19-40371

Mr. John Patrick Wallace
#1621931
CID Stiles Prison
3060 FM 3514
Beaumont, TX 77705-0000

Appendix
A

Appendix B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

September 15, 2020

#1621931
Mr. John Patrick Wallace
CID Stiles Prison
3060 FM 3514
Beaumont, TX 77705-0000

No. 19-40371 John Wallace v. Lorie Davis, Director
USDC No. 4:17-CV-511

Dear Mr. Wallace,

We received your Motion for Production of Clerk's Records. In light of the motion is unnecessary. A copy of the motion for reconsideration is $3.50, we are taking no action on this motion.

We must charge $.50 per page for a copy of the motion for reconsideration. Upon receipt of the payment, the copies will be forwarded.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40371

JOHN PATRICK WALLACE,

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:

John Patrick Wallace, Texas prisoner # 1621931, was convicted of burglary of a habitation and sentenced to serve 36 years of imprisonment. Now, he moves this court for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition as untimely. He argues that his untimely filing should be excused because he is actually innocent.

A prisoner will receive a COA only if he "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). One "satisfies this standard by demonstrating 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*, 537 U.S. at 327. Where the district court has rejected the application on a procedural ground, the applicant must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Because Wallace has not met these standards, his COA motion is DENIED.

ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE

Appendix C

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

JOHN PATRICK WALLACE, #1621931	§	
	§	
VS.	§	CIVIL ACTION NO. 4:17cv511
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

The above-named and numbered case was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation recommending that the petition be denied and dismissed with prejudice because it is time-barred. Petitioner filed objections.

Having made a *de novo* review, the court concludes that the findings and conclusions of the Magistrate Judge are correct, and the objections of Petitioner are without merit. Petitioner fails to show that the Report and Recommendation is in error or that he is entitled to equitable tolling. Accordingly, the court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court. It is

ORDERED that the petition for writ of habeas corpus is **DENIED** and Petitioner's case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. It is further

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

SIGNED this the 14th day of March, 2019.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

Case: 4:17cv511

John Patrick Wallace 1621931
Allan B. Polunsky Unit
3872 FM 350
Livingston, TX 77351

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

JOHN PATRICK WALLACE, #1621931	§	
	§	
VS.	§	CIVIL ACTION NO. 4:17cv511
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Petitioner John Patrick Wallace filed the above-styled and numbered petition for a 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 Collin County conviction for burglary of a habitation, Cause No. 291-82795-07. On September 17, 2008, he was sentenced to thirty-six years' confinement. The Fifth Court of Appeals affirmed his conviction on April 30, 2010, Cause No. 05-08-01369-CR. Petitioner filed the present petition on July 13, 2017. He argues that he is entitled to federal habeas corpus relief because his due process rights were violated. The Director was not ordered to file a response.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was enacted. 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

The United States Supreme Court confirmed that the AEDPA statute of limitation is not a jurisdictional bar, and it is subject to equitable tolling in *Holland v. Florida*, 560 U.S. 631 (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*, 130 S. Ct. at 2562). "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 that the Fifth Circuit has expressly held that proceeding *pro se,* illiteracy, deafness, lack of legal training, unfamiliarity with the legal process, and claims of actual innocence 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).

Petitioner filed a response to this Court's order as to the timeliness of his petition. In his response, Petitioner concedes his petition is not timely, but claims that he is actually innocent. The Supreme Court, in *McQuiggin v. Perkins,* 133 S. Ct. 1924 (2013), held that actual innocence, if proved, serves as a means of avoiding the AEDPA one-year statute of limitations. 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, "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 new evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied the trial was free of nonharmless constitutional error. *Id.* at 1936.

In the present case, the Court first notes Petitioner fails to show newly discovered evidence. Nothing presented in Petitioner's federal petition is newly discovered. Second, Petitioner's actual innocence claim is actually a sufficiency of the evidence argument. In the context of actual innocence, Petitioner must establish factual innocence – he must show he did not commit the crime. *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992). Petitioner wholly fails to show factual innocence, as required. *Id.*

Finally, Petitioner also fails to establish he exercised reasonable diligence. While the

Supreme Court rejected the theory that petitioners who assert *convincing* actual-innocence claims must also prove reasonable diligence, it held that timing is a relevant factor in evaluating the reliability of petitioner's proof of innocence. *Perkins*, 133 S. Ct. at 1935 (emphasis added). Petitioner fails to assert a convincing actual-innocence claim, and also fails to show he exercised reasonable diligence. *Id.* at 1928.

In sum, Petitioner filed his § 2254 petition six years, one month, and thirteen days beyond the AEDPA limitations deadline. He fails to show he is actually innocent or that "rare and extraordinary circumstances" prevented him from timely filing. *Perkins*, 133 S. Ct. at 1928; *Davis*, 158 F.3d at 810-11. Petitioner also fails to show he was reasonably diligent. *Perkins*, 133 S. Ct. at 1928. Consequently, the § 2254 petition should be denied and 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 this 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 a petitioner's 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 habeas petition on procedural grounds without reaching the petitioner's 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.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Petitioner's § 2254 motion 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 respectfully recommended that the court find that Petitioner is not entitled to a certificate of appealability.

RECOMMENDATION

It is recommended Petitioner's motion for relief 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.

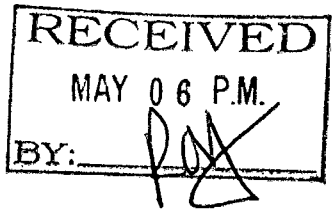
Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences 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 30th day of August, 2018.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

Appendix D

AFFIRMED; Opinion Filed April 30, 2010.



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-08-01369-CR

JOHN PATRICK WALLACE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-82795-07

OPINION

Before Justices Richter, Lang-Miers, and Myers
Opinion By Justice Lang-Miers

A jury convicted John Patrick Wallace of burglary of a habitation. After appellant pleaded true to two prior burglary of a habitation convictions, the jury assessed punishment at thirty-six years' imprisonment. In two issues, appellant contends the evidence is legally and factually insufficient to support the conviction. We affirm.

BACKGROUND

On September 16, 2007, Dana Starr, the complainant, picked up her children from Sunday school and returned home at 11:30 a.m. When she drove into her garage, which is attached to her house, she left the door up and went into the house. Starr testified her backyard is surrounded by a brick wall, and the driveway has an iron gate across it to block entry from the alley. The gate

opens with a remote control device. Starr testified she was inside the house for about forty minutes then she returned to her car. She immediately noticed her wallet, which she kept in the console for convenience, was missing. Starr went back in the house to look for the wallet, then returned to the garage after a few minutes. She saw that her husband's vehicle had its doors ajar, and a radar detector was missing from the vehicle. Starr immediately called the credit card company. She learned one of her credit cards had already been used twice, at a gas station and at a Walgreens. Starr called the police. A Dallas police officer came to Starr's home. A short time later, a Plano police officer telephoned Starr and said he had her wallet. Starr went to the Plano jail and retrieved her wallet at 2:00 p.m. Cash and one credit card were missing from the wallet. Starr testified she did not give anyone permission to enter her garage and take property from her vehicle, and that whoever stole her property would either have had to jump over the brick wall or open the iron gate to gain entry into the yard and garage. At trial, Starr identified a credit card issued in her name and a radar detector as property belonging to her and her husband.

On September 16, 2007, Plano police officer Joel Scott made a traffic stop on a vehicle driven by appellant for having no front license plate and making an unauthorized U-turn. Appellant was in the driver's seat, and a man later identified as Marsalis Hutchinson was in the front passenger seat. Scott testified that when he first noticed the vehicle, it was approximately two blocks from a Walgreens in the 4000 block of Preston Road. After Scott activated his flashing lights to pull over the vehicle, appellant slowed down but did not stop immediately. Scott saw appellant and Hutchinson "fumbling with something." Appellant drove "a quater mile" before he stopped even though Scott had activated his flashing lights. When Scott asked appellant for identification, appellant gave Scott an Oklahoma driver's license in the name of "John Gatharie." Scott testified he could not verify the license because his computer was not working properly at the time. He asked

appellant for paperwork that showed he owned the vehicle. Appellant reached into the glove compartment and grabbed a receipt from a motor company in the name of "John Wallace." When Scott asked appellant who John Wallace was, appellant said he was both John Wallace and John Gatharie because "his mother was a Wallace and his father was a Gatharie."

Scott testified he became suspicious of appellant's nervous behavior and vague answers and called for a backup officer. When the second officer arrived, Scott got appellant out of the vehicle and arrested him for traffic violations, including no driver's license, no insurance, and no front license plate. When he searched appellant, Scott found $494 in cash and various cards in appellant's pants pockets, including a credit card issued to Dana Starr, five $100-American Express gift cards; two $50-American Express gift cards; a $50-Marriott gift card, a $100-Marriott travel card; a $25-Cold Stone Creamery gift card, and several gift cards from stores and restaurants without a designated amount. Scott asked appellant who Dana Starr was; appellant said he did not know. Scott then searched appellant's vehicle and found the following items: identification with appellant's name and picture on it, a woman's wallet under the driver's seat that contained Starr's identification and several credit cards, a pair of black gloves between the driver's seat and center console, a new radar detector, and two credit union checks with an address printed on them that did not match appellant's address.

Scott testified he called the police dispatcher to obtain a telephone number for Starr. He learned that a Dallas police officer was headed to the Starr residence to take a burglary report. Scott telephoned Starr and learned one of her credit cards had been used at a nearby Walgreens. Scott sent the backup officer to Walgreens to look at possible surveillance footage of the transaction. The officer obtained a surveillance videotape that showed a person who resembled appellant purchasing something at a front register. The purchase occurred at 12:01 p.m. on September 16, 2007. Scott

testified the clothing of the person using the credit card at the Walgreens matched the clothing appellant had on at the scene of the traffic stop.

Plano police officer Steven Sanders testified he was the second officer to arrive at the traffic stop. He briefly talked with Hutchinson, the front seat passenger, while Scott made appellant get out of the vehicle and then arrested him. After a few minutes, Sanders went to a nearby Walgreens to investigate whether appellant was the same person who used Starr's credit card there. Sanders talked with the store manager and viewed surveillance videotape of transactions at the front cash registers. Sanders testified that although he could not see the person's face on the videotape, he saw a man at the register whose clothing and distinctive hat matched the clothing and hat appellant was wearing at the time of the traffic stop. The videotape was admitted into evidence and played to the jury as Sanders pointed out that appellant stood at the register and used Starr's credit card at 12:01 p.m.[1] Appellant did not testify or present any evidence during the guilt/innocence phase of the trial.

DISCUSSION

In two issues, appellant contends the evidence is legally and factually insufficient because there is no eyewitness testimony, no eyewitness identification, and a useless videotape because you cannot see the face of the person who used Starr's credit card. Appellant asserts there is no evidence he was physically present at the time the offense was committed or that he and Hutchinson were acting together to commit the offense. In reviewing a challenge to the legal sufficiency of the evidence, we examine the evidence to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005). We review all the evidence in the light most favorable to the

[1] The Walgreens surveillance videotape is not a part of the appellate record. However, the jury heard testimony from both Scott and Sanders that the person on the videotape using Starr's credit card had on the same clothing and distinctive hat as appellant wore at the traffic stop the same day of the burglary.

verdict, and assume the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *See Rollerson v. State*, 227 S.W.3d 718, 724 (Tex. Crim. App. 2007).

In a factual sufficiency review, we consider all of the evidence in a neutral light and determine whether (1) the evidence supporting the conviction is too weak to support the fact-finder's verdict or, (2) considering conflicting evidence, the fact-finder's verdict is against the great weight and preponderance of the evidence. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009). We may only find the evidence factually insufficient when necessary to prevent manifest injustice. *Id.* Unless the record clearly reveals a different result is appropriate, we must defer to the fact-finder's determination concerning what weight to give to contradictory testimony. *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

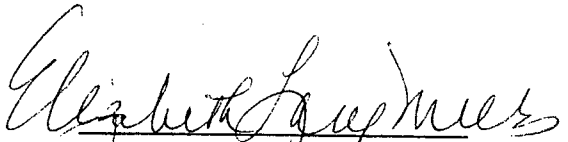
To obtain a conviction, the State was required to prove beyond a reasonable doubt that appellant intentionally and knowingly, without the effective consent of Dana Starr, the owner, entered a habitation with the intent to commit theft, attempted to commit theft, or committed theft. *See* TEX. PENAL CODE ANN. § 30.02(a) (Vernon 2003). The jury was instructed it could find appellant guilty as a principal actor to the offense, guilty as a party to the offense, or not guilty. *See* TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003). A person is criminally responsible as a party if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both. *See id.* § 7.01(a). A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he aids the other person in committing the offense. *See id.* § 7.02(a)(2). In determining whether the accused is guilty as a party, the fact finder may consider events occurring before, during, and after commission of the offense. *Michel v. State*, 834 S.W.2d 64, 67 (Tex. App.–Dallas 1992,

no pet.).

The jury heard testimony that there was less than forty minutes between the time Starr discovered her wallet missing and when officers discovered Starr's wallet and credit cards in appellant's possession. Starr's wallet was found under the driver's seat where appellant had been sitting, and her credit card was found in appellant's pocket. Appellant offered no explanation to the officers as to why he possessed Starr's stolen property. Unexplained possession of property recently stolen in a burglary permits an inference that an accused is the person who committed the burglary. *See Poncio v. State*, 185 S.W.3d 904, 905 (Tex. Crim. App. 2006). Moreover, the jury was free to accept or reject any and all of the evidence presented by either side. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The jury could have reasonably concluded that appellant was the person who entered Starr's habitation without her consent and stole her property.

Viewed under the proper standards, we conclude the unexplained possession of property recently stolen in a burglary in conjunction with the fact that appellant was wearing the same clothing as the person who was captured on store surveillance videotape using Starr's credit card are sufficient to support his burglary of a habitation conviction. *See Poncio*, 185 S.W.3d at 905. We resolve appellant's two issues against him.

We affirm the trial court's judgment.



ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOHN PATRICK WALLACE, Appellant

No. 05-08-01369-CR V.

THE STATE OF TEXAS, Appellee

Appeal from the 219th Judicial District Court of Collin County, Texas. (Tr.Ct.No. 219-82795-07).
Opinion delivered by Justice Lang-Miers, Justices Richter and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered April 30, 2010.

Elizabeth Lang-Miers

ELIZABETH LANG-MIERS
JUSTICE