

APPENDIX A

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

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Filed: December 18, 2018

Mr. Deandre Anderson
Gus Harrison Correctional Facility
2727 E. Beecher Street
Adrian, MI 49221

Re: Case No. 17-1740, *Deandre Anderson v. Robert Napel*
Originating Case No. : 5:16-cv-12675

Dear Mr. Anderson:

Enclosed is a copy of the Order filed on July 2, 2018, denying your motion for a certificate of appealability per your request received on December 17, 2018.

Sincerely yours,

s/Karen S. Fultz
Case Manager
Direct Dial No. 513-564-7036

cc: Mr. David H. Goodkin

Enclosure

No. 17-1740

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 02, 2018
DEBORAH S. HUNT, Clerk

DEANDRE ANDERSON,
Petitioner-Appellant,

V.

ROBERT NAPEL, Warden,
Respondent-Appellee.

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ORDER

Deandre Anderson, a pro se Michigan prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. This court construes the notice of appeal as an application for a certificate of appealability (COA). *See Fed. R. App. P. 22(b)(2)*. Anderson also moves to proceed in forma pauperis on appeal.

In 2009, following a bench trial in Michigan state court, Anderson was convicted of first-degree home invasion, first-degree criminal sexual conduct, and third-degree criminal sexual conduct. The trial court sentenced him to fifty months to twenty years in prison on the home invasion conviction, eighty-five months to fifty years in prison on the first-degree criminal sexual conduct conviction, and fifty months to fifteen years in prison on the third-degree criminal sexual conduct conviction, all to be served concurrently. The Michigan Court of Appeals affirmed. *See People v. Anderson*, No. 293574, 2010 WL 4226641, at *1 (Mich. Ct. App. Oct. 26, 2010). On June 28, 2011, the Michigan Supreme Court denied Anderson's application for leave to appeal. *People v. Anderson*, 798 N.W.2d 801 (Mich. 2011) (mem.). In October 2013 and September 2015, Anderson filed motions for relief from judgment in the state trial court, both of which were denied.

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In July 2016, Anderson filed this § 2254 petition, arguing that he is actually innocent of his crimes and that his appellate counsel was ineffective. The State moved to dismiss the petition as untimely. Anderson responded that he was entitled to equitable tolling and that his late filing should be excused because he is actually innocent. Construing the State's motion as a motion for summary judgment because documents outside of the pleadings were presented, *see Fed. R. Civ. P. 12(d)*, the district court concluded that Anderson's petition was untimely and that he had failed to show that he was entitled to equitable tolling or that he is actually innocent of his crimes. The court granted the State's motion, denied Anderson's petition, and declined to issue a COA. Anderson filed a notice of appeal that appeared to be untimely, as noted in this court's show cause order. However, because Anderson has submitted evidence establishing the timely filing of his notice of appeal, this court will withdraw the show cause order.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the petitioner can satisfy § 2253(c)(2) by establishing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A habeas petition filed under § 2254 is subject to a one-year limitations period. 28 U.S.C. § 2244(d)(1). The limitations period in this case was triggered when Anderson's convictions became final "by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A). Anderson's convictions became final on September 26, 2011, when the ninety-day period expired for him to seek a writ of certiorari in the Supreme Court from the Michigan Supreme Court's order denying him leave to appeal. *See Gonzalez v. Thaler*, 565 U.S. 134, 149-50 (2012); *Bronaugh v. Ohio*, 235 F.3d 280, 283-84 (6th Cir. 2000); *see also* Sup. Ct. R. 13. The limitations period began to run the next day on September 27, 2011, and ran uninterrupted until expiring on September 26, 2012. Anderson's later state post-conviction actions, first commenced in October 2013, did not revive the already expired limitations period. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Therefore,

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Anderson filed his petition nearly four years too late, and reasonable jurists would not debate the district court's conclusion that the petition is untimely.

Below, Anderson argued that he was entitled to equitable tolling because he diligently pursued his rights, aside from the time that he suffered from a "[f]ractured arm and other medical issues."

Section 2244(d) is subject to equitable tolling when a 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) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Reasonable jurists would not debate the district court's rejection of Anderson's equitable tolling argument. His summary allegations of having suffered medical issues without reference to when they occurred or how they prevented him from timely filing his petition fail to show that he is entitled to equitable tolling.

Additionally, Anderson argued that he was actually innocent of his crimes, summarily asserting that adverse witness testimony at trial should not be believed, that witnesses recanted their testimony, and that his own testimony, which was not given at trial, would have convinced the jury of his innocence.

To establish actual innocence, a petitioner must "persuade[] the district court that, in light of . . . new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

The district court rejected Anderson's actual innocence claim, concluding that his summary credibility attacks on witness testimony were insufficient to show his actual innocence, that the record provided no support for his allegation that witnesses recanted their testimony, and that his own assertions of his innocence, based on what he would have testified to at trial, did not show that the jury would not have convicted him. *See Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) (noting that evidence impeaching a witness's credibility "will seldom, if ever," be enough to establish actual innocence); *see also McCray v. Vasbinder*, 499 F.3d 568, 573 (6th Cir. 2007)

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(noting that self-serving testimony by a defendant is generally insufficient to establish his actual innocence). Reasonable jurists would not debate these conclusions.

Accordingly, for the reasons given, this court **DENIES** Anderson's COA application, **DENIES** his in forma pauperis motion as moot, and **WITHDRAWS** the show cause order.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Deandre Anderson,

Petitioner, Case No. 16-cv-12675

v.

Judith E. Levy
United States District Judge

Shane Place,

Mag. Judge Stephanie Dawkins
Respondent. Davis

**OPINION AND ORDER GRANTING RESPONDENT'S MOTION
TO DISMISS [7], DENYING PETITION FOR WRIT OF HABEAS
CORPUS [1], DENYING AS MOOT MOTION TO DEFER RULING
[9], AND DENYING CERTIFICATE OF APPEALABILITY AND
PERMISSION TO APPEAL *IN FORMA PAUPERIS***

Deandre Anderson ("Petitioner"), a Michigan Department of Corrections prisoner, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. 1.) Petitioner challenges his convictions, following a bench trial in Alpena Circuit Court, for first-degree criminal sexual conduct, MICH. COMP. LAWS § 750.520b(1)(c), first-degree home invasion MICH. COMP. LAWS § 750.110a(2), and third-degree criminal sexual conduct, MICH. COMP. LAWS § 750.520d(1)(b). As a result of these convictions, Petitioner is serving concurrent sentences

of eighty-five months to fifty years and fifty months to twenty years. (Dkt. 1 at 1.)

This matter is before the Court on respondent's motion to dismiss. (Dkt. 7.) Petitioner filed a motion to defer the ruling on respondent's motion until he filed a response. (Dkt. 9.) Petitioner thereafter filed a response to the motion. (Dkt. 10.)

For the reasons set forth below, the Court grants respondent's motion to dismiss, and denies the petition for a writ of habeas corpus. The Court also denies as moot Petitioner's motion to defer, and denies a certificate of appealability and permission to proceed on appeal *in forma pauperis*.

I. Background

Petitioner was convicted after a bench trial on June 23, 2009 of home invasion and first- and third-degree criminal sexual conduct against Nichole Barilik and Bobbi Hanna. (Dkt. 1 at 1.)

At trial, Barilik testified that she and Petitioner had a romantic relationship, which she ended in mid-September 2008. After this, Petitioner continued to call her. On December 2, 2008, Barilik agreed to talk with Petitioner at Bobbi Hanna's house, where Petitioner was

staying. During the conversation, Petitioner slapped Barilik and grabbed her by the neck. Hanna heard the scuffle, and she told Petitioner to stop. Barilik then left.

Barilik testified that later that night, she woke up at approximately 5 a.m. to find Petitioner standing next to her bed, wearing only his boxer shorts. Petitioner touched her under her blanket. She told him to leave, but Petitioner pulled back the covers, climbed in her bed, held her wrists down, and sexually assaulted her.

Barilik went to the police station on December 8, 2008 to report that Petitioner was harassing her, but she did not mention the sexual assault. Barilik testified that she decided to pursue the rape charge when she heard that Bobbi Hanna had accused Petitioner of raping her.

At trial, Bobbi Hanna also testified. She testified that she met Petitioner on August 14, 2008, and became friends with him. He moved in with her in November 2008. On December 8, 2008, Petitioner broke off their romantic relationship, stating that he was in love with Barilik.

Two days later, on the night of December 10, 2008, Petitioner came home around 1:30 a.m. After Hanna went into her room and changed into her nightgown, Petitioner came into her room and

wrapped his arms around her. Hanna testified that she shoved Petitioner away and told him he needed to go to bed. Instead, Petitioner took his clothes off and sexually assaulted her.

After Petitioner left, Hanna called her friend Jessica Cohoon. Cohoon testified at trial that Hanna was hysterical on the phone, and told her that Petitioner raped her. Cohoon had a co-worker call the police and go to Hanna's house. Petitioner was arrested the next morning.

Petitioner, who represented himself at trial, maintained that any sexual contact he had with the women was consensual, and that the two women conspired to press charges against him after each woman found out that Petitioner had slept with the other.

The trial court found Petitioner guilty of the offenses detailed above. (Dkt. 8-13.) Following sentencing, Petitioner was appointed appellate counsel who filed an appellate brief raising a single claim: the trial court denied Petitioner his Sixth Amendment right to counsel when it failed to ensure that his waiver was knowing, voluntary, and intelligent by not informing him of the dangers of self-representation.

On October 26, 2010, the Michigan Court of Appeals issued an unpublished opinion affirming Petitioner's convictions. *People v. Anderson*, No. 293574, 2010 WL 4226641 (Mich. Ct. App. Oct. 26, 2010). Petitioner filed an application for leave to appeal with the Michigan Supreme Court. On June 28, 2011, the Michigan Supreme Court denied the application. *People v. Anderson*, 489 Mich. 971 (Mich. 2011) (table).

Over two years later, on October 17, 2013, Petitioner filed a motion for relief from judgment in the trial court, challenging the legality of his arrest and the weight of the evidence presented against him. The trial court denied the motion in a brief order dated October 18, 2013. (Dkts. 8-15, 8-16.)

On January 27, 2014, Petitioner filed a delayed application for leave to appeal with the Michigan Court of Appeals, which denied the application. *People v. Anderson*, No. 319898 (Mich. Ct. App. June 27, 2014). Petitioner did not appeal this decision to the Michigan Supreme Court. (See Dkt. 8-25.)

On September 23, 2015, Petitioner filed a second motion for relief from judgment with the trial court. The motion again challenged the legality of Petitioner's arrest, accused the police of improperly focusing

on just one suspect, asserted that the police obtained a statement from him in violation of his constitutional rights, and challenged the effectiveness of his appellate counsel. (Dkt. 8-17.)

On November 2, 2015, the trial court denied the motion, citing MICH. CT. R. 6.502(G)(2), which generally prohibits defendants from filing successive motions for relief from judgment. (Dkt. 8-18.) Petitioner filed a delayed application for leave to appeal in the Michigan Court of Appeals, and on May 5, 2016, the Michigan Court of Appeals dismissed the appeal pursuant to MICH. CT. R. 6.502(G)(2). *People v. Anderson*, No. 331561 (Mich. Ct. App. May 5, 2016). Petitioner did not appeal this decision to the Michigan Supreme Court. (Dkt. 8-25.)

On July 13, 2016, Petitioner filed a federal habeas petition, which raises two claims: (1) Petitioner is actually innocent, and (2) Petitioner was denied effective assistance of appellate counsel. (Dkt. 1.)

II. Legal Standard

Respondent has filed a motion to dismiss. However, because the motion and the record before the Court includes a number of documents outside of the pleadings, the Court will treat the motion as a motion for summary judgment.

filed by a state prisoner seeking habeas relief from a state court judgment. 28 U.S.C. § 2244(d)(1). Under section 2244(d)(1)(A), the one-year limitations period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.”¹ The limitation period is tolled while “a properly filed application for State post-conviction or other collateral review . . . is pending.” 28 U.S.C. § 2244(d)(2).

In this case, the Michigan Supreme Court denied leave to appeal on June 28, 2011. Petitioner then had ninety (90) days to petition for a writ of certiorari to the U.S. Supreme Court, which he did not do. Thus, the statute of limitations began to run on September 26, 2011, and expired one year later on September 27, 2012.

Petitioner filed his first post-conviction review motion with the state trial court on October 17, 2013, over a year after the statute of limitation had already expired. Because Petitioner’s post-conviction motion was filed after the one-year limitations period expired, it did not toll or reset the limitations period. *McMurray v. Scutt*, 136 F. App’x 815, 817 (6th Cir. 2005) (citing *Vroman v. Brigano*, 346 F.3d 598, 602

¹ Section 2244(d) lists other events that trigger the statute of limitations, but none of these are relevant to Petitioner’s case.

pleas are rare.” *Id.* “[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* (quoting *Schlup*, 513 U.S. at 329).

Petitioner states that “the only new evidence is the petitioners/defendant’s testimony which wasn’t given during the trial process; recantation of testimony by alleged victims and/or impeachment (polygraph exam was submitted).” (Dkt. 10 at 1.) He also asserts “a reasonable trier, juror, or fact finder would not have convicted me nor should you have confidence in the outcome of the trial in light of the testimonial evidence found within the transcript of record, which should raise more than enough reasonable doubt of guilt.” (*Id.* at 4.) Petitioner then argues the witnesses should not have been believed, and the trial court erred in accepting their testimony to convict him. (*Id.* at 5–9.)

First, an attack on a witness’s credibility is generally insufficient to establish actual innocence because a rational fact-finder may have chosen to believe the witness’s testimony. *See Sawyer v. Whitley*, 505

U.S. 333, 349 (1992) (newly discovered impeachment evidence “will seldom, if ever,” establish actual innocence); *In Re Byrd*, 269 F.3d 561, 577 (6th Cir. 2001) (“attacks on trial witness’s . . . reliability . . . do not provide proof of ‘actual innocence’”).

Second, although Petitioner suggests that the victims recanted their testimony, the record provides no support for this allegation. Finally, Petitioner’s own assertions of innocence based on what he would have testified to at trial are likewise insufficient to support his actual innocence claim, especially when the testimony includes no facts unknown to Petitioner at the time of trial. “A reasonable juror surely could discount [a petitioner’s] own testimony in support of his own cause.” *McCray v. Vasbinder*, 499 F.3d 568, 573 (6th Cir. 2007) (collecting cases).

In sum, there is no new, reliable evidence, and Petitioner’s arguments do not demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. Petitioner is therefore not entitled to equitable tolling. His habeas petition is untimely and must be dismissed. Accordingly, the Court grants respondent’s motion.

IV. Certificate of Appealability

Before Petitioner may appeal, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a court denies relief on procedural grounds without addressing the merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000). Having undertaken the requisite review, the court concludes that jurists of reason could not debate the Court’s procedural ruling. A certificate of appealability will therefore be denied. Leave to appeal *in forma pauperis* is also denied because an appeal of this order could not be taken in good faith. 18 U.S.C. § 1915(a)(3).

V. Conclusion

For the reasons set forth above, respondent's motion to dismiss (Dkt. 7) is GRANTED, and the petition for a writ of habeas corpus (Dkt. 1) is DENIED.

Because the Court did not rule on the petition for a writ of habeas corpus before Petitioner filed a response to the motion to dismiss, the motion to defer ruling (Dkt. 9) is DENIED as moot.

A certificate of appealability and permission for leave to appeal *in forma pauperis* are DENIED.

IT IS SO ORDERED.

Dated: May 1, 2017
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on May 1, 2017.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager

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