

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MAY 23, 2018 ORDER.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 23, 2018
DEBORAH S. HUNT, Clerk

DERRICK L. JOHNSON,

Petitioner-Appellant,

v.

WARDEN PICKAWAY CORRECTIONAL
INSTITUTION,

Respondent-Appellee.

ORDER

Derrick L. Johnson, a pro se Ohio prisoner, appeals from the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Johnson has applied for a certificate of appealability (COA). Johnson also moves for in forma pauperis status.

In 1992, an Ohio jury convicted Johnson of two counts of aggravated murder, one count of attempted aggravated murder, and one count of aggravated robbery. The trial court sentenced Johnson to life imprisonment. The Ohio Court of Appeals affirmed his convictions, *State v. Johnson*, No. 13449, 1993 WL 248135 (Ohio Ct. App. July 7, 1993), and Johnson did not seek further review of that decision.

In 2014, Johnson filed a pro se motion for leave to file a delayed motion for a new trial, but the trial court denied his motion. The Ohio Court of Appeals affirmed this decision, *State v. Johnson*, No. 26339, 2016 WL 3655247 (Ohio Ct. App. July 8, 2016), and the Ohio Supreme Court declined further review.

In 2015, Johnson filed his § 2254 petition in the district court, alleging that newly discovered evidence revealed that a witness perjured himself at Johnson's trial. The magistrate

judge recommended dismissing the petition as untimely, *Johnson v. Bradley*, No. 3:15-CV-090, 2017 WL 3961670 (S.D. Ohio Sept. 8, 2017), and the district court adopted this recommendation. *Johnson v. Lisath*, No. 3:15-CV-90, 2017 WL 4402585 (S.D. Ohio Oct. 2, 2017). The district court also denied Johnson a COA to appeal its decision.

Under 28 U.S.C. § 2253(c)(2), this court will grant a COA for an issue raised in a § 2254 petition only if the petitioner “has made a substantial showing of the denial of a constitutional right.” A petitioner satisfies this standard by demonstrating that reasonable jurists “could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003)); see also *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

• Reasonable jurists could not disagree with the district court’s conclusion that Johnson’s § 2254 petition was untimely. • A one-year limitations period applies to federal habeas corpus petitions filed by state prisoners. 28 U.S.C. § 2244(d)(1); *Holbrook v. Curtin*, 833 F.3d 612, 615 (6th Cir. 2016), cert. denied, 137 S. Ct. 1436 (2017). • This limitations period runs from the latest of four dates—for Johnson, the relevant one is “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” See § 2244(d)(1)(D). •

• Johnson did not comply with the § 2244(d) statute of limitations for filing his § 2254 petition. • Johnson maintains that all of the claims in his habeas petition are based on newly discovered evidence. • At Johnson’s trial, the victim of the attempted murder, Ralph Allen, denied any involvement in drug dealing at the time of the home invasion that resulted in the robbery, murders, and Allen’s attempted murder. However, in subsequent federal court proceedings involving Johnson’s co-defendant, Keith DeWitt, Allen admitted his participation in drug dealing from the house at the time of the invasion. Johnson acknowledges that he became aware of Allen’s admission of prior false testimony when the district court published its 2004 decision in the *DeWitt* case. See *United States v. DeWitt*, No. 3:98-cr-00081 (S.D. Ohio Jan. 20, 2004).

Despite this knowledge, Johnson waited until 2015 to file his § 2254 petition, and he offers no reason for this extensive delay.

Although he did not timely file his § 2254 petition, Johnson argues that the district court should have equitably tolled the applicable limitations period. The § 2244(d)(1) statute of limitations is not a jurisdictional bar and, therefore, is subject to equitable tolling where a habeas petitioner “shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010). This court applies equitable tolling sparingly, and Johnson bears the burden of proving that he is entitled to it. *See Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). Johnson has not met this burden. He presents no argument that he has been pursuing his rights diligently or that an extraordinary circumstance prevented his timely filing.

Johnson lastly argues that he is entitled to equitable tolling of the limitations period because he is actually innocent of his convictions. If proven, actual innocence may provide a basis for applying equitable tolling. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). While Johnson relies on Allen’s changed testimony, it clearly does not demonstrate Johnson’s actual innocence. Allen was a key witness against Johnson, and his admission of drug dealing during the *DeWitt* proceedings casts some doubt on his credibility. However, it does not rise to the level of establishing that no reasonable juror would have found Johnson guilty if they had been aware of Allen’s new testimony.

Accordingly, we **DENY** Johnson’s COA application. We also **DENY** his motion to proceed in forma pauperis as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SEPTEMBER 28, 2018

ORDER DENYING EN BANC REHEARING

No. 18-3007

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 28, 2018
DEBORAH S. HUNT, Clerk

DERRICK L JOHNSON,

Petitioner-Appellant,

v.

WARDEN PICKAWAY CORRECTIONAL
INSTITUTION,

Respondent-Appellee.


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ORDER

Before: ROGERS, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Derrick L. Johnson petitions for rehearing en banc of this court's order entered on May 23, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Filed: September 28, 2018

Mr. Derrick L Johnson
Pickaway Correctional Institution
P.O. Box 209
Orient, OH 43146

Re: Case No. 18-3007, *Derrick Johnson v. Warden Pickaway Correctional*
Originating Case No.: 3:15-cv-00090

Dear Mr. Johnson,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Stephanie Lynn Watson

Enclosure

APPENDIX C
UNITED STATES DISTRICT COURT
DECEMBER 18, 2017
Decision and Entry Adopting
United States Magistrate Judge's Report and
Recommendation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DERRICK L. JOHNSON,

Petitioner,

v.

CHARLES BRADLEY, Warden,
Pickaway Correctional
Institution,

Respondent.

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Case No. 3:15-cv-90

JUDGE WALTER H. RICE

DECISION AND ENTRY ADOPTING UNITED STATES MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATIONS ON MOTION TO
VACATE (DOC. #41), REPORT AND RECOMMENDATIONS ON
MOTION TO AMEND OR FROM RELIEF FROM JUDGMENT (DOC.
#44), AND REPORT AND RECOMMENDATIONS ON RECOMMITTAL
(DOC. #46); OVERRULING PETITIONER'S OBJECTIONS THERETO
(DOCS. ##42 AND 51); OVERRULING PETITIONER'S MOTION TO
VACATE AND REINSTATE CASE DUE TO LACK OF SERVICE OF THE
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION[S] (DOC.
#40); OVERRULING PETITIONER'S MOTION TO AMEND, OR IN THE
ALTERNATIVE, FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV.
P. 59 AND 60 (DOC. #43); CASE TO REMAIN TERMINATED ON
DOCKET

On October 2, 2017, the Court issued a Decision and Entry Adopting
Magistrate Judge Merz's September 8, 2017, Report and Recommendations, and
sustaining Respondent's Motion to Dismiss the Petition Under 28 U.S.C. § 2254
for Writ of Habeas Corpus. Docs. ##35, 36. The Court noted that no Objections
had been filed. Moreover, the Petition was "extremely untimely" and Petitioner
had failed to show that equitable tolling was warranted or that the "actual

innocence" exception applied. Doc. #36. Judgment was entered in favor of Respondent and against Petitioner. Doc. #37.

Petitioner then filed a Motion to Compel Service of the September 8, 2017, Report and Recommendations, claiming that he was not properly served with a copy. Doc. #38.¹ That motion was denied as not credible. Doc. #39.

On October 12, 2017, Petitioner filed a Motion to Vacate and Reinstate Case Due to Lack of Service of the Magistrate Judge's Report & Recommendation[s]. Doc. #40. The following day, Magistrate Judge Merz issued a Report and Recommendations on Motion to Vacate, noting that no mail had been returned to the Court, and that "[p]rior and subsequent docket entries of Court-generated documents show the same method of service (See ECF Nos. 6, 9, 10, 12, 16, 18, 24, 36, 37, & 39)." He also noted that the motion did not include any substantive reasons why Petitioner believed that the judgment was wrong. He recommended that the Court deny the motion "without prejudice to the timely filing of a motion under Fed. R. Civ. P. 59(e) which includes any substantive objections Mr. Johnson has to the judgment." Doc. #41.

On November 2, 2017, Petitioner filed Objections to the October 13, 2017, Report and Recommendations, pointing out that the September 8, 2017, Report and Recommendations (ECF #35) were not included on the list of Court-generated

¹ Petitioner maintains that he learned of the Report and Recommendations while reviewing his docket on the computer in the prison library.

documents cited by Magistrate Judge Merz. Doc. #42. The Court recommitted this issue to Magistrate Judge Merz. Doc. #45.

On November 2, 2017, Petitioner also filed a Motion to Amend, or in the Alternative, for Relief from Judgment Under Fed. R. Civ. P. 59(e)(3) and 60(b)(6), again arguing only that he had not received a copy of the September 8, 2017, Report and Recommendations "via certified U.S. Mail," and that this document was not included on the list cited by Magistrate Judge Merz. Doc. #43.

On November 3, 2017, Magistrate Judge Merz issued a Report and Recommendations on Motion to Amend or for Relief from Judgment. He first noted that Petitioner is not entitled to service via certified mail. He rejected Petitioner's argument that, because the September 8, 2017, Report and Recommendations (Doc. #35) was not included on the list of court documents that had been mailed to him, this proved that he had not been served. He explained that Document #35 had been served in the same way as many "[p]rior and subsequent" documents, as listed in the Report and Recommendations. Moreover, Magistrate Judge Merz noted that Petitioner had advanced no substantive reason why the Petition should not have been dismissed as untimely. He therefore recommended that the Court deny the Motion to Amend or for Relief from Judgment. Doc. #44.

On November 8, 2017, Magistrate Judge Merz issued a Report and Recommendations on Recommittal. Doc. #46. Noting that the issues raised by Petitioner in his Objections, Doc. #42, to the October 13, 2017, Report and

Recommendations, Doc. #41, were identical to the issues raised in the Motion to Amend or for Relief from Judgment, Magistrate Judge Merz found that no further analysis was needed. He again recommended that the Court deny the Motion to Vacate.

The Court granted Petitioner's request for additional time to file Objections to the November 3, 2017, Report and Recommendations. Docs. ##47, 48. On December 11, 2017, Petitioner filed Objections to the Magistrate Judge's November 3, 2017, Report and Recommendations and November 8, 2017, Recommittal. Doc. #51.

Petitioner raises three Objections. He first argues that the October 2, 2017, Judgment should be vacated so that he can file Objections to the September 8, 2017, Report and Recommendations. He next argues that Magistrate Judge Merz abused his discretion in finding that Petitioner was, in fact, served with a copy of the Report and Recommendations. He maintains that there is no proof of service, and the docket entry shows that he was *not* served by U.S. mail. Finally, Petitioner argues that Magistrate Judge Merz abused his discretion by attempting to cure the denial of his right to file Objections to the September 8, 2017, Report and Recommendations, by suggesting that he file a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e).

Upon a thorough *de novo* review of the Court's file and the applicable law, the Court OVERRULES Petitioner's Objections to the October 13, 2017, Report and Recommendations, Doc. #42, and Petitioner's Objections to the Magistrate

Judge's November 3, 2017, Report and Recommendation[s] and November 8, 2017, Recommittal, Doc. #51.

The Court's docket shows that the September 8, 2017, Report and Recommendations were sent by regular mail to Petitioner at Pickaway Correctional Institution, P.O. Box 209, Orient, OH 43146. This mail was not returned to the Court as undeliverable, creating the rebuttable presumption that it was received. Petitioner submits an unsworn note from "NB" stating that the only legal mail Petitioner received in September of 2017, was logged on September 7, 2017. Doc. #51, PageID#999. Petitioner points out that this was the day *before* the Report and Recommendations were issued.

The unsworn note submitted by Petitioner, however, is insufficient to overcome the presumption that mail sent to the last known address and not returned was received. *See, e.g., Mecaj v. Mukasey*, 263 F. App'x 449, 451 (6th Cir. 2008). As Magistrate Judge Merz noted, numerous documents sent by regular mail to the same address, both before and after September 8, 2017, were delivered to Petitioner. Accordingly, there is no basis to vacate the October 2, 2017, Judgment based on the alleged failure to serve Petitioner with a copy of the September 8, 2017, Report and Recommendations.

As Magistrate Judge Merz properly noted, because Judgment had already been entered, Petitioner could no longer file Objections, but he could file a Motion to Alter or Amend the Judgment under Fed. R. Civ. P. 59(e), raising any substantive Objections that he had to the Judgment. Citing *Hurst v. Fannie Mae*,

642 F. App'x 533 (6th Cir. 2016), Petitioner argues that he is prejudiced by having to raise substantive arguments in a Rule 59(e) motion instead of through Objections to the Report and Recommendations. He notes that, in *Hurst*, the Sixth Circuit stated that Rule 59 motions cannot be used "to raise arguments which could, and should, have been made before judgment issued." *Id.* at 541.

The Court rejects Petitioner's claim of prejudice. Notably, although he filed a Rule 59(e) motion, he simply reiterated his arguments concerning the alleged failure to serve him with the September 8, 2017, Report and Recommendations. He has yet to raise a single, substantive Objection to the Court's decision to dismiss his Petition as "extremely untimely." If Petitioner had raised substantive Objections to the Judgment, and the Court found it necessary to alter or amend the Judgment in order to prevent manifest injustice, the Court would have authority to do so under Rule 59(e). *See GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (noting the circumstances under which a court may grant a Rule 59(e) motion).

Based on the reasoning and citations of authority set forth by United States Magistrate Judge Michael R. Merz, as well as upon a thorough *de novo* review of this Court's file and the applicable law, the Court ADOPTS Magistrate Judge Merz's Report and Recommendations on Motion to Vacate (Doc. #41), Report and Recommendations on Motion to Amend or for Relief from Judgment (Doc. #44), and Report and Recommendations on Recommittal (Doc. #46). The Court OVERRULES Petitioner's Objections thereto (Docs. ##42, 51).

The Court OVERRULES WITH PREJUDICE Petitioner's Motion to Vacate and Reinstatement Case Due to Lack of Service of the Magistrate Judge's Report and Recommendation[s] (Doc. #40), and Petitioner's Motion to Amend, or in the Alternative, for Relief from Judgment under Fed. R. Civ. P. 59 and 60 (Doc. #43).

The above-captioned case shall remain terminated on the Court's docket.

Date: December 18, 2017

A handwritten signature in black ink, appearing to read "Walter H. Rice", is written over a horizontal line.

WALTER H. RICE
UNITED STATES DISTRICT JUDGE