Supreme Court, U.S.
FILED
FEB 22 2021
OFFICE OF THE CLERK

No. #

IN THE

SUPREME COURT OF THE UNITED STATES

Eddy James Howard,
PETITIONER,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE-
CORRECTIONAL INSTITUTIONS DIVISION,
RESPONDENT.

APPLICATION FOR A CERTIFICATE OF APPELABILITY
TO: Samuel A. Alito, Jr.
UNITED STATES SUPREME COURT JUSTICE FOR THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Eddy James Howard
No. #01859038
Ellis State Farm
1697 FM 980
Huntsville, Texas. 77340

Petitioner, In propria persona.

QUESTIONS PRESENTED

QUESTION No. 1

WHETHER THE PETITIONER'S MENTAL ILLNESS AND EVIDENCE IS SUFFICIENT TO WARRANT EQUITABLE TOLLING OF THE 1-YEAR LIMITATION PERIOD?

QUESTION No. 2

WHETHER THE PETITIONER'S CLAIM OF ACTUAL INNOCENCE IS SUFFICIENT TO WARRANT EQUITABLE TOLLING OF THE 1-YEAR LIMITATION PERIOD?

QUESTION No. 3

WHETHER THE DISTRICT COURT WAS CORRECT IN IT'S APPLICATION OF LAW THAT THE PETITIONER'S CONVICTION BECAME FINAL ON JUNE 07, 2014 – THIRTY (30) DAYS AFTER THE STATE COURT OF APPEALS AFFIRMED THE JUDGMENT OF CONVICTION ON MAY 08, 2014, RATHER THAN THE DATE THAT MANDATE WAS ISSUED BY THE STATE COURT OF APPEALS?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this application is a follows:

Petitioner;	Eddy James Howard No. #01859038 Ellis State Farm 1697 FM 980 Huntsville, Texas. 77340
Respondent;	Lorie Davis, Director Texas Department of Criminal Justice- Correctional Institutions Division P.O. Box 99 Huntsville, Texas. 77342
Counsel for Respondent;	Ken Paxton Attorney General State of Texas P.O. Box 12548 Austin, Texas. 78711

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IN THE

SUPREME COURT OF THE UNITED STATES

To: Samuel A. Alito, Jr.
Supreme Court Justice
United States Court of Appeals
For The Fifth Circuit;

The Petitioner respectfully prays that a Certificate of Appealability issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears and is attached hereto as Appendix A to this application and is unpublished.

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, in Civil Action No. #3:18-CV-2629-L;-BK, Styled; Eddy James Howard v. Lorie Davis, Director, Texas Department of Criminal Justice-Correctional Institutions Division appears and is attached hereto as Appendix B to this application and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided the case was on October 02, 2020.

No Petition for Panel Rehearing was timely filed in this case.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 2253(c)(1)(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C., Section 2253(c)(1)(A) - Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from; the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.

Title 28 U.S.C., Section 2253(c)(2) - A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28 U.S.C., Section 2244(d)(1)(A) -(d)(1) A one-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 run from the latest of -

(A) the date on which the judgmnet became final by the conclusion of direct review or the expiration of the time for seeking such review.

6TH Amendment To The United States Constitution - In all criminal prosecutions, the accused shall enjoy the right to a speddy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

8TH Amendment To The United States Constitution - Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

14TH Amendment To The United States Constitution - Section 1; All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Penal Code, Section 22.01 - (a) A person commits an offense if the person: (1) intentionally, knowingly, or recklessly cause bodily injury to another, including the person's spouse, or (2) intentionally or knowingly threaten's another person with imminent bodily injury, including the person's spouse.

Texas Penal Code, Section 22.02 - A person commits the offense of aggravated assault if the person commits an offense as defined by Section 22.01 of the Texas Penal Code, and (1) causes serious bodily injury to a person, or (2) uses or exhibits a deadly weapon during the commission of the assault.

STATEMENT OF THE CASE

The Petitioner was convicted by a jury upon a plea of not guilty for the alleged offense of Aggravated Assault with a deadly weapon, to-wit: A Moter Vehicle. Punishment was assessed at forty-five (45) years confinement in the Texas Department of Criminal Justice-Correctional Institutions Division.

Having exhausted State remedies, the Petitioner initiated a federal habeas proceeding before the United States District Court for the Northern District of Texas, Dallas Division, on October 03, 2018. The proceedings were referred to a United States Magistrate Judge, who on April 4, 2019, entered a Findings, Conclusions and Recommendation concluding that the federal habeas petition should be dismissed with prejudice as barred by the one-year statute of limitations. (Appendix C). The Petitioner filed a Written Response and Objections to the Findings, Conclusions and Recommendation of the United States Magistrate Judge that were docketed on May 24, 2019. (Appendix B). On May 29, 2019, the district court conducted a de novo review thereby accepting the findings and conclusions of the Magistrate Judge, overruled the Petitioner's objections, and dismissed the Petitioner's federal habeas petition with prejudice as barred by the one-year statute of limitations, and sua sponte denied a Certificate of Appealability. (Appendix B).

The Petitioner gave a timely notice of appeal to the United State Court of Appeals for the Fifth Circuit, and filed an Application for A Certificate of Appealability. On October 02, 2020, United States Circuit Judge, Jerry E. Smith, entered an Order denying

the Petitioner's Application for A Certificate of Appealability (Appendix A).

Before the district court there was no dispute that the Petitioner's conviction became final on June 7, 2014, and that the 1-year limitation period expired on June 08, 2015. It was undisputed that the Petitioner filed his first State habeas petition on August 10, 2016, after the 1-year limitation period had expired. (Appendix C).

Before the district court the Petitioner argued that new evidence shows that he was incompetent to stand trial, and that the 1-year limitation period did not commence until the date that the new evidence was acquired. The district court, nor the court of appeals addressed this issue.

Before the district court the Petitioner argued that he was under the influence and was taking "antipsychotropic medication" from the time of his arrest and trial, up to May of 2016, when the medication was reduced that allowed him to comprehend, function, communicate and understand his circumstances. The Petitioner furthered that the medications had a serious side effect that substantially interferred with and compromised his ability to concentrate and to reason well. The Petitioner requested to expand the record with copies of his Jail Medical Records, and submitted an Affidavit, although, of a Prisoner, that was based on personal knowledge, that the Petitioner was under the influence and taking psychoropic medication from May 25, 2012 to May of 2016, and portions of Pharmacy Records that provided evidence that the Petitioner was in fact under the influence and taking psychotropic medications

at the time of the incident and arrest, the time of trial, and during the relevant time periods for the filing of both his State post-conviction remedies and federal habeas petition.

Before the district court, the Petitioner's claim of "Actual Innocence was premised upon an Ineffective Assistance of Counsel claim, wherein trial counsel fail to request the lesser-included offense(s) of Reckless Driving, Deadly Conduct, and Intoxication Assault. The Petitioner argued that the jury was never allowed to perform it's function as to his guilt or innocence of the offense charged, where under the evidence had the jury been given the instruction(s) and option to consider the same under the evidence, the jury would have found him guilty of one of the lesser-included offense(s) rather than the offense charged... In addressing the claim, the district court held that the Petitioner did not present any new evidence in support of the claim and did not come close to satisfying the rigorous standard announced in McQuiggin v. Perkins, 569 U.S. 838 (2013).

REASONS FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Title 28 U.S.C., Section 2253(c)(1)(A) provides that unless a circuit justice or judge issues a Certificate of Appealability (COA), an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. Further, a COA may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. Thus, the issuance of a COA is a jurisdictional prerequisite. See., Miller-El v. Cockrell, 123 S.Ct. 1029 (2003). Therefore, there should be no discren or discretion in the operation of the Statute, and as provided by Rule 22 of the Supreme Court Rules allowing application(s) to an individual Justice of the United States Supreme Court. In view of the clear language of the text, the Petitioner has a right to seek the issuance of a COA from the Presiding Justice for the United States Court of Appeal for the Fifth Circuit. Thus, the Justice to whom this Application is addressed has jurisdiction to determine whether a COA should issue in this case.

To obtain a COA, a petitioner must make a "substantial showing of the denial of a constitutional right." See., Title 28 U.S.C., Section 2253(c)(2), and Slack v. McDanial, 529 U.S. 437 (2000).

In light of the stutory text of Section 2253(c)(2) and under this Court's interpretation, because the district court dismissed the petition on procedural grounds, this Court will grant a COA only if reasonable jurists would debate whether the district court's procedural ruling was correct, and whether the petitioner

state's a valid claim of a constitutional deprivation. Id. Thus, if a habeas petitioner has stated a debatable issue concerning the correctness of the district court's procedural ruling. Then, if the district court pleadings, the record, and the COA application demonstrates that reasonable jurists could debate whether the habeas petitioner has made a valid claim of a constitutional deprivation, a COA will issue. However, if those materials are unclear or incomplete, then a COA should be granted and the appellate panel, if it decides the procedural issue favorable to the heabeas petitioner, may have to remand the case for further proceedings. It is the law of the United States Court of Appeals for the Fifth Circuit, that any doubts whether to grant a COA should be resolved in the petitioner's favor. See., Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000). Further, a COA should issue where it is demonstrated that jurists could conclude that the issue presented are adequate to deserve encouragement to proceed further. See., Miller-El., Supra.

Since, the district court dismissed the Petitioner's federal habeas petition upon a procedural ground as time-barred by the 1-year limitation period, the Applicant addresses the hurdle of whether the instant federal habeas petition state's a valid claim or claims of a constitutional deprivation. The Applicant argues that the Petitioner has met the requirements of this hurdle, because the Petitioner has raised facially valid constitutional claims arguing, that: (1) he was incompetent at the time of trial and therefore the execution of his sentence is constitutionally impremissible in view of Atkins v. Virginia, 122 S.Ct. 2242 (2002),

Drope v. Missouri, 95 S.Ct. 896 (1995), Washington v. Harper, 110 S.Ct. 2018 (1990), thus, violative of the Petitioner's constitutional rights under the 8TH and 14TH Amendments to the United States Constitution.; (2) the evidence is insufficient to support the conviction as to implicate the afforded protection of the 14TH Amendment to the United States Constitution and this Court's decision in In re Winship, 90 S.Ct. 1068 (1970), and Jackson v. Virginia, 99 S.Ct. 2781 (1979); (3) he received ineffective assistance of counsel as to implicate the afforded protection of the 6TH and 14TH Amendments to the United States Constitution and this Court's decision in Strickland v. Washington, 104 S.Ct. 2052 (1984); and McMann v. Richardson, 90 S.Ct. 1441 (1970). Therefore, there is no dispute as to whether or not the petition state's a valid claim or claims of the denial of aconstitutional right.

Since the district court dismissed the Petitioner's federal habeas petition on procedural grounds, the second hurdle, it must be determined whether reasonable jurists would debate whether the district court was correct by dismissing the foregoing federal habeas petition as time-barred by the 1-year limitation period, or that the issue presented is adequate to serve encouragement to proceed further.

The Applicant is mindful, that this Court has held that the 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 intrest in human liberty. See., Lonchar v. Thomas,

116 S.Ct. 1293 (1996). Cf., O'Neal v. McAninah, 115 S.Ct. 972 (1995); describing the basic purpose underlying the "Writ" as the correction and the consequent conviction of an innocent person.

A judicial process should not be limitless. A "court" fails in its primary duty in protecting the innocent and punishing the guilty when it intentionally "slams" the courthouse doors against one who is, in fact, innocent of wrong doing. The Anglo-American Jurisprudence System, even when it procedures are fairly followed reaches a patently inaccurate result which has caused an innocent person to be wrongly imprisoned for a crime he did not commit, the "system" has an obligation to set things straight. "When one undertakes to administer justice, what is done for one, must be done for everyone in equal degree."

WHETHER THE PETITIONER'S MENTAL ILLNESS ISSUE AND EVIDENCE IS SUFFICIENT TO WARRANT EQUITABLE TOLLING OF THE 1 YEAR LIMITATION PERIOD?

In view of the Petitioner's arguments and evidence, the district court held that this was insufficient to entitle him to tolling.

First, it is to note, that the Petitioner presented evidence in the form of an opinion testimony by a laywitness pursuant to Rule 701 of the Federal Rules of Evidence, that was based on personal knowledge, and was in the form of an opinion limited to one rationally based on the witness's preception at the time, based upon the Petitioner's medical records... The Petitioner presented facts and evidence that was sufficient to positively, unequivocally and clearly generated a real substantial and legitimate doubt as to the Petitioner's mental capacity to establish that he was incapable or unable to pursue his legal rights in the

timely filing of his federal habeas petition. The district court followed with the assertion, that even if the Petitioner's medical records could support his assertion that he was taking certain medications during the one-year limitation period, such evidence, without more, does not establish that this presented him from filing his habeas petition within the one-year limitation period.

The district court did not reference the medication(s) that the Applicant was taking and as supported by the evidence, was taking Zyprexa, Trazadone, Celexa, Lyrica, Resperadal, Elavil, until May of 2016. This Court in Harper, Supra., held that these antipsychotic drugs, sometimes called neurolepties or psychotropic drugs are medications commonly used in treating mental disorders. Cf., U.S. v. Reynolds, 553 F.Supp.2d 788 (S.D. Tex. 2008); describing the effects of Risperidone. Common sense would dictate that the Petitioner was inable and uncapable to function, and did not have the mental capacity to function with ordinary intelligence or have the intellect and understanding to file or initiate his State habeas application and federal petition until after the medication had been reduced.

In Hulsey v. Thaler, 421 Fed.Appx. 386 (5th Cir. 2011); the United States Court of Appeals for the Fifth Circuit held, that although the prisoner described some of his mental health symptoms, he never articulated a reason why he was able to file his pleading later, but was unable to do so earlier. In other words, he had not articulated some changed circumstances in his mental condition.

The court of appeals furthered, that Hulsey was stable and capable of filing his petition for a period of time that lasted

over a year. During this time, he filed neither his State nor his federal habeas petition, and offered no explanation of why he was able to file his State petition in late 2007 and his federal habeas petition in 2009,but was unable to do so in 2005 or 2006..

In the instant case, the Petitioner described his mental condition, and articulated a reason why he was unable to file his pleading, and commenced his State habeas petition, followed by his federal habeas petition after his medication had been reduced that allowed him to function, communicate, and understand his circumstances. This does not exclude the side effects that substantially interferred with his ability to compromise,concentrate,and reason well. In the instant case,the Petitioner was not stable or capable of filing his petition until after May of 2016.

It is to note, like in the instant case, the matter was first and initially referred to a Magistrate Judge, who reccommended dismissal of the petition as time-barred. Hulsey timely filed objections, and before accepting the Magistrate Judge's recommendation, the district judge ordered the State to file all of Hulsey's medical records with the court to assist in the evaluation of Hulsey's argument for equitable tolling...A matter of which the district court did not undertake...The district court without thoroughly conducting an independent review and investigation into the matter, took position that the Petitioner's arguments and evidence was insufficient to entitle him to tolling. The district court's review was at best cursory. It is paramont that a meaningful review be based on a complete and accurate record. Absent the Petitioner's medical records, the district court did

not have a complete source of objective evidence to assist it in the evaluation of the Petitioner's argument for equitable tolling that implicated a constitutionally protected liberty interest, as in this case, the Petitioner's access to the "All Great Writ."

The Applicant argues that reasonable jurist could debate whether the Petitioner was sufficiently competent to have prepared and filed his State application prior to the expiration of the 1-year limitation as to toll the applicable 1-year limitation period, or filed his federal habeas petition prior to the expiration of the 1-year limitation, not excluding the fact, that the Petitioner presented sufficient facts and evidence of probative value, that would warrant and deserves the encouragement to proceed further.

At best the district court's determination that the Petitioner's mental illness did not effect the Petitioner's ability to pursue his legal rights is at best suspect.

However, as presented some materials are unclear and incomplete, this this Court should grant a COA.

WHETHER THE PETITIONER'S CLAIM OF ACTUAL INNOCENT IS SUFFICIENT TO WARRANT EQUITABLE TOLLING OF THE 1-YEAR LIMITATION PERIOD?

The Court of Appeals for the Nineth Circuit in Majoy v. Roe, 296 F.3d 770 (9th Cir. 2002); held that a habeas petitioner need not show that he or she is "actually innocent" of the charged offense. Rather, he or she must show that a court cannot have confindence in the outcome of his or her trial. Likewise, in Lisker v. Knowles, 463 F.Supp.2d 1008 (C.D Cal. 2006); holding, that a petition's untimeless may be excused where a habeas petitioner presents facts showing that an error of consistutional magnitude

led to a trial so unfair that absent the error, no reasonable juror could have convicted the petitioner. Thus, a claim of actual innocence is not primarily based upon a showing of new evidence under McQuiggin v. Perkins, 133 S.Ct. 1924 (2013). When faced with such a credible claim of actual innocence, a federal district court must develope the record. See., Lisker, Supra.

In the instant case, the district court addressed the Petitioner's claim of actual innocence under the McQuiggin standard of review in adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge. The district court did not address the Petitioner's claim of actual innocence as argued upon and in reference to his "Ineffective Assistance of Counsel Claim," that trial counsel fail to request the jury to be instructed upon the lesser-included offense(s) of Reckless Driving, Deadly Conduct, or Intoxication Assault, that was supported by the evidence.

Given this failure, the jury was never allowed to perfom it's function as to the guilt or innocent of the Petitioner under the evidence, where had the jury been given the option under the evidence, no reasonable jury would have found the Petitioner guilt of the charged offense but of a lesser-included offense rather than the offense charged... It is the absent of this error no reasonable juror could have convicted the Petitioner of the offense.

The Petitioner was charged with the alleged offense of Aggravated Assault by the use of a deadly weapon, to-wit: a moter vehicle, and alleging the cupable mental state(s) of reckless, intentionally and knowingly.

Under Texas law, Section 545.401(e) of the Texas Transportation Code, reckless driving constitutes the lesser-included offense of aggravated assault with a moter vehicle. See., Benge v. State, 94 S.W.3d 31 (Tex.App. 14th Dist 2002), and Rice v. State, 305 S.W.3d 900 (Tex.App. 5th Dist. 2010). Further, Intoxication Assault is found under Section 49.07 of the Texas Penal Code.

Visable from the evidence, it was undisputed, upon the testimony of the prosecutions' witnesses, that the Petitioner was intoxicated when he entered the Convenience Store, that he left out of the Store and got into his vehicle, and backed out at a high rate of speed, and then took off at a high rate of speed crashing his vehicle into the Store front. The prosecution's witness and alleged victim testified that he did not believe that the Petitioner intended to hit him. The prosecution's second witness and alleged victim was merely a patron in the Store, and testified that she did not believe that the Petitioner intended to hit and/or injure her...

Would the mere fact that the Petitioner drove his vehicle into a "Store Front" and therefore guilty of assault, force the conclusion ispo facto that he was going to murder the Store Clerk and Patron on the spot any more that he consciously disregarded the possibility that the manner in which he drove his vehicle endangered the safety of others, or that he lost control of the vehicle which he drove? In the instant case, there is no-evidence direct or circumstantial of what the intentions of the Petitioner's were beyond the fact that he ran and crashed his vehicle into the Store front. There are many possible ideas that may have

been in the Petitioner's mind, but more then speculation is required.

In the instant case, the established facts are not highly indicative of the Petitioner's intent to commit the offense, specifically to cause serious bodily injury or bodily injury to the Store Clerk and the Patron with a deadly weapon, to-wit: a moter vehicle. The jury, had trial counsel objected and requested that an instruction on the lesser-included offense of reckless driving be giving to the jury, could have found that the Petitioner did not intend to hit the Store Clerk and the Patron, but consciously disregarded the possibility that the manner in which he drove the vehicle might endanger the safety of others. It can be rationally concluded that the Petitioner was guilty only of reckless driving, or that the purported assault occurred only because he was intoxicated and reckless drove a moter vehicle... There was sufficient evidence that would have permitted the jury to rationally find that if the Petitioner was guilty at all, he was guilty or reckless driving or intoxication assault.

Therefore, it can be concluded, that "trial counsel's omissions" are of constitutional magnitude that led to a trial so unfair, that absent trial counsel's omissions and the error, no reasonable juror could have convicted the Petitioner.

Notwithstanding, that it would be a fundamental miscarriage of justice for the claim not to be considered.

The Applicant argues that reasonable jurist could debate whether the Petitioner's claim of actual innocence is sufficient to overcome the procedural hurdle of the 1-year limitation period in view of Majoy and Lisker, Supra. Further, in view of these holdings,

the issue presented deserves further encouragement to proceed further.

Therefore, a COA is warranted and should issue by this Court.

WHETHER THE DISTRICT COURT WAS CORRECT IN IT'S APPLICATION OF LAW THAT THE PETITIONER'S CONVICTION BECAME FINAL ON JUNE 07, 2014 - THIRTY (30) DAYS AFTER THE STATE COURT APPEALS AFFIRMED THE JUDGMENT OF CONVICTION ON MAY 08, 2014, RATHER THEN THE DATE THAT MANDATE WAS ISSUED BY THE STATE COUT OF APPEALS?

In adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge, the district court held that because the Petitioner did not file a petition for discretionary review (PDR), his conviction became final on June 07, 2014 - 30 days after the State court of appeals affirmed his judgment of conviction on May 08, 2014. Thus, the limitations period expired one year later, on June 07, 2015.

In view of Title 28 U.S.C., Section 2244(d)(1)(A), the 1-year limitation period shall run from the latest of several start dates, including the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review. Since, this matter is an issue of federal law and relying on this Court's decision in Caspari v. Bohlen, 114 S.Ct. 948 (1994), as cited by Tinker v. Moore, 255 F.3d 1331 (11th Cir. 2001); the issuance of the "Mandate" on direct appeal makes a criminal judgment final and that date will be used for the purpose of Title 28 U.S.C., Section 2244(d)(1)(A).

Under the district court's findings, the findings are silent on the matter of the issuance of the "Mandate" by the State appellate court. However, it is revealed, that the Petitioner's first State

post-conviction application was dismissed as non-complaint on September 07, 2016 by the Texas Court of Criminal Appeals. The actual basis and reasoning for the dismissal is uncertain and unclear, but for the sake of the argument, it is possible that this dismissal occurred as a proximate result of the absent of "Mandate" issued by the State appellate court.

Under Texas law itself, a direct appeal is not final until the issuance of "Mandate." See., Lookingbill v. Cockrell, 293 F.3d 256 (5th Cir. 2002), Carter v. State, 510 S.w.2d 323 (Tex.Cr.App. 1974), Ex Parte Renier, 734 S.W.2d 349 (Tex.Cr.App. 1987), Ex Parte Johnson, 12 S.W.3d 472 (Tex.Cr.App. 2000), and Rule 18.1(b) of the Texas Rules of Appellate Procedure. Absent the issuance of mandate the case remains pending in the State appellate court, and absent the issuance of a mandate by the State appellate court the Texas Court of Criminal Appeals will not entertain a State post-conviction application.

Thus, the district court committed plain error in the application of federal law in determining when the 1-year limitation period commenced, as it is possible that the Petitioner's conviction did not become final until after September 07, 2016.

Since, the material on this matter is incomplete, this Court is required to issue a COA.

The Applicant also argues, that reasonable jurist could debate as to whether the 1-year limitation period commenced on June 07, 2014, in the absent of the issuance of a mandate under this Court's decision in Caspari, Supra. Given the liberty implicated value of the matter and the Petitioner's rights to the "All Great

Writ" this matter and issue deserves the encouragement to proceed further.

Therefore, a COA is warranted and should be granted by this Court.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, and in the interest of justice, the Petitioner respectfully moves and prays that for the reasons advanced and as demonstrated above, that a Certificate of Appealability in all be granted.

ACCORDINGLY WRITTEN,

/s/ Eddy James Howard

Eddy James Howard
No. #01859038
Ellis State Farm
1697 FM 980
Huntsville, Texas. 77340

Petitioner, In propria persona.

United States Court of Appeals for the Fifth Circuit

No. 19-10905

EDDY JAMES HOWARD,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-2629

ORDER:

Eddy Howard, a Texas prisoner #1859038 moves for appointment of counsel and for a certificate of appealability ("COA") following the dismissal of his 28 U.S.C. § 2254 application challenging his convictions of aggravated assault with a deadly weapon. He contends that the district court erred in dismissing, as time-barred his claims that the jury was not properly charged, there was insufficient evidence to convict, he was incompetent at the time of trial, he received ineffective assistance of counsel, and he is actually innocent. Howard also challenges the decision not to hold an evidentiary hearing, the

Appendix A.

denial of a discovery request, and the denial of a motion under Federal Rule of Civil Procedure 59(e).

To obtain a COA, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In addition, because the denial of Howard's petition was based on a procedural ground, he is required to 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 Howard has not made the requisite showing for a COA on his constitutional claims, a COA is DENIED. His motion for appointment of counsel is also DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EDDY JAMES HOWARD, #01859038,	§	
	§	
Petitioner,	§	
v.	§	Civil Action No. **3:18-CV-2629-L**
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

The Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Report") (Doc. 9) was entered on April 4, 2019, recommending that the court deny Petitioner's habeas petition (Doc. 3) as supplemented by his Written Response (Doc. 8) and dismiss with prejudice this action as time-barred and not equitably tolled. The Report indicates that Petitioner's conviction became final June 7, 2014, and the one-year limitations period expired June 8, 2015. Regarding tolling, the Report indicates that, while Petitioner implies that he has suffered from mental health issues throughout his life, was incompetent to stand trial, and was heavily medicated until recently, he did not expound on these assertions. The Report further explains that unsupported conclusory assertions of mental illness are not sufficient to support equitable tolling.

Petitioner filed objections (Doc. 12) to the Report, which were docketed on May 24, 2019. In his objections, Petitioner takes issue with the legal authority referenced in the Report. In addition, he maintains that he was taking "antipsychotropic medication from the time of his arrest and trial up to May of 2016, when [his] medication was reduced which allowed [him] to comprehend . . . function, communicate and understand his . . . circumstances." Obj. 2. Petitioner further asserts

Appendix B

that such medication "had serious side effects that substantially interfered with and compromised [his] ability to concentrate and to reason well." *Id.* Petitioner contends that, at the time of his arrest, he was taking a number of medications and requests the court to order Respondent to supplement the record in this case with a copy of his jail medical records. Petitioner's objections are not verified. He, instead, relies on the affidavit of another prisoner who states that: (1) he has known Petitioner since November 16, 2019; and (2) Petitioner was taking "psychotropic medication" from May 25, 2012, to approximately May 2016. Obj. 8. In addition, Petitioner also attached a copy of a pharmacy record, which shows that he was prescribed a number of medications between October 2010 and March 2012. Petitioner also asks the court to take judicial notice of expert testimony in *Bigby v. Dretke*, 402 F.3d 551 (5th Cir. 2005), to show that chronic paranoid schizophrenia is one of the most serious forms of mental illness that impairs a person's interpersonal relationships and causes persons suffering from the illness to misperceive what is going on around them. Obj. 3.[1]

Petitioner's arguments and evidence are insufficient to entitle him to tolling. He asks the court to take judicial notice that chronic paranoid schizophrenia is a serious mental illness that alters a person's perception, but nothing in the record indicates that Petitioner has ever been diagnosed with this illness or that he was unable to pursue his legal rights in timely filing his habeas petition as a result. Report 5 (citing *Hulsey v. Thaler*, 421 F. App'x 386, 391 (5th Cir. 2011) (per curiam)). Petitioner also asks the court to find that he was taking various medications during the one-year limitations period. His evidence of pharmacy records, however, precedes this period; and the affidavit relied upon is not made on personal knowledge, as the prisoner who provided the affidavit

[1] Petitioner also submitted copies of news articles discussing his criminal offense and what appears to be a letter he wrote to the magistrate judge. When the letter was written is unclear. Also unclear are Petitioner's reasons for submitting these materials. Regardless, they do not affect the court's determination that Petitioner's contentions and evidence are insufficient to establish his entitlement to equitable tolling.

acknowledges that he did not know Petitioner during the time period in question. Moreover, even if Petitioner's medical records could support his assertion that he was taking certain medications during the one-year limitations period, such evidence, without more, does not establish that this prevented him from filing his habeas petition within the one-year limitations period.

Accordingly, having reviewed the pleadings, file, record in this case, and Report, and having conducted a de novo review of that portion of the Report to which objection was made, the court determines that the findings and conclusions of the magistrate judge are correct; **accepts** them as those of the court; **overrules** Petitioner's objections; **denies** his habeas petition as supplemented (Docs. 3, 8); and **dismisses with prejudice** this action as barred by the one-year statute of limitations.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the court **denies** a certificate of appealability.[2] The court determines that Petitioner has failed to show: (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong;" or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this court] was correct

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[2] Rule 11 of the Rules Governing §§ 2254 and 2255 Cases provides as follows:

> **(a) Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> **(b) Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). In support of this determination, the court accepts and incorporates by reference the Report. In the event that Petitioner files a notice of appeal, he must pay the $505 appellate filing fee or submit a motion to proceed *in forma pauperis* on appeal.

It is so ordered this 29th day of May, 2019.

Sam A. Lindsay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EDDY JAMES HOWARD, #01859038,	§	
	§	
Petitioner,	§	
v.	§	Civil Action No. **3:18-CV-2629-L**
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

JUDGMENT

This judgment is issued pursuant to the court's order, dated May 29, 2019. It is, therefore, **ordered, adjudged, and decreed** that this action is **dismissed with prejudice** as time-barred. The clerk of the court **shall** transmit a copy of this judgment and a copy of the order dated May 29, 2019, accepting the Findings, Conclusions and Recommendation of the United States Magistrate Judge, to Plaintiff.

Signed this 29th day of May, 2019.

Sam A. Lindsay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EDDY JAMES HOWARD,	§	
#01859038,	§	
PETITIONER,	§	
	§	
V.	§	**CIVIL CASE NO. 3:18-CV-2629-L-BK**
	§	
LORIE DAVIS, DIRECTOR,	§	
TEXAS DEPARTMENT OF CRIMINAL	§	
JUSTICE, CORRECTIONAL	§	
INSTITUTIONS DIVISION DIV.,	§	
RESPONDENT.	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and *Special Order 3*, this case was referred to the United States magistrate judge for case management, including findings and a recommended disposition. As detailed here, Petitioner Eddy James Howard's petition for writ of habeas corpus under 28 U.S.C. § 2254 should be summarily **DISMISSED WITH PREJUDICE** as barred by the one-year statute of limitations.

I. BACKGROUND

In 2013, a jury found Howard guilty of aggravated assault with a deadly weapon and assessed punishment at 45 years' imprisonment. *Howard v. State*, No. F47059 (413th Dist. Ct., Johnson Cty., Tex., June 6, 2013), *aff'd*, No. 10-13-00240-CR, 2014 WL 1882761 (Tex. App.—Waco May 8, 2014, no pet.). He unsuccessfully sought state habeas relief. *Ex parte Howard*, No. WR-85,646-01 (Tex. Crim. App. September 7, 2016) (dismissed as non-compliant); *Ex parte Howard*, No. WR-85,646-02 (Tex. Crim. App. October 19, 2016) (denied relief); *Ex parte*

Howard, No. WR-85,646-03 (Tex. Crim. App. May 12, 2017) (returned to district clerk); *Ex parte Howard*, No. WR-85,646-04 (Tex. Crim. App. August 29, 2018) (dismissed as successive).[1] On October 3, 2018, Howard filed the instant *pro se* federal habeas petition, challenging his conviction. Doc. 3 at 4-10. As his federal petition appeared untimely, the Court directed Howard to respond regarding the application of the one-year limitations period, which he has now done. Doc. 8 (*Petitioner's Written Response*). Having now reviewed all of the applicable pleadings and law, the Court concludes that Howard's petition was filed outside the one-year limitations period and, because no exception applies, should be dismissed as time barred.[2]

II. ANALYSIS

A. One-Year Statute of Limitations and Statutory Tolling

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a one-year statute of limitations for state inmates seeking federal habeas corpus relief, which the Court may consider *sua sponte* after providing notice and an opportunity to respond. *See* 28 U.S.C. § 2244(d); *Day v. McDonough*, 547 U.S. 198, 209-10 (2006). Howard does not allege any facts that could trigger a starting date under Subsections 2254(d)(1)(B)-(D), so the one-year limitations period began to run from the date his judgment of conviction became final. *See* 28 U.S.C. § 2244(d)(1)(A) (a state prisoner ordinarily has one year to file a federal habeas petition,

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[1] The state habeas docket sheets are available at http://search.txcourts.gov/Case.aspx?cn=WR-85,646-01&coa=coscca, http://search.txcourts.gov/Case.aspx?cn=WR-85,646-02&coa=coscca, http://search.txcourts.gov/Case.aspx?cn=WR-85,646-03&coa=coscca, and http://search.txcourts.gov/Case.aspx?cn=WR-85,646-04&coa=coscca (last accessed Mar. 27, 2019).

[2] The dates listed herein were verified through information available on the state court web pages and the electronic state habeas record obtained through the Texas Court of Criminal Appeals.

counted 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").

Because Howard did not file a petition for discretionary review (PDR), his conviction became final on June 7, 2014—30 days after the state court of appeals affirmed his judgment of conviction on May 8, 2014. *See* Tex. R. App. Proc. 68.2(a) (PDR must be filed within 30 days of either the date on which the judgment is affirmed, or the last timely motion for rehearing is overruled by the court of appeals). The limitations period expired one year later, on Sunday, June 7, 2015 (extended to Monday June 8, 2015). *See* FED. R. CIV. P. 6(a).

Because Howard did not file his first state application until August 10, 2016, more than 14 months months after the limitations period expired, and his other state applications post-dated that initial filing, he is not entitled to statutory tolling.[3] *See* 28 U.S.C. § 2244(d)(2); *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Consequently, the petition *sub judice*, deemed filed on September 27, 2018, is clearly outside the one-year limitations period, absent equitable tolling.[4]

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[3] The first state application is deemed filed on August 10, 2016, the date on which Howard indicated it was signed and, therefore, likely was handed to prison officials for mailing. *Richards v. Thaler*, 710 F.3d 573, 579 (5th Cir. 2013) (extending prison mailbox rule to state habeas application). That a prison writ writer filed the initial application without Howard's knowledge does not in-and-of-itself alter the application of the mailbox rule. Doc. 3 at 16; *cf. Uranga v. Davis*, 893 F.3d 282, 286 (5th Cir. 2018), *cert. denied*, 2019 WL 659941 (2019) (concluding prison writ writer can resort to "next friend" device to sign a Rule 59(e) motion).

[4] The Court deems the federal petition filed on September 27, 2018, the date Petitioner certified placing it in the prison mail system. Doc. 3 at 17; *see* Rule 3(d) of the RULES GOVERNING SECTION 2254 PROCEEDINGS (providing the "mailbox rule" is applicable to inmates who use jail/prison's internal mailing system).

B. Equitable Tolling and Mental Illness

Howard's filings, even when liberally construed in light of his *pro se* status, do not present due diligence and "rare and exceptional circumstances" warranting equitable tolling. *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (to be entitled to equitable tolling, a 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" (quotations and quoted case omitted)). Unexplained delays do not evince due diligence or rare and extraordinary circumstances. *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999) (noting "equity is not intended for those who sleep on their rights" (quotation and quoted case omitted)).

Furthermore, this is not a case in which Howard pursued "the process with diligence and alacrity." *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000) (per curiam). As previously noted, he squandered the entire one-year period, waiting more than 14 months from the date his conviction became final to file his first state habeas application. Moreover, Howard's *pro se* status and unfamiliarity with the law do not suffice as a basis for equitable tolling. *See Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) ("proceeding *pro se* is not a 'rare and exceptional' circumstance because it is typical of those bringing a § 2254 claim"); *Turner v. Johnson*, 177 F.3d 390, 391-392 (5th Cir. 1999) (per curiam) (finding that "neither a plaintiff's unfamiliarity with the legal process nor his lack of representation during the applicable filing period merits equitable tolling").

Howard implies that he has suffered from mental health issues throughout his life. He avers that (1) "new evidence demonstrates that [he] was incompetent to stand trial," (2) his "first [state habeas] application was filed by a prison writ writer without his knowledge . . . or consent," and (3) he was "heavily medicated until this past year" with psychotropic medications.

Doc. 3 at 16. But Howard does not expound on his assertions in *Petitioner's Written Response.* Doc. 8. While mental illness may support equitable tolling of the limitations period, *see Fisher*, 174 F.3d at 715, it does not do so as a matter of course and the petitioner still bears the burden of proving rare and exceptional circumstances. *Smith v. Kelly*, 301 Fed. Appx. 375, 378 (5th Cir. 2008) (per curiam). Moreover, unsupported, conclusory assertions of mental illness are insufficient to support equitable tolling. *Id.* The mental illness must render the petitioner "unable to pursue his legal rights during" the relevant time period. *Id.; see also Hulsey v. Thaler*, 421 Fed. Appx. 386, 391 (5th Cir. 2011) (per curiam) (affirming refusal to equitably toll limitations period based on petitioner's mental condition, where petitioner was stable and capable of filing his petition for a period that lasted over one year).

Here, as in *Smith*, Howard has proffered nothing to demonstrate that, during the one-year period, he suffered from a mental illness that prevented him from pursing his legal rights. Even assuming Howard suffered from a mental health condition during the one-year period, there is nothing in the record, apart from his self-serving assertions, to suggest that his condition rendered him unable to pursue his legal rights, namely, timely filing his Section 2254 petition. *See Crawford v. Davis*, No. 3:18-CV-1486-B-BK, 2018 WL 7078540, at *2 (N.D. Tex. Dec. 27, 2018), R. & R. accepted, 2019 WL 266886 (N.D. Tex. Jan. 18, 2019) (collecting cases declining equitable tolling because the petitioner's vague, unsupported, self-serving, allegations were insufficient to show his mental health issues prevented him from seeking habeas relief during the one-year period).

Consequently, Howard has not met his burden to establish that equitable tolling is warranted in this case. *See Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002) (per curiam).

C. Actual Innocence and Fundamental Miscarriage of Justice

Howard also asserts a claim of actual innocence and suggests that the fundamental miscarriage of justice exception applies. Doc. 3 at 16; Doc. 8 at 2-3. Again, his bare assertions are unavailing. Insofar as Petitioner relies on miscarriage of justice principles as a stand-alone exception to the one-year limitations period—independent of his actual innocence claim—his assertion fails. As confirmed in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), "the fundamental miscarriage of justice exception applies only in cases of actual innocence." *Coleman v. Greene*, 845 F.3d 73, 76–77 (3d Cir. 2017) (addressing exception in context of time barred habeas petition). *Perkins* held that "a credible showing of actual innocence" not only satisfies the fundamental miscarriage of justice exception for state procedural default issues but also justifies an equitable exception to section 2244(d)'s limitations period. 569 U.S. at 391, 397. *See also United States v. Williams*, 790 F.3d 1059, 1075-76 (10th Cir. 2015) ("Historically, the common law miscarriage of justice exception (also referred to as the actual innocence exception) allowed a petitioner to overcome certain procedural bars to postconviction relief if a petitioner could show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'") (quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995)).

That notwithstanding, Howard also fails to present a credible claim of actual innocence. While a claim of actual innocence may provide "a gateway through which a petitioner may pass" when the limitations period has elapsed, "tenable actual-innocence gateway pleas are rare." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). A gateway actual innocence claim is available only when a movant presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 401 (quotations and quoted case omitted). To meet the

threshold requirement, a petitioner must present new evidence in support of his claim and "'show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Id.* at 399 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

As indicated previously, Howard's actual innocence claim is conclusory. He alleges neither specific facts nor newly discovered evidence that would undermine this Court's confidence in the jury's guilty verdict. Doc. 3 at 16; Doc. 8 at 2-3. *See Perkins*, 569 U.S. at 386 (noting that to present a credible claim a petitioner must produce new evidence that is sufficient to persuade the court that "'no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt'" (quoting *Schlup*, 513 U.S. at 329)). Instead, Howard purports to challenge only the sufficiency of the evidence and the trial court's failure to instruct the jury on the lesser included offenses of intoxication assault and reckless driving, just as he asserted in his fourth state habeas application. Doc. 3 at 5-8. Even when liberally construed, however, Howard's arguments are not supported by new reliable evidence that was not presented at trial. *See Hancock v. Davis*, 906 F.3d 387, 390 (5th Cir. 2018) ("Evidence does not qualify as 'new' under the *Schlup* actual-innocence standard if 'it was always within the reach of [petitioner's] personal knowledge or reasonable investigation.'"), *pet. for cert filed*, No. 18-940 (Jan. 18, 2019). Consequently, Howard's conclusory assertion that he is innocent does not come close to satisfying the rigorous *Schlup* standard. *See Cannon v. McCain*, 2017 WL 4570498, at *1 (5th Cir. July 6, 2017) (denying certificate of appealability because actual innocence claim was conclusory and not supported by new, reliable evidence). Thus, his actual innocence claim fails.

III. CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be **DISMISSED WITH PREJUDICE** as barred by the one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1).

SO RECOMMENDED on April 4, 2019.

RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). 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 aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996), *modified by statute,* 28 U.S.C. § 636(b)(1) (extending the time to file objections to 14 days).

United States Court of Appeals for the Fifth Circuit

No. 19-10905

EDDY JAMES HOWARD,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-2629

ORDER:

Eddy Howard, Texas prisoner #01859038, moves for appointment of counsel and for a certificate of appealability ("COA") following the dismissal of his 28 U.S.C. § 2254 application challenging his convictions of aggravated assault with a deadly weapon. He contends that the district court erred in dismissing, as time-barred his claims that the jury was not properly charged, there was insufficient evidence to convict, he was incompetent at the time of trial, he received ineffective assistance of counsel, and he is actually innocent. Howard also challenges the decision not to hold an evidentiary hearing, the

denial of a discovery request, and the denial of a motion under Federal Rule of Civil Procedure 59(e).

To obtain a COA, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In addition, because the denial of Howard's petition was based on a procedural ground, he is required to 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 Howard has not made the requisite showing for a COA on his constitutional claims, a COA is DENIED. His motion for appointment of counsel is also DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

No. #_____

IN THE

SUPREME COURT OF THE UNITED STATES

Eddy James Howard,
PETITIONER,,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice-
Correctional Institutions Division,
RESPONDENT.

PROOF OF SERVICE

I, Eddy James Howard, do swear or declare that on this date, February 22, 2021, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and APPLICATION FOR A CERTIFICATE OF APPEALABILITY on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

Ken Paxton
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas. 78711

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 22 day of February, 2021.

/s/ Eddy James Howard
Eddy James Howard