# APPENDIX "A"

(U.S. Court of Appeals Decision)

# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 11, 2021
Lyle W. Cayce
Clerk

No. 18-31152

JAMAAL DIGGS,

*Petitioner—Appellant*,

*versus*

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

*Respondent—Appellee*.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:17-CV-1624

Before WIENER, COSTA, and WILLETT, *Circuit Judges*.

PER CURIAM:*

Jamaal Diggs sought federal postconviction relief to challenge his state murder conviction. But by the time he filed his federal petition for a writ of habeas corpus, the one-year time limit for doing so had lapsed. Diggs recognizes that the petition was late but contends the district court should

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

have tolled the limitations period. Because the district court did not abuse its discretion in concluding that equitable tolling was not appropriate, we affirm.

I.

Jamaal Diggs shot and killed a man in broad daylight. At his trial, two eyewitnesses testified that Diggs was the shooter. Diggs was convicted of second-degree murder and sentenced to life in prison.

The intermediate state court rejected Diggs's direct appeal on February 12, 2014. Because he failed to appeal that ruling to the state supreme court, Diggs's conviction became final thirty days later, on March 14. *See* LA. SUP. CT. R. X, § 5(a).

Diggs waited almost a year—334 days to be exact—to seek state habeas relief. The state trial court denied that petition in 2015. The intermediate state court denied a petition for review the next year. The Louisiana Supreme Court then took nineteen months to deny a petition for review, doing so on September 29, 2017.

But Diggs did not immediately learn of the state supreme court's ruling. Because of staff turnover, that court failed to send court decisions to Diggs's prison for a two-month period in 2017. As a result of this delay, Diggs did not learn about the high court's ruling until November 9, 2017, 41 days after the state high court had denied his petition.

It took Diggs 29 days after learning about his state court loss to file his federal habeas petition. He recognized he was filing outside the one-year limitations period but asked the federal district court to toll the clock for the 41 days the state supreme court failed to notify him of its ruling. That tolling would allow Diggs's federal petition to come in just under the wire (363 days).

The magistrate judge recommended dismissing the petition as untimely, concluding that Diggs had failed to exercise the due diligence required for tolling. The magistrate judge emphasized Diggs's delay in filing both his state and federal petitions. The district court agreed and dismissed the habeas petition with prejudice.

We authorized this appeal of the district court's refusal to toll the limitations period.

II.

A federal petition for a writ of habeas corpus must be filed within one year of when the conviction became final. 28 U.S.C. § 2244(d)(1)(A). But that period is tolled when a state habeas petition is pending. *Id.* § 2244(d)(2). As we have recounted, Diggs filed his petition 404 days after his conviction became final. So it is only timely if he is entitled to equitable tolling for the 41 days during which he did not know the Supreme Court of Louisiana had rejected his petition.

Equitable tolling may be warranted in "rare and exceptional circumstances." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (quoting *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998)). Equitable tolling is "discretionary," "does not lend itself to bright-line rules," and "turns on the facts and circumstances of a particular case." *Id.* But there are two general requirements: a habeas petitioner must show "'(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)); *see also Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010). A state-created delay in sending a court opinion to a petitioner may constitute an extraordinary circumstance. *See, e.g.*, *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000). But the district court did not abuse its discretion in finding that Diggs failed

to demonstrate the other requirement: due diligence. *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (applying the abuse-of-discretion standard).

Those who "sleep on their rights" are not entitled to equitable tolling. *Fisher*, 174 F.3d at 715 (quoting *Covey v. Ark R. Co.*, 865 F.2d 660, 662 (5th Cir. 1989)). A petitioner seeking equitable tolling must demonstrate that he "'pursued the [habeas corpus relief] process with diligence and alacrity' both before and after receiving notification" that his state petition was denied. *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (alteration in original) (quoting *Phillips*, 216 F.3d at 511).

We therefore consider the timing of both the petitioner's state and federal habeas petitions. *Jackson v. Davis*, 933 F.3d 408, 411–13 (5th Cir. 2019). For the state habeas filing, we have found diligence when a petitioner waited two months to file, *see Hardy*, 577 F.3d at 599, but not when it took up to seven months to file, *see Stroman v. Thaler*, 603 F.3d 299, 302–03 (5th Cir. 2010). For the federal habeas filing, "[w]e have found diligent petitioners who filed in federal court one week, three weeks, and one month after receiving delayed notice of the denial of state habeas relief." *Jackson*, 933 F.3d at 411 (citing *Hardy*, 577 F.3d at 597; *Williams v. Thaler*, 400 F. App'x 886, 891 (5th Cir. 2010); *Phillips*, 216 F.3d at 511) (cleaned up). But we have found a petitioner was not diligent when he waited seven weeks to file in federal court. *Stroman*, 603 F.3d at 302.

The promptness of the filings in the above cases offers useful guidance, *Jackson*, 933 F.3d at 411, but the equitable nature of tolling ultimately requires a holistic assessment of the petitioner's diligence. *Palacios v. Stephens*, 723 F.3d 600, 606 (5th Cir. 2013). Consequently, a petitioner who waited to file his state petition until there was only a little over a month remaining on the clock nonetheless showed diligence by filing motions seeking an evidentiary hearing before the state court, inquiring about

the status of his state petition while it was pending, and then filing his federal habeas petition within one week of being notified that his state petition had been denied. *Umana v. Davis*, 791 F. App'x 441, 442–43 (5th Cir. 2019). A petitioner also showed diligence despite having filed his state petition with less than a month remaining when he made four inquiries to the state court about its delay and contacted the federal court regarding his federal petition 17 days after he learned of the state court's ruling. *Williams*, 400 F. App'x at 891. On another occasion, a petitioner, who received notice that his state habeas petition was denied four months after the fact, showed diligence by filing an out-of-time appeal in state court just three days after he received this delayed notice. *Phillips*, 216 F.3d at 511.

Diggs cannot demonstrate diligence in any of these facets: not on the front end of filing the state habeas petition, not on the back end of filing the federal petition after the state court denial, and not in between those times by inquiring about the status of his pending state habeas petition. Diggs waited 334 days after his conviction became final before mailing his state petition, leaving him only 30 days to file a federal petition once the state habeas proceedings concluded. Then, once he received notice (albeit delayed) that his state petition had been denied, he waited another 29 days to file in federal court. And although more than a year and a half had passed between Digg's submitting his petition to the Louisiana Supreme Court and receiving the final decision, he never inquired about the case's status. The district court thus did not abuse its discretion in concluding that both before and after receiving notification that his state petition was denied, Diggs failed to demonstrate the degree of diligence that warrants tolling the statutory filing deadline.

* * *

We AFFIRM the judgment of the district court.

# APPENDIX "B"

(U.S. District Court's Decision)

WESTLAW

**Diggs v. Vannoy**
United States District Court, W.D. Louisiana, Lafayette Division. | October 12, 2018 | Not Reported in Fed. Supp. | 2018 WL 495586

2018 WL 4955867
Only the Westlaw citation is currently available.
United States District Court, W.D. Louisiana,
Lafayette Division.

Jamaal DIGGS #486702

v.

Darrel VANNOY

CIVIL ACTION NO. 17-CV-1624-P
Signed 10/12/2018

## Attorneys and Law Firms

Jamaal Diggs, Angola, LA, pro se.

Daniel M. Landry, III, D A's Office 15th J.D.C., Lafayette, LA, Ted L. Ayo, 15th J.D.C., Abbeville, LA, for Darrel Vannoy.

**JUDGMENT**

S. MAURICE HICKS, JR., CHIEF JUDGE

***1** For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, and after an independent review of the record including the objections filed by petitioner, and having determined that the findings and recommendation are correct under the applicable law;

**IT IS ORDERED** that the petition for habeas corpus be **DISMISSED WITH PREJUDICE** as time-barred by the provisions of 28 U.S.C. § 2244(d).

**THUS DONE AND SIGNED** in Shreveport, Louisiana, on this 12th day of October, 2018.

## All Citations

Not Reported in Fed. Supp., 2018 WL 4955867

**End of**

**Document**

# APPENDIX "C"

(U.S. District Court Magistrate Report and Recommendation)

WESTLAW

**Diggs v. Vannoy**
United States District Court, W.D. Louisiana, Lafayette Division. | September 18, 2018 | Not Reported in Fed. Supp. | 2018 WL 495

2018 WL 4956950
Only the Westlaw citation is currently available.
United States District Court, W.D. Louisiana,
Lafayette Division.

Jamaal DIGGS #486702

v.

Darrel VANNOY

CASE NO. 6:17-CV-01624
Signed 09/18/2018

## Attorneys and Law Firms

Jamaal Diggs, Angola, LA, pro se.

Daniel M. Landry, III, DA's Office, Lafayette, LA, Ted L. Ayo, Abbeville, LA, for Darrel Vannoy.

**SEC P**

**REPORT AND RECOMMENDATION**

CAROL B. WHITEHURST, UNITED STATES MAGISTRATE JUDGE

*1 Pro se petitioner Jamaal Diggs, an inmate in the custody of Louisiana's Department of Corrections, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on December 11, 2017. Petitioner attacks his 2012 conviction for second degree murder and the life sentence imposed thereafter by the Fifteenth Judicial District Court, Vermilion Parish, Louisiana. This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636 and the standing orders of the Court.

### I. Background

On October 24, 2012, a jury found petitioner guilty as charged of second degree murder and he was sentenced to serve life in prison without the benefit of parole, probation, or suspension of sentence. His retained appellate attorney argued the following assignments of error on direct appeal to the Third Circuit Court of Appeal: (1) evidence at trial was

contradictory, inconsistent and tainted, therefore, legally insufficient; and (2) his sentence was unconstitutionally excessive. On February 12, 2014, the Third Circuit affirmed petitioner's conviction and sentence. *State of Louisiana v. Jamaal Cole Diggs*, 13-766 (La. App. 3 Cir. 2/14/2014), 154 So.3d 15; *see also* Rec. Doc. 1-3, pp. 4-15. Petitioner did not file an application for writ of certiorari in the Louisiana Supreme Court. See Rec. Doc. 1-2, p. 3.

On February 11, 2015, petitioner filed a pro se application for post-conviction relief in the Fifteenth Judicial District Court. [Rec. Doc. 1-3, pp. 23-56]. Petitioner alleged three claims for relief: (1) ineffective assistance of trial counsel in failing to object when prosecutor elicited police officer testimony of petitioner's post-*Miranda* exercise of his Fifth Amendment right against self-incrimination; (2) ineffective assistance of appellate counsel in failing to raise the issue of trial counsel failing to object to the prosecutor elicited police officer testimony; (3) ineffective assistance of trial counsel in failing to raise issue of impeached testimony, standing alone, being unconstitutionally used to obtain conviction; and (4) ineffective assistance of trial counsel in failing to object to prosecutorial misconduct where prosecutor made prejudicial remarks concerning facts not offered in evidence. [Rec. Doc. 1-3, p. 41]

The trial court denied plaintiff's application on August 10, 2015. [Rec Doc. 1-4, pp. 2-3] On September 8, 2015, Petitioner sought further review in the Third Circuit Court of Appeal [Rec. Doc. 1-4, pp. 5-30] and on March 14, 2016, in Docket Number KH-15-00853, the Court of Appeal denied writs, finding no error in the trial court's ruling. [Rec. Doc. 1-4, p. 32] Thereafter, Petitioner filed an application for writs in the Louisiana Supreme Court. [Rec. Doc. 1-4, pp. 35-57] On September 29, 2017, that court denied writs without comments. *State of Louisiana ex rel. Jamaal Cole Diggs v. State of Louisiana*, 2016-KH-0697 (La. 9/29/2017), 227 So.3d 260; *see also* [Rec. Doc.1-4, p. 60] Petitioner asserts, however, that he did not receive the Court's ruling until November 9, 2017, due to a delay in the sending of the Court's ruling, established by correspondence sent from Louisiana Supreme Court Clerk of Court, John Tarlton Olivier, and attached as an exhibit to the instant petition. [Rec. Doc. 1-3, p. 2]

***2** Petitioner filed the instant petition on December 11, 2017. He argues the following claims for relief: (1) the evidence at trial was contradictory, inconsistent and tainted, therefore legally insufficient to establish the defendant's guilty behind reasonable doubt; (2) should a defendant be automatically imprisoned for life without the chance or opportunity to ever be released without a meaningful and particularized evaluation of an appropriate sentence in view of *Dorthey* and its progeny; (3) trial counsel in failing to object when prosecutor elicited police officer testimony of petitioner's post-*Miranda* exercise of his Fifth Amendment right against self-incrimination; (4) trial counsel failed to object to prosecutor elicited police officer testimony of petitioner's post-Miranda silence and ask for a mandatory

mistrial/appellate counsel failed to raise the issue on direct appeal; (5) trial counsel failed to raise issue of impeached testimony, standing alone, being unconstitutionally used to obtain conviction; and (6) trial counsel failed to object to prosecutorial misconduct where prosecutor made prejudicial remarks concerning facts not offered in evidence.

## II. Law and Analysis

### A. Standard of Review - 28 U.S.C. § 2254

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, 28 U.S.C. § 2254, governs habeas corpus relief. The AEDPA limits how a federal court may consider habeas claims. After the state courts have "adjudicated the merits" of an inmate's complaints, federal review "is limited to the record that was before the state court[.]" *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). An inmate must show that the adjudication of the claim in state court:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

A decision is "contrary to" clearly established Federal law "if the state court arrives at a conclusion opposite to that reached by ... [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5 Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ). "The 'contrary to' requirement refers to holdings, as opposed to the dicta, of ... [the Supreme Court's] decisions as of the time of the relevant state court decision." *Id.* at 740. Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court "identifies the correct governing legal principle from ... [the Supreme Court's] decisions but unreasonably applies the principle to the facts of the prisoner's case." *Id.* at 741.

Section 2254(d)(2) speaks to factual determinations made by the state courts. Federal courts presume such determinations to be correct; however, a petitioner can rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

### B. Timeliness

This petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Therefore, the court must apply the provisions of AEDPA,

including the timeliness provisions. *Villegas v. Johnson*, 184 F.3d 467, 468 (5th Cir. 8/9/1999); *In Re Smith*, 142 F.3d 832, 834, citing *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Title 28 U.S.C. § 2244(d)(1)(A) was amended by AEDPA to provide a one-year statute of limitations for the filing of applications for writ of *habeas corpus* by persons such as petitioner, who are in custody pursuant to the judgment of a State court. This limitation period generally runs 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).

However, the statutory tolling provision of 28 U.S.C. § 2244(d)(2) provides that the time during which a properly filed application for post-conviction relief was pending in state court is not counted toward the limitation period. *Ott v. Johnson*, 192 F.3d 510, 512 (5th Cir. 1999); *Fields v. Johnson*, 159 F.3d 914, 916 (5th Cir. 1998); 28 U.S.C. § 2244(d)(2). Any lapse of time before the proper filing of an application for post-conviction relief in state court is counted against the one-year limitation period. *Villegas*, 184 F.3d 467, citing *Flanagan v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998).

***3** Federal courts have interpreted § 2244(d)(1)(A) to provide that the state court judgment is not final for habeas purposes until the 90 day period for filing a writ of certiorari to the United States Supreme Court has run (see Supreme Court Rule 13; *Ott v. Johnson*, 192 F.3d 510 (5th Cir. 1999) ). "Direct review, which includes a petition for certiorari to the Supreme Court, occurs 'when the Supreme Court either rejects the petition for certiorari or rules on its merits.' *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). If no petition is filed, then we examine the second method of creating finality, 'the expiration of the time for seeking such review.' *Id.* If a criminal defendant has pursued his direct appeal through the highest state court, then this period includes the 90 days for filing a petition for certiorari to the Supreme Court. *Id.* If not, then it includes the time for seeking further state-court direct review. *Id.* At the conclusion of these periods, the judgment becomes final." *Foreman v. Dretke*, 383 F.3d 336, 338 (5th Cir. 2004)(emphasis supplied).

Federal courts may raise the one-year time limitation *sua sponte*. *Kiser v. Johnson*, 163 F.3d 326 (5th Cir. 1999). Petitioner concedes that his petition is untimely. The respondent, however, asserts that the petition is timely and failed to address equitable tolling of the one year time limitation. Accordingly, the Court will raise the time limitation *sua sponte*.

As shown above, petitioner concedes, and the published jurisprudence confirms, that petitioner did not seek further direct review of his conviction and sentence in the Louisiana Supreme Court. His judgment of conviction and sentence thus became final by "... the expiration of the time for seeking such review ..." Louisiana Supreme Court Rule X, § 5(a) provides: "An application seeking to review a judgment of the court of appeal ... shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal ..." On February 12, 2014, the Third Circuit affirmed petitioner's conviction and

sentence. *State of Louisiana v. Jamaal Cole Diggs*, 13-766 (La. App. 3 Cir. 2/14/2014), 154 So.3d 15; *see also* Rec. Doc. 1-3, pp. 4-15. Thus, petitioner's judgment of conviction and sentence became final for AEDPA purposes thirty days later, or on or about March 14, 2014, when the delays for filing in the Supreme Court lapsed. Petitioner therefore had one year, or until March 14, 2015, to file his federal habeas corpus petition.

Petitioner was able to toll the AEDPA's limitations period when he filed his Application for Post-Conviction Relief in the District Court. However, he did not file his application until February 11, 2015, and by that time, a period of almost eleven months (334 days) of the 1-year limitations period had expired un-tolled. Thereafter petitioner was able to toll limitations until September 29, 2017, when the Louisiana Supreme Court denied writs. *State of Louisiana ex rel. Jamaal Cole Diggs v. State of Louisiana*, 2016-KH-0697 (La. 9/29/2017), 227 So.3d 260. However, petitioner then allowed 75 days to elapse between the date the Supreme Court denied writs (September 29, 2017) and the date he signed and mailed the instant petition (December 11, 2017). In other words, the petition is clearly time-barred since 334 days elapsed un-tolled between the date of finality of judgment and the date he filed his application for post-conviction relief and 72 days elapsed thereafter between the date the post-conviction proceedings were terminated and the date he filed his federal *habeas* petition. More than one year elapsed untolled between the date of finality of judgment and the date the petitioner filed the instant petition.

**1. Equitable Tolling**

Petitioner argues for equitable tolling based on the State-created impediment, the delay of the Court Clerk in mailing the notice of the Louisiana Supreme Court's ruling on his post-conviction application. The Fifth Circuit has held that the AEDPA's one-year statute of limitations can, in rare and exceptional circumstances, be equitably tolled. *See Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). However, "[e]quitable 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." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (quotation marks omitted).

***4** "A petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006). In other words, "To be entitled to equitable tolling, [the petitioner] must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (*quoting Pace v. DiGuglielmo*, 544 U.S. 408, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) ). Of course, the habeas petitioner has the burden of establishing that he is entitled to equitable tolling, and Federal 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).

In this case, Petitioner argues that he is entitled to equitable tolling due to the Louisiana Supreme Court Clerk of Court's delay in mailing the Court's ruling on his post-conviction application. To bolster his argument, Petitioner attaches a letter from the Clerk of Court dated October 25, 2017, which states, "Due to a change in staff, these items [court actions and acknowledgement letters] have not been sent to the Legal Department at Angola for distribution since August 25, 2017. We expect to have forwarded all items since that date by Thursday, October 26, 2017." [Rec. Doc. 1-3, p.2] Petitioner contends that he did not receive the Court's ruling under November 9, 2017. Accordingly, he argues that the failure of the Court to provide timely notice of the denial of his writ provides sufficient reason to equitably toll the limitations period under the December 8, 2017 mailing of the instant habeas petition.

Petitioner's own allegations confirm that he did not act with due diligence during the one-year period. Petitioner squandered most of the one-year available under § 2244(d)(1), leaving little margin in the event of an error. Petitioner waited almost eleven months (334 days) after his conviction became final before mailing his state application on February 11, 2015. This left only 30 days of the one-year period to act once the state habeas proceedings concluded. Leaving little margin for error is not cautious and, clearly, not diligent. *See Schmitt v. Zeller*, 354 Fed. Appx. 950, 952 (5th Cir. 2009) (unpublished per curiam) (having only two months to act once the state habeas proceedings concluded, having squandered most of the one-year period before filing the state application, was a factor in denying equitable tolling); *Hudson v. Quarterman*, 332 Fed. Appx. 209, 210 (5th Cir.) (unpublished per curiam), cert. denied, 558 U.S. 949, 130 S.Ct. 442, 175 L.Ed.2d 274 (2009) (eleven and one-half month delay in mailing state application after conviction became final did not evince due diligence; as such petitioner was not entitled to equitable tolling for two-week delay between mailing of state habeas application and its filing in state court).

Moreover, petitioner's lack of due diligence did not end here. Following the denial of his state application, he delayed another 75 days before handing his federal petition to prison officials for mailing. Petitioner states that he did not learn of the denial of his state writ until November 9, 2017. Even assuming the truth of this assertion, Petitioner still delayed an additional 29 days, between learning of the denial of the state writ and the mailing of the federal petition on December 8, 2017.

Petitioner's pleadings fail to provide an explanation for the lengthy delays in this case. Unexplained delays do not evince due diligence or rare and extraordinary circumstances. "[E]quity is not intended for those who sleep on their rights. *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999). Nor does Petitioner's pro se status and unfamiliarity with the law suffice as a basis for equitable tolling. *See Turner v. Johnson*, 177 F.3d 390, 391-92 (5th

Cir. 1999) ("neither a plaintiff's unfamiliarity with the legal process nor his lack of representation during the applicable filing period merits equitable tolling.").

***5** The long delay noted above weighs heavily against a finding of equitable tolling in this case. *See Schmitt v. Zeller*, 354 Fed. Appx. 950, 951 (5th Cir. 2009) (declining to find equitable tolling where the petitioner waited 10 months after his conviction became final before applying for state habeas relief: "We have recognized that a component of the obligation to pursue rights diligently is not to wait until near a deadline to make a filing, then seek equitable tolling when something goes awry"). *See also Nelms v. Johnson*, 51 Fed.Appx. 482 (5th Cir. 2002) (noting that the Court had "found no case in which equitable tolling was granted after a petitioner had let ten months of the ... limitations period slip by"). This is further illustrated in the case of *Davis v. Cain*, 2017 U.S. Dist. LEXIS 160974, 2017 WL 4296401, *4 (W.D. La. Aug. 8, 2017), where equitable tolling was denied to a petitioner who allowed 351 days of un-tolled time to elapse before commencing post-conviction proceedings in state court, thereby leaving only 14 days within which to file in federal court after the state process ended. As noted by the Court in that case, such a delay "is not due diligence." *See also Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999) (denying equitable tolling where the petitioner commenced his state post-conviction proceedings two days prior to the expiration of the one-year limitations period and filed his federal habeas corpus application 17 days after the limitations period had expired); *Atkins v. Chappius*, 2017 U.S. Dist. LEXIS 63587, 2017 WL 1489140, *2 (W.D. NY April 26, 2017) (denying equitable tolling where "plaintiff waited until 12 days prior to the expiration of the statute to file his motion for collateral relief, indicating that he did not employ due diligence in pursuing his claims"); *Caddell v. Director, TDCJ-CID*, 2010 U.S. Dist. LEXIS 33367, 2010 WL 1417693, *3 (E.D. La. Mar. 11, 2010) (same where the petitioner waited 338 days after the finality of his conviction to commence state post-conviction proceedings); *Adams v. Quarterman*, 2008 U.S. Dist. LEXIS 22505, 2008 WL 763071, *4 (N.D. Tex. Mar. 20, 2008) (same where the petitioner commenced his state post-conviction proceedings with only five days remaining in the limitations period); *Harris v. Quarterman*, 2007 U.S. Dist. LEXIS 88989, 2007 WL 4258319, *4 (N.D. Tex. Dec. 4, 2007) (same where the petitioner commenced his state post-conviction proceedings with only one day remaining in the limitations period).

Notwithstanding the initial long delay in commencement of his state post-conviction proceedings, Petitioner would apparently have this Court grant him equitable tolling because of the delay that occurred when the state court clerk's office failed to send him timely notice of the denial of his PCR application. As noted above, Petitioner the Clerk of Court for the Louisiana Supreme Court did not in fact forward notice of this denial until approximately one month after the Court's decision, and Petitioner asserts that he did not receive same until November 9, 2017. This Court concludes, however, that Petitioner still has not shown that he acted with sufficient diligence to support the application of equitable tolling in this case.

As noted above, the Fifth Circuit has concluded that "[l]ong delays in receiving notice of state court action may warrant equitable tolling" under certain circumstances. *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009). Even then, however, a petitioner must show that he " 'pursued the [habeas corpus relief] process with diligence and alacrity' both before and after receiving notification." *Id., quoting Phillips v. Donnelly*, supra 216 F.3d at 511. In the instant case, as noted above, Petitioner did not act with diligence prior to commencing his PCR proceedings in state court. *See Davis v. Cain*, supra, 2017 WL 4296401, 2017 U.S. Dist. LEXIS 160974 (noting that the petitioner had not shown diligence and had "put himself in a dangerous position" by waiting until only a "precious 14 days" remained in the limitations period to commence his state PCR proceedings). Moreover, after the state court clerk's office mailed Petitioner the referenced notice on or about October 26, 2017 (which he allegedly received on November 9, 2017), Petitioner waited another month, until December 8, 2017, to mail his petition. As pointed out in *Davis v. Cain*, supra, 2017 WL 4296401, 2017 U.S. Dist. LEXIS 160974, it was incumbent upon Petitioner, in light of the limited time remaining to him, to have anticipated the possibility of delay and to have taken some action to prepare his anticipated pleadings in advance so as to have them ready to file immediately upon receipt of notice of the state court's action.

Finally, while Petitioner was not legally required to file an earlier "protective" federal habeas corpus application in order to show that he was acting with diligence, *see Palacios v. Stephens*, 723 F.3d 600, 607-08 (5th Cir. 2013), *citing Pace v. DiGuglielmo, supra*, 544 U.S. at 416, 125 S.Ct. 1807, such a filing would have potentially protected him from the running of the limitations period, and his failure to do so also weighs against a finding of equitable tolling in this case. *Id.* (noting that the petitioner's "failure to file a protective federal habeas petition weighs against but is not dispositive of, the reasonable diligence inquiry"). *See also Madden v. Thaler*, 521 Fed. Appx. 316, 323 (5th Cir. 2013) (concluding that, to show diligence, the petitioner "should have filed a protective federal petition").

***6** Based on the foregoing, this Court should find that Petitioner is not entitled to equitable tolling. In short, Petitioner has not shown that he acted with reasonable diligence during the lengthy period that elapsed before he commenced his PCR proceedings in state court or during the interval that subsequently elapsed after he received notice, albeit late, of the denial of his PCR application by the state trial court. Accordingly, Petitioner has not made a showing sufficient to support a finding of rare and exceptional circumstances that warrant the application of equitable tolling.

Finally, in certain rare instances, a petitioner may seek to avoid the effect of untimeliness by establishing that he is in fact innocent of the charged offenses. *See McQuiggin v. Perkins*, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013), The *McQuiggin* Court cautioned, however, that viable actual-innocence gateway claims are rare, explaining that "a petitioner does not meet the threshold requirement unless he persuades the district

court that, in light of ... new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. at 1928, *citing Schlup v. Delo*, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (internal quotation marks omitted). To be credible, a claim of actual innocence requires that a petitioner 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. *Schlup v. Delo, supra*, 513 U.S. at 324, 115 S.Ct. 851. In the instant case, Petitioner has presented no new evidence, much less evidence sufficient to support a claim of actual innocence, and he has therefore failed to set forth a viable claim of actual innocence sufficient to avoid the operation of the limitations bar. Accordingly, Petitioner's application should be dismissed as untimely.

## II. Conclusion and Recommendation

Therefore,

**IT IS RECOMMENDED** that this petition for habeas corpus be **DISMISSED WITH PREJUDICE** because petitioner's claims are barred by the one-year limitation period codified at 28 U.S.C. § 2244(d).

Under the provisions of 28 U.S.C. Section 636(b)(1)(C) and Rule 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen (14) days after being served with a copy of any objections or response to the District Judge at the time of filing.

**Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. See, *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).**

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. Within fourteen (14) days from service of this Report and Recommendation, the parties may file a memorandum setting forth arguments on whether a certificate of appealability should issue. See 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.

*7 THUS DONE in Chambers on this 18th day of September, 2018.

## All Citations

Not Reported in Fed. Supp., 2018 WL 4956950

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**End of Document**

# APPENDIX "D"

(U.S. Court of Appeals Rehearing Order)

# United States Court of Appeals for the Fifth Circuit

No. 18-31152

JAMAAL DIGGS,

*Petitioner—Appellant*,

*versus*

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

*Respondent—Appellee.*

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:17-CV-1624

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion January 11, 2021, 5 CIR., _____, _____ F.3D _____)

Before WIENER, COSTA, and WILLETT, *Circuit Judges*.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

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