, 2013. But on February 20, 2014, Guillen filed his motion for relief from judgment in the state trial court. The statute of limitations was tolled from that date until May 19, 2017, when the Tennessee Supreme Court denied permission to appeal the Tennessee Criminal Court of Appeals decision that affirmed the denial of Guillen's motion for relief from judgment. *See* 28 U.S.C. § 2244(d)(2). The limitations period thus began to run on May 20, 2017, and expired one year later, on May 19, 2018. Guillen filed his petition on July 31, 2018, over two months after the statute of limitations period expired. Contrary to Guillen's argument, the time was not tolled during the ninety-day certiorari period after entry of the appellate decision in his post-conviction proceedings. *See Lawrence*, 549 U.S. at 333-36. Reasonable jurists therefore could not debate the district court's procedural ruling that Guillen's petition was time-barred.

Guillen argues that he is entitled to equitable tolling. Section 2244(d) is subject to equitable tolling when a petitioner 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) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

According to Guillen, he is entitled to equitable tolling because of (1) his ignorance of the law, (2) the ineffective assistance of counsel and prison legal assistants, and (3) his limited English proficiency. Reasonable jurists could not debate the district court's rejection of these arguments. First, ignorance of the law does not excuse late filings. *See, e.g.*, *Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004) (rejecting ignorance of the law as a basis for equitable tolling). Second, Guillen's claim that the untimeliness of his petition is excused by the ineffective assistance of counsel lacks merit. *See id.* (holding that "a petitioner's reliance on the unreasonable and incorrect advice of his or her attorney is not a ground for equitable tolling" of the statute of limitations). Finally, "where a petitioner's alleged lack of proficiency in English has not prevented the petitioner from accessing the courts, that lack of proficiency is insufficient to justify an equitable tolling of the statute of limitations." *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002). Here, Guillen's

multiple pro se filings demonstrate his ability to access the courts. Reasonable jurists therefore would agree with the district court's conclusion that Guillen is not entitled to equitable tolling.

Accordingly, the court **DENIES** the motion for a COA and **DENIES** as moot the motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LUIS GUILLEN,	)	Appendix — "B" - (2) (Rec in Sep 2019)
Petitioner,	)	
v.	)	No. 2:18-cv-02537-TLP-tmp
MIKE PARRISH,	)	
Respondent.	)	

JUDGMENT

JUDGMENT BY COURT. This action came before the Court on Plaintiff's pro se Petition, filed on August 3, 2018. (ECF No. 1.) In accordance with the Order Directing Clerk to Modify Docket, Denying Motion for Status as Moot, Granting Motion for Leave to File a Supplemental Response, Granting Motion to Dismiss, Dismissing Petition Under 28 U.S.C. § 2254, Denying Motion for Counsel, Denying Certificate of Appealability, Certifying Appeal Not Taken in Good Faith, and Denying Leave to Proceed *In Forma Pauperis* on Appeal (ECF No. 31), entered by the Court,

IT IS ORDERED, ADJUDGED, AND DECREED that this action is **DISMISSED WITH PREJUDICE.**

APPROVED:

s/ Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

August 30, 2019
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Appendix – "B"
(Rec in July 2020)

LUIS GUILLEN,

Petitioner,

v.

MIKE PARRISH,

Respondent.

Case No. 2:18-cv-02537-TLP-tmp

ORDER DIRECTING CLERK TO MODIFY DOCKET,
DENYING MOTION FOR STATUS AS MOOT,
GRANTING MOTION FOR LEAVE TO FILE A SUPPLEMENTAL RESPONSE,
GRANTING MOTION TO DISMISS,
DISMISSING PETITION UNDER 28 U.S.C. § 2254,
DENYING MOTION FOR COUNSEL,
DENYING CERTIFICATE OF APPEALABILITY,
CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH,
AND
DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Petitioner, Luis Guillen[1], brings several matters to the Court's attention. He first petitioned pro se for habeas corpus relief by someone in state custody under 28 U.S.C. § 2254 ("§ 2254 Petition", ECF No. 1.)[2] In response, Respondent, Mike Parrish, moved to Dismiss

[1] Petitioner Luis Guillen, is a Tennessee prisoner now housed at the Trousdale Turner Correctional Center ("TTCC") and his prisoner number is 500168.

[2] The proper respondent to a habeas petition is Guillen's custodian TTCC Warden Rusty Washburn ("Respondent" or the "Warden"). *See Rumsfeld v. Padilla*, 542 U.S. 426, 434–435 (2004). *See* Tennessee Felony Offender Information Lookup, https://apps.tn.gov/foil/search.jsp (last visited Aug. 15, 2019); *see* Tennessee Department of Correction, https://www.tn.gov/correction/sp/state-prison-list/trousdale-turner-correctional-center.html (last visited Aug. 15, 2019). The Court

Untimely Habeas Corpus Petition. (ECF No. 10.) Petitioner then moved for Status. (ECF No. 24.) Petitioner also responded to Respondent's Motion to Dismiss. (ECF No. 27.) Petitioner later moved for Leave to File A Supplemental Response to that Motion to Dismiss. (ECF No. 29.) And finally, Petitioner moved for the appointment of Counsel. (ECF No. 30.)

For the reasons stated below, the Court **GRANTS** the Petitioner's Motion for Leave to File A Supplemental Response to Respondent's Motion to Dismiss (ECF No. 29) and **GRANTS** Respondent's Motion to Dismiss Untimely Habeas Corpus Petition (ECF No. 10); **DENIES** the remaining motions as moot (ECF Nos. 24 and 30); and **DISMISSES** the § 2254 Petition as time-barred.

I. STATE COURT PROCEDURAL HISTORY

In July 2010, the Shelby County Grand Jury indicted Guillen on one count of aggravated rape and three counts of aggravated kidnapping. *See Guillen v. State*, No. W2016-00198-CCA-R3-PC, 2016 WL 6915579, at *1 (Tenn. Crim. App. Nov. 22, 2016), *perm. app. denied* (Tenn. May 19, 2017). At the end of a trial, the jury returned a guilty verdict as to the aggravated rape count and a single count of aggravated kidnapping. The trial court merged the aggravated kidnapping convictions and sentenced Guillen to consecutive sentences of twenty-five years for aggravated rape and ten years for aggravated kidnapping, for a total effective sentence of thirty-five years imprisonment. *Id.* The trial court entered the judgments. (*See* ECF No. 9-1 at PageID 161-164; *see* also ECF No. 11 at PageID 1367-70.)

On April 13, 2012, Guillen timely noticed his appeal. (ECF No. 9-1 at PageID 169; *see* ECF No. 11 at PageID 1375.) The Tennessee Court of Criminal Appeals affirmed the judgments

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directs the Clerk to record the Respondent as TTCC Warden Rusty Washburn and terminate all references to Mike Parrish as the respondent.

of the trial court. *See State v. Guillen*, No. W2012-00826-CCA-R3-CD, 2013 WL 4007532, at *14 (Tenn. Crim. App. Aug. 2, 2013) (ECF No. 9-10), *perm. app. denied* (Tenn. Dec. 10, 2013). The Tennessee Supreme Court denied permission to appeal on December 10, 2013. (*See* ECF No. 9-13).

Guillen submitted a timely Petition for Relief from Conviction or Sentence to prison authorities for mailing. (*See* ECF No. 9-14 at PageID 924-934.) The trial court denied the post-conviction petition. (*Id.* at PageID 949-985.) Guillen timely noticed his appeal of the post-conviction ruling. (*Id.* at PageID 987.) The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court. (ECF No. 9-19.) *See Guillen*, 2016 WL 6915579, at *1, 6. On May 19, 2017, the Tennessee Supreme Court denied permission to appeal. (ECF No. 9-22.)

II. THE HABEAS PROCEEDINGS

Guillen petitioned this Court under § 2254. (ECF No. 1.) He placed the petition in the prison mailing system on July 31, 2018. (*Id.* at PageID 39.) The Court directed the Warden to file the state court record and to respond to the petition. (ECF No. 7.) The Warden timely complied with the state court record and a motion to dismiss. (ECF Nos. 9 & 10.) The Warden later filed redacted portions of the state court record. (ECF Nos. 11-23.)

Guillen moved for status. (ECF No. 24.) On February 15, 2019, the Warden filed Respondent's Notice of Service. (ECF No. 25.) On March 5, 2019, he filed Respondent's Supplemental Notice of Service. (ECF No. 26.) Guillen responded to the motion to dismiss. (ECF No. 27.) Four months later, Guillen filed Petitioner's Motion for Leave to File A Supplemental Response to Respondent's Motion to Dismiss (ECF No. 29) and Petitioner's Motion for Counsel (ECF No. 30).

III. MOTION FOR STATUS

Guillen moved for status asserting that he did not receive Respondent's answer or response to the petition. (ECF No. 24 at PageID 2285.) Guillen requests that the Court grant his motion and direct Respondent to file his answer or response. (*Id.* at PageID 2285.)

On February 15, 2019, the Warden filed Respondent's Notice of Service stating that he would send Guillen another copy of the motion to dismiss and supporting memorandum. (ECF No. 25.) On March 5, 2019, the Warden filed a Supplemental Notice of Service which included the Fed Ex tracking receipt reflecting service of the motion to dismiss and memorandum to Guillen. (ECF No. 26.) This takes care of the motion for status.

The Warden responded to the § 2254 Petition by moving to dismiss, and properly served Guillen with that motion and supporting memorandum. This makes the issues raised in this motion moot. Petitioner's Motion for Status (ECF No. 24) is therefore DENIED as moot.

IV. MOTION FOR LEAVE TO FILE SUPPLEMENTAL RESPONSE

The Court now turns to Guillen's Motion for Leave to File A Supplemental Response to Respondent's Motion to Dismiss filed on July 31, 2019. (ECF No. 29.) Respondent never responded to this motion, and the time for responding has expired.

Guillen's response to Respondent's Motion to Dismiss was filed and Guillen waited over four months to move for a supplemental response. (ECF No. 27.) In that supplemental response, rather than argue for equitable tolling, Guillen now argues that his § 2254 Petition was timely based on S. Ct. R. 13, which allows ninety days to petition for writ of certiorari in the United States Supreme Court. (*Id.* at PageID 2302-2304.) Guillen contends that he found a piece of a legal note from a lawyer in which the lawyer mentioned a 90-day grace period after the post-conviction petition was denied by the state court of last resort. (*Id.* at PageID 2302.) He asserts

that his one-year statute of limitations did not begin to run until August 18, 2017, after the 90-day grace period, and did not expire until one year later. (*Id.* at PageID 2304.) Guillen argues his filing was therefore timely. (*Id.*)

Despite the tardiness of this supplement, the Court will consider Guillen's argument in resolving Respondent's motion to dismiss. The Motion for Leave to File A Supplemental Response to Respondent's Motion to Dismiss is thus GRANTED.

V. MOTION TO DISMISS UNTIMELY HABEAS PETITION

There is statutory authority for federal courts to issue habeas corpus relief for persons in state custody. *See* 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Respondent argues that Guillen's § 2254 Petition was untimely, that he is not entitled to equitable tolling, and that the petition should be dismissed as time-barred. (ECF No. 10-1 at PageID 1267-71.) The Court finds Respondent's argument well-taken.

A. Timeliness

Originally, Guillen did not dispute that the § 2254 Petition was not timely filed. (ECF No. 1 at PageID 36; *see* ECF No. 27 at PageID 2294.) But now he asserts in his supplemental filing that the petition was timely.

Twenty-eight U.S.C. § 2244(d) provides:

> (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 begin to 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 initially 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; and
>
> (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.

28 U.S.C. § 2244(d).

State convictions ordinarily become "final" under § 2244(d)(1)(A) on "the first non-weekend day following the expiration of the 90-day period during which [Guillen] was eligible to petition the Supreme Court for certiorari." *Pinchon v. Myers*, 615 F.3d 631, 640 (6th Cir. 2010) (citing *Lawrence v. Fla.*, 549 U.S. 327, 333 (2007)); *see* Sup. Ct. R. 13.1 ("A petition for a writ of certiorari . . . is timely when it is filed . . . within 90 days after entry of the order denying discretionary review").

After the Tennessee Court of Criminal Appeals issued its decision on direct appeal, the Tennessee Supreme Court denied permission to appeal on December 10, 2013. As a result, Guillen's convictions became final the last date for petitioning for a writ of certiorari with the United States Supreme Court on March 10, 2014.

The limitations period was tolled, under 28 U.S.C. § 2244(d)(2), when Guillen submitted his post-conviction petition to prison authorities for mailing on February 20, 2014. Because

Guillen filed his post-conviction petition before the date that his judgments became final, the tolling began immediately. *See* 28 U.S.C. § 2244(d)(2). The Tennessee Court of Criminal Appeals affirmed the post-conviction trial court, and the Tennessee Supreme Court denied permission to appeal on May 19, 2017. This is a critical date.

The limitations period for the filing of Guillen's petition here began to run the next day, May 20, 2017, and continued to run for 365 days until it expired on May 21, 2018. (*See* ECF No. 10-1 at PageID 1268.) Guillen then waited more than seventy-days to submit his petition for mailing, July 31, 2018.[3]

Guillen argues his petition is timely considering the date that the Tennessee Supreme Court denied discretionary review in the post-conviction proceedings. As mentioned, however, post-conviction proceedings in state court only toll the statute of limitations. And here, the post-conviction proceedings were no longer pending. Guillen does not get a second 90-day period after denial of discretionary review in the post-conviction proceedings. *See* Sup. Ct. R. 13.1; *Crowder v. United States*, 757 F. App'x 479, 481 (6th Cir. 2018) ("A petition for certiorari must be filed within ninety days of the entry of judgment by the court of appeals."); *see also Lawrence*, 549 U.S. at 331–332 (holding that "[t]he application for state postconviction review is . . . not 'pending' after the state court's postconviction review is complete, and § 2244(d)(2) does not toll the 1–year limitations period during the pendency of a petition for certiorari.").

[3] Under the prison mailbox rule, a pro se prisoner files the complaint when the prisoner hands it over to prison officials for mailing to the court. *See Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008). Even though a stamp on the petition shows August 3, 2018, the filing date for the prison mailbox rule is July 31, 2018. (*See* ECF No. 1 at PageID 1, 39.)

As stated, the denial of discretionary review from the direct appeal (on December 10, 2013) triggered the running of the statute of limitations for this petition under § 2254. As a result, Guillen's § 2254 Petition was not timely filed.

B. Equitable Tolling

This Court will now turn to the doctrine of equitable tolling to see if there is any relief for Guillen. "[T]he doctrine of equitable tolling allows federal courts to toll a statute of limitations when a litigant's failure to meet a legally mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (internal quotation marks omitted), *abrogated on other grounds as recognized in Johnson v. United States*, 457 F. App'x 462, 470 (6th Cir. 2012). Under the right circumstances, § 2254 limitations period can be subject to equitable tolling. *Holland v. Fla.*, 560 U.S. 631, 645–49 (2010). "[T]he doctrine of equitable tolling is used sparingly by the federal courts." *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *see also Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003) (same); *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003) (same). "The party seeking equitable tolling bears the burden of proving he is entitled to it." *Robertson*, 624 F.3d at 784. 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." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Guillen at first argued that he was entitled to equitable tolling. (*See* ECF No. 1 at PageID 36-39; *see also* ECF No. 27 at PageID 2294-97.) Guillen claimed that in September 2017, his post-conviction lawyer informed him that the Tennessee Supreme Court denied permission to appeal back in May 2017. (ECF No. 1 at PageID 36.) Some months later, on March 20, 2018,

Guillen received a legal assist from the prison law library and heard that he had missed the deadline for filing a § 2254 Petition. (*Id.*) Yet from April through July 2018, Guillen received a legal assist from a Spanish-speaking inmate at a different prison and prepared this § 2254 Petition. (*Id.*)

Guillen is a *pro se* indigent Mexican national with limited English proficiency who has no formal knowledge of the law. (*Id.* at PageID 37.) He argues that he was diligent in pursuing his appeal. (*Id.*) Guillen contends that he requested a legal assist with no undue delay, but because of maximum security/segregation, the prison only allowed him to get assistance one hour per week. (*Id.*) He argues that he reasonably relied on his counsel and legal helper to timely file any necessary appeals or legal proceedings. (*Id.*) Guillen notes that, although his post-conviction counsel notified him about the Tennessee Supreme Court's decision several months before the deadline to file his habeas petition, counsel failed to inform him about the statute of limitations for filing that petition. (*Id.*)

Guillen asserts that the extraordinary circumstances were that (1) he has limited English proficiency and needs a language interpreter; (2) he is indigent and unable to hire counsel or an interpreter; (3) he is a layperson proceeding *pro se*; (4) he is a maximum/segregation inmate under extreme restrictions in practicing his right to access the courts. (*Id.* at PageID 38.) Guillen also contends that his post-conviction counsel abandoned him by failing to inform him of the deadline for filing a federal habeas petition. (*Id.*) Guillen argues that the statute of limitations should be equitably tolled based on his diligence and the extraordinary circumstances. (*Id.*; *see* ECF No. 27 at PageID 2294-96.)

In response, the Warden argues that Guillen is not entitled to equitable tolling because the grounds alleged are not adequate. (ECF No. 10-1 at PageID 1269.) The Warden notes that

ignorance of the law, *pro se* status, and the ineffective assistance of a prison legal assistant do not constitute extraordinary circumstances for equitable tolling. (*Id.*) Quoting the Sixth Circuit in *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002), the Warden argues that "where a petitioner's alleged lack of proficiency in English has not prevented the petitioner from accessing the courts, that lack of proficiency is insufficient to justify an equitable tolling of the statute of limitations." (*Id.* at PageID 1269-70.)

As for the allegations that post-conviction counsel abandoned Guillen and failed to inform him of the deadline, the Warden acknowledges that egregious behavior may constitute an extraordinary circumstance. (*Id.* at PageID 1270.) He contends however that post-conviction counsel's failure to provide full information about the deadline for filing the petition does not warrant equitable tolling. (*Id.*) And a petitioner's lack of knowledge of the filing deadlines is unpersuasive when it comes to a determination to allow equitable tolling. (*Id.*) *See Martin v. Hurley*, 150 F. App'x 513, 516 (6th Cir. 2005). Counsel's letter to Guillen notified him that there was a means to relief and encouraged him to pursue it. (*Id.* at PageID 1271.) The Warden argues that Guillen has not shown that he was diligent, and the grounds presented for equitable tolling, whether considered individually or collectively, fail. (*Id.*)

Guillen responds that the Warden is incorrect. (ECF No. 27 at PageID 2294.) Guillen restates the arguments about equitable tolling he made in his § 2254 Petition. (*Id.* at PageID 2294-96.) He asserts that it was not his ignorance alone, the ineffective assistance of a prison legal assistance alone, or his limited English proficiency that warrants equitable tolling, but "the totality and cumulative effect" of these circumstances. (*Id.* at PageID 2296.) Guillen argues that "[t]here cannot be more extra ordinary circumstance than Petitioner's cumulative circumstance." (*Id.* at PageID 1296-97.)

To show diligence, Guillen must show that "he was unable, despite diligent efforts, to procure either legal materials in his own language or translation assistance from an inmate, library personnel, or other source." *Levy v. Osborne*, 734 F. App'x 960, 963 (6th Cir. 2018) (quoting *Mendoza v. Carey*, 449 F.3d 1065, 1070 (9th Cir. 2006)). Guillen has not shown diligence in obtaining legal assistance in Spanish, legal materials in Spanish, or translation assistance to timely file his § 2254 Petition. Nor has Guillen shown diligence in pursuing his rights or that extraordinary circumstances prevented his timely filing.

Even still, a credible claim of actual innocence may overcome AEDPA's limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But Guillen has submitted no new reliable evidence to support such a claim. *See Schlup v. Delo*, 513 U.S. 298, 325 (1995).

Respondent's motion to dismiss the petition (ECF No. 10) as time barred is GRANTED. The petition is DISMISSED WITH PREJUDICE. The Court will enter judgment for Respondent. Petitioner's and Motion for Counsel (ECF No. 30) is DENIED as moot.

VI. APPELLATE ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003); *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A court will issue a COA only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must reflect the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A petitioner makes a "substantial

showing" when the petitioner shows 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.'" *Miller-El*, 537 U.S. at 336 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same).

A petitioner need not show that the appeal will succeed to get a COA. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814–15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. *Bradley*, 156 F. App'x at 773 (quoting *Miller-El*, 537 U.S. at 337).

Here, there can be no question that the claims in this petition are barred by the statute of limitations. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court DENIES a COA.

Here for the reasons the Court denies a COA, the Court determines that any appeal would not be taken in good faith. The Court therefore CERTIFIES, under Fed. R. App. P. 24(a), that any appeal here would not be taken in good faith, and leave to appeal *in forma pauperis* is **DENIED**.[4]

IT IS SO ORDERED this 23rd day of August, 2019.

s/ Thomas L. Parker

THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

[4] If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit within 30 days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).