

## *Appendix - A*

# United States Court of Appeals for the Fifth Circuit

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No. 21-40433

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A True Copy  
Certified order issued Feb 22, 2022

*Tyler W. Cuyce*  
Clerk, U.S. Court of Appeals, Fifth Circuit

BRANDON L. COOPER,

*Petitioner—Appellant,*

*versus*

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

*Respondent—Appellee.*

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Application for Certificate of Appealability from the  
United States District Court for the Eastern District of Texas  
USDC No. 4:21-CV-114

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## ORDER:

Brandon L. Cooper, Texas prisoner # 1797873, seeks a certificate of appealability (COA) to appeal the denial of a 28 U.S.C. § 2254 application challenging his conviction for robbery. He asserts that he is actually innocent because of constitutional errors at his trial and on appeal and because the evidence was insufficient to prove his guilt. He also asserts that his Fourth Amendment rights were violated and that he was denied effective assistance of counsel. Because Cooper fails to show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" that the application was time barred, a COA is DENIED. *Slack v. McDaniel*, 529

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No. 21-40433

U.S. 473, 484 (2000). To the extent Cooper asserts that the actual innocence standard for overcoming the untimeliness of his § 2254 claims is satisfied by new evidence from surveillance cameras, we lack jurisdiction to consider arguments raised for the first time in a COA motion filed here. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018); *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

Don R. Willett  
DON R. WILLETT  
United States Circuit Judge

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## Appendix - B

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

BRANDON L. COOPER, #1797873

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VS.

CIVIL ACTION NO. 4:21cv114

DIRECTOR, TDCJ-CID

§

**ORDER OF DISMISSAL**

The above-entitled and numbered civil action was referred to United States Magistrate Kimberly C. Priest Johnson. The Report and Recommendation of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. The Magistrate Judge recommended the petition for writ of habeas corpus be dismissed with prejudice as time-barred. (Dkt. # 8). Petitioner filed objections. (Dkt. # 13).

Petitioner first argues that he was unable to timely file a petition for discretionary review ("PDR"). He asserts this was due to "multiple extraordinary circumstances beyond his control" including numerous prison unit lockdowns, lack of proper updated legal material, staff not responding to his law library requests, and the unit mailroom not timely processing mail. (Dkt. # 13, p. 2). However, Petitioner's failure to timely file a PDR did not cause the instant petition to be time-barred. As the Magistrate Judge noted, the appropriate limitations provision is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. Because Petitioner did not file a PDR, his conviction became final when the opportunity to file a PDR had expired. He had thirty days after the court of appeals issued a decision to file a PDR. Tex. R. App. Proc. 68.2(a). The Fifth Court of Appeals affirmed Petitioner's conviction on June 11, 2014; thus,

his conviction became final on July 11, 2014. The present petition was due no later than July 11, 2015, in the absence of tolling provisions. It was not filed until February 2, 2021, five years, six months, and twenty-two days beyond the limitations period. Although Petitioner filed an application for state habeas corpus relief on September 24, 2020, equitable tolling does not apply where a state court petition is filed after the expiration of the one year period. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Thus, Petitioner's failure to timely file a PDR did not cause the instant petition to be time-barred.

Moreover, the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, and unfamiliarity with the legal process do not constitute extraordinary circumstances. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir. 2000). The Fifth Circuit has recognized that "an inadequate law library does not constitute a 'rare and exceptional' circumstance warranting equitable tolling." *Scott v. Johnson*, 227 F.3d 260, 263 n.3 (5th Cir. 2000) (citing *Felder*, 204 F.3d at 171-73). Additionally, "[l]ockdowns and periods in which a prisoner is separated from his legal papers are not 'exceptional circumstances' in which equitable tolling is appropriate." *Dodd v. United States*, 365 F.3d 1273, 1283 (11th Cir. 2004). "Equity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999) (quoting *Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989)).

Petitioner next asserts that he is actually innocent. Petitioner fails to present any new evidence to satisfy the actual-innocence exception nor has he demonstrated that equitable tolling is justified on this basis. In his remaining objections, Petitioner contends that he has exercised reasonable diligence, and that "compelling facts became discoverable that were not discoverable before the one-year time limit." (Dkt. # 13, pp. 5-6). Petitioner provides the Court with no legal

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and/or evidentiary basis. Moreover, unexplained delays are not evidence of due diligence nor do they qualify as an extraordinary circumstance. *Fisher*, 174 F.3d at 715..

*focus on this*

Petitioner does not state any grounds for equitable tolling, and there is nothing in the record to indicate he is entitled to it. Without any evidence that some “extraordinary circumstance” prevented Petitioner from filing the instant Petition, the Court finds that Petitioner is not entitled to equitable tolling. Therefore, Petitioner’s objections lack merit.

In sum, Petitioner provides no information to refute the Magistrate Judge’s finding that he filed his federal habeas petition five years, six months, and twenty-two days beyond the AEDPA limitations deadline. None of Petitioner’s objections contradict the Magistrate Judge’s finding that Petitioner filed an untimely habeas petition.

After reviewing the Report and Recommendation and conducting a de novo review of Petitioner’s objections, the Court concludes the findings and conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the Court.

Accordingly, it is **ORDERED** the petition for writ of habeas corpus is **DENIED**, and the case is **DISMISSED** with prejudice. A Certificate of appealability is **DENIED**. It is further **ORDERED** all motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 19th day of May, 2021.

  
AMOS L. MAZZANT  
UNITED STATES DISTRICT JUDGE

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

BRANDON L. COOPER, #1797873

VS.

DIRECTOR, TDCJ-CID

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CIVIL ACTION NO. 4:21cv114

**FINAL JUDGMENT**

Having considered the petition and rendered its decision by opinion and order of dismissal issued this date, the Court **ORDERS** that this case is **DISMISSED** with prejudice.

SIGNED this 19th day of May, 2021.

  
AMOS L. MAZZANT  
UNITED STATES DISTRICT JUDGE

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

BRANDON L. COOPER, #1797873

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VS.

CIVIL ACTION NO. 4:21cv114

DIRECTOR, TDCJ-CID

§

**REPORT AND RECOMMENDATION**  
**OF UNITED STATES MAGISTRATE JUDGE**

*Pro Se* Petitioner Brandon L. Cooper, an inmate confined in the Texas prison system, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to United States Magistrate Judge Kimberly C. Priest Johnson for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636, and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

**I. PROCEDURAL BACKGROUND**

Petitioner is challenging his Collin County conviction. Cause No. 401-81168-2011. Petitioner was charged with robbery. Petitioner pled not guilty and a jury sentenced him to thirty-five years' imprisonment on June 15, 2012. The Fifth District Court of Appeals affirmed Petitioner's conviction on June 11, 2014. *Cooper v. State*, No. 05-12-00898-CR (Tex. App. - Dallas June 11, 2014). Petitioner did not file a petition for discretionary review ("PDR"). Petitioner filed an application for state habeas corpus relief on September 24, 2020. It was denied without written order on January 6, 2021. *Ex parte Brandon Lawrence Cooper*, No. WR-91,804-01. Petitioner filed the instant petition on February 2, 2021. The Court did not order a response from the Director.

## **II. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996**

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) was signed into law. The law made several changes to the federal habeas corpus statutes, including the addition of a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). The AEDPA provides that the one-year limitations period shall run from the latest of four possible situations: the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review; the date an impediment to filing created by the State is removed; the date in which a constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *Id.* at § 2244(d)(1)(A)-(D). The AEDPA also provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation. *Id.* at 2244(d)(2).<sup>1</sup>

The appropriate limitations provision is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. Petitioner did not file a PDR; thus, the conviction became final when the opportunity to file a PDR had expired. He had thirty days after the court of appeals issued a decision to file a PDR. Tex. R. App. Proc. 68.2(a). The Fifth Court of Appeals affirmed his conviction on June 11, 2014; thus, the conviction became final on July 11, 2014. The present petition was due no later than July 11, 2015, in the absence of tolling provisions.

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<sup>1</sup> The Fifth Circuit discussed the approach that should be taken in applying the AEDPA one-year statute of limitations in *Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998) and *Fields v. Johnson*, 159 F.3d 914 (5th Cir. 1998).

It was not filed until February 2, 2021, five years, six months, and twenty-two days beyond the limitations period.

The provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a *properly filed* application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation (emphasis added). The Supreme Court held that “an application is ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.” *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Petitioner filed an application for state habeas corpus relief on September 24, 2020, which was denied without written order by the Texas Court of Criminal Appeals on January 6, 2021. *Ex parte Brandon Lawrence Cooper*, No. WR-91,804-01. However, equitable tolling does not apply where a state court petition is filed after the expiration of the one year period. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

The United States Supreme Court confirmed the AEDPA statute of limitations is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). “A habeas petitioner is entitled to equitable tolling only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 560 U.S. at 649). “Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.” *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The petitioner bears the burden of proving he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

The Fifth Circuit has held the district court has the power to equitably toll the limitations period only in “extraordinary circumstances.” *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299 (5th Cir.

1998). To qualify for such equitable tolling, the petitioner must present “rare and exceptional circumstances.” *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998). In making this determination, it should be noted the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, and unfamiliarity with the legal process do not constitute extraordinary circumstances. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir. 2000). As a general rule, equitable tolling has historically been limited to situations where the petitioner “has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990). Equitable tolling cannot be used to thwart the intent of Congress in enacting the limitations period. *See Davis*, 158 F.3d at 811 (noting that “rare and exceptional circumstances” are required). At the same time, the Court is aware dismissal of a first federal habeas petition is a “particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.” *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). Additionally, the Fifth Circuit has held that “[e]quity is not intended for those who sleep on their rights.” *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999). To obtain the benefit of equitable tolling, Petitioner must also establish he pursued habeas relief with “reasonable diligence.” *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013); *Holland*, 560 U.S. at 653 (the diligence required for equitable tolling purposes is reasonable diligence).

On February 9, 2021, this Court issued an Order giving Petitioner fourteen days to respond to the timeliness of his petition. (Dkt. # 5). In his response, Petitioner contends that as an indigent prisoner, he needed additional time to research and draft his legal documents, including his

application for state habeas corpus relief. (Dkt. # 7). However, as already noted, the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, and unfamiliarity with the legal process do not constitute extraordinary circumstances. *Felder*, 204 F.3d at 173.

Petitioner filed his Section 2254 petition five years, six months, and twenty-two days beyond the AEDPA limitations deadline. He fails to show he is entitled to equitable tolling due to actual innocence, or that “rare and extraordinary circumstances” prevented him from timely filing. *Davis*, 158 F.3d at 810-11. Petitioner also fails to show he was reasonably diligent in his pursuit of relief. *Phillips*, 216 F.3d at 511. Consequently, the Section 2254 petition should be denied and dismissed as time-barred.

### **III. CERTIFICATE OF APPEALABILITY**

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 “unless a circuit justice or judge issues a certificate of appealability.” 28 U.S.C. § 2253(c)(1)(B). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because “the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.”).

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a “substantial showing of the denial of a constitutional right” in

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a certificate of appealability should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Petitioner's § 2254 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended the court find that Petitioner is not entitled to a certificate of appealability.

#### **IV. RECOMMENDATION**

It is accordingly recommended that Petitioner's motion for relief under 28 U.S.C. § 2254 be denied and the case dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place

in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 10th day of March, 2021.



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KIMBERLY C. PRIEST JOHNSON  
UNITED STATES MAGISTRATE JUDGE