APPendix A

No. 18-3326

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 08, 2018
DEBORAH S. HUNT, Clerk

ROBERT L. BURNS, JR.,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
TIM SHOOP, Warden,)
)
Respondent-Appellee.)

Robert L. Burns, Jr., a pro se Ohio prisoner, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He has applied for a certificate of appealability ("COA") and moves to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 22(b), 24(a)(5).

A jury convicted Burns of three counts of illegal use of a minor in nudity-oriented performance, three counts of corruption of a minor, and one count of corrupting another with drugs. *See* Ohio Rev. Code §§ 2907.323(A)(1), 2907.04(A), 2925.02(A)(4). On April 25, 2012, he was sentenced to thirteen years and three months in prison. The Ohio Court of Appeals affirmed the trial court's judgment on direct appeal. *State v. Burns*, No. 2012-CA-37, 2012 WL 4831630 (Ohio Ct. App. Oct. 9, 2012) (unpublished opinion). Burns did not seek to appeal to the Ohio Supreme Court.

On February 23, 2015, Burns filed a motion in the trial court for "production of *Brady* [*v. Maryland*, 373 U.S. 83 (1963),] material." On June 22, 2017, he filed a "motion to compel disclosure of exculpatory material and information." The trial court denied the motion to compel disclosure. The Ohio Court of Appeals noted the filing of both motions and affirmed,

concluding that Burns had not been "erroneously denied post-conviction disclosure of evidence." *State v. Burns*, No. 17-CA-0069, 2018 WL 335162, at *2 (Ohio Ct. App. Jan. 8, 2018) (unpublished opinion).

Meanwhile, on October 23, 2015, Burns filed a petition for post-conviction relief. The trial court denied the petition as untimely, and the Ohio Court of Appeals affirmed. *State v. Burns*, No. 15-CA-98 (Ohio Ct. App. July 6, 2016), *perm. app. denied*, 67 N.E.3d 824 (Ohio) (table), *cert. denied*, 138 S. Ct. 73 (2017).

In his § 2254 petition, placed in the prison mailing system on January 22, 2018, Burns raised two grounds for relief: (1) the trial court abused its discretion by denying his post-conviction petition where new evidence demonstrated that police officers planted evidence and where tampering with evidence resulted in the conviction of an innocent person, and the suppression or exclusion of this evidence at trial violated the Constitution; and (2) trial counsel rendered ineffective assistance by (a) allowing the introduction of tainted evidence at trial and the suppression of exculpatory and impeachment evidence, (b) not filing a motion for a suppression hearing which permitted the prosecution to use illegally seized evidence, (c) not seeking a competency evaluation, and (d) not moving to dismiss the indictment for a speedy trial violation, and appellate counsel rendered ineffective assistance by not having a prior proceeding transcribed and by not raising issues such as ineffective assistance of trial counsel and the violation of his right to a speedy trial.

Without requiring service on the State, a magistrate judge recommended dismissing the § 2254 petition as untimely. Upon de novo review and over Burns's objections, the district court adopted the magistrate judge's recommendation and dismissed the § 2254 petition. The court declined to issue a COA.

In his COA application, Burns reasserts his claims that the trial court abused its discretion by denying his post-conviction petition and that trial and appellate counsel rendered ineffective assistance.

An individual seeking a COA is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason 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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the appeal concerns a district court's procedural ruling, a COA should issue when the petitioner demonstrates "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A prisoner must file a § 2254 petition within one year after the latest of certain events, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" and "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A), (D). A prisoner may toll the limitations period by properly filing a state application for post-conviction review. *See* 28 U.S.C. § 2244(d)(2).

Jurists of reason would agree that Burns's § 2254 petition was not filed within one year of the conclusion of direct review. *See* 28 U.S.C. § 2244(d)(1)(A). His convictions became final on November 23, 2012, when he could no longer seek a timely appeal before the Ohio Supreme Court. *See* Ohio S. Ct. Prac. R. 7.01(A)(1)(a)(i) (providing forty-five days to file jurisdictional appeal); *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). Burns then had one year, i.e., until November 23, 2013, to file his § 2254 petition unless he tolled the limitations period by properly filing for collateral relief in state court. *See* 28 U.S.C. § 2244(d)(1), (d)(2). Burns neither filed a § 2254 petition in the district court nor sought collateral relief in state court by that date. Moreover, his post-conviction petition, filed October 23, 2015, was not "properly filed" because the state court rejected it as untimely. *See Allen v. Siebert*, 552 U.S. 3, 7 (2007). Additionally, the post-conviction petition would not have revived the limitations period. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) ("The tolling provision does not . . . 'revive' the limitations period . . .; it can only serve to pause a clock that has not yet fully run.") (citation omitted).

Jurists of reason would agree that Burns did not make a substantial showing that he filed his § 2254 petition within one year of "the date on which the factual predicate of the claim or

claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Burns's vague allegations of planted or otherwise tainted evidence did not include the dates that he purportedly discovered this new evidence. Additionally, his daughter testified at trial that Burns stated that he had been "set up" by the police and others. *Burns*, 2012 WL 4831630, at *1. Thus, Burns knew of the alleged factual predicate for this claim by the time of trial.

Jurists of reason would further agree that Burns is not otherwise entitled to equitable tolling. A prisoner is entitled to equitable tolling of the limitations period upon a showing that he was diligently pursuing his rights but was prevented from timely filing the § 2254 petition by an extraordinary circumstance. *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Jones v. United States*, 689 F.3d 621, 627 (6th Cir. 2012). Alternatively, the untimeliness of a petition may be excused on the ground of actual innocence where a petitioner "show[s] that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

Burns failed to describe any actions suggesting that he diligently pursued his rights but failed to timely file his petition because of any extraordinary circumstance. Although he vaguely alleged that mental incompetence may have interfered with his pursuit, he did not provide any details regarding his alleged mental incompetence or how it caused him to file an untimely habeas petition. *See Watkins v. Deangelo-Kipp*, 854 F.3d 846, 851 (6th Cir.), *cert. denied*, 138 S. Ct. 101 (2017).

Further Burns has not supported a claim of actual innocence. Jurists of reason would agree that Burns's "new evidence" did not cast doubt on the verdict. *See Schlup*, 513 U.S. at 317. As noted by the district court, the evidence at trial included, among other things, photographs, computer images, testimony by the juvenile victim, testimony by a witness to the filming and sexual activity, and police testimony regarding a controlled call from the victim to Burns.

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Accordingly, the court **DENIES** the COA application. The in forma pauperis motion is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

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

ROBERT L. BURNS, JR.,

Petitioner,

v.

WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION,

Respondent.

CASE NO. 2:18-CV-00055
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Chelsey M. Vascura

REPORT AND RECOMMENDATION

Petitioner, a state prisoner, has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on its own motion to consider the sufficiency of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. For the reasons that follow, it is **RECOMMENDED** that this action be **DISMISSED**.

Facts and Procedural History

Petitioner challenges his April 25, 2012 convictions after a jury trial in the Licking County Court of Common Pleas on three counts of illegal use of a minor in nudity oriented performance, in violation of O.R.C. § 2907.323; three counts of corruption of a minor, in violation of O.R.C. § 2907.04(A); and one count of corrupting another with drugs, in violation of O.R.C. § 2925.02. Petitioner was sentenced to an aggregate term of thirteen years and three months incarceration and classified as a sexually oriented offender. *See State v. Burns*, No. 2012-CA-37, 2012 WL 4831630 (Ohio Fifth App. Dist. Oct. 9, 2012). On October 9, 2012, the state appellate court affirmed the judgment of the trial court. *Id.* Petitioner apparently did not file an appeal to the Ohio Supreme Court.

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> On October 22, 2015, more than three years after his trial, appellant filed a pro se petition for post-conviction relief ("PCR"). Via a judgment entry issued on November 25, 2015, the trial court denied appellant's petition for post-conviction relief as untimely. On July 6, 2016, we affirmed. *See State v. Burns*, 5th Dist. Licking No. 15–CA–98, 2016–Ohio–4833. Appellant's attempts to have the decision reviewed by the Ohio Supreme Court and the United States Supreme Court were unsuccessful. *See State v. Burns*, 147 Ohio St.3d 1506, 2017–Ohio–261, 67 N.E.3d 824; *Burns v. Ohio*, 138 S.Ct. 73, 199 L.Ed.2d 50 (2017).
>
> In addition, on February 23, 2015, prior to his aforesaid PCR petition, appellant had filed a post-conviction "motion for production of *Brady* material."FN1 Then, on June 22, 2017, appellant filed a "motion to compel disclosure of exculpatory material and information." The State filed a response on August 3, 2017.
>
> On August 8, 2017, the trial court denied appellant's motion to compel disclosure via a judgment entry.
>
> On August 31, 2017, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:
>
> "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S 'MOTION TO COMPEL DISCLOSURE OF EXCULPATORY MATERIAL AND INFORMATION,' WHEN IT IS CLEAR THAT SOME OF THE DISCOVERY WAS SUPPRESSED, AND OTHER DISCOVERY WAS MARKED 'COUNSEL ONLY' BY THE PROSECUTION WHO SET OUT TO MISLEAD THE TRIAL PROCESS, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS."
>
> FN1: *See Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

State v. Burns, No. 17 CA 0069, 2018 WL 355162, at *1 (Ohio App. 5th Dist. Jan. 8, 2018). On January 8, 2018, the appellate court affirmed the judgment of the trial court. *Id.* Petitioner apparently did not file an appeal to the Ohio Supreme Court.

On January 22, 2018, Petitioner filed this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He asserts that the state courts improperly denied his petition for

post-conviction relief (claim one); and that he was denied the effective assistance of trial and appellate counsel due to the admission of tainted evidence, the suppression of exculpatory and impeachment evidence, prosecutorial misconduct, and based on his attorney's failure to file a request for a competency evaluation or a motion to dismiss due to the violation of Petitioner's right to a speedy trial (claim two).

Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996, imposes a one-year statute of limitations on the filing of habeas corpus petitions. 28 U.S.C. § 2244(d) provides:

> (d) (1) A 1–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 judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Applying the language of § 2244(d)(1)(A), Petitioner's conviction became final in November 2012, forty-five days after the appellate court's October 9, 2012, decision affirming Petitioner's convictions, and when the time for filing a timely appeal to the Ohio Supreme Court expired. *See Albert v. Warden, Chillicothe correctional Institution,* No. 2:16-cv-1110, 2017 WL 2189561, at *3 (S.D. Ohio May 18, 2017) (citing *Norris v. Bunting*, No. 2:15-cv-764, 2017 WL 749200, at *8 (S.D. Ohio Feb. 27, 2017) (citing *Crangle v. Kelly*, 838 F.3d 673, 679 (6th Cir. 2016); *Adams v. Chillicothe Correctional Institution*, No. 2:16-cv-00563, 2016 WL 3906235, at *2 (S.D. Ohio July 19, 2016) (citing *Worthy v. Warden*, No. 2:12-cv-652, 2013 WL 4458798, at *2 (S.D. Ohio Aug. 19, 2013)) (citing *Searcy v. Carter*, 246 F.3d 515, 518–19 (6th Cir. 2001); *Marcum v. Lazarof,* 301 F.3d 480, 481 (6th Cir. 2002)). The statute of limitations expired one year later, in November 2013. Petitioner's February 23, 2015 and October 22, 2015 post-conviction motions did not affect the running of the statute of limitations because Petitioner filed these actions after the statute of limitations had already expired. "State collateral actions filed after the statute of limitations has expired do not toll the running of the statute of limitations under 28 U.S.C. § 2244(d) (2)." *Lacking v. Jenkins*, No. 2:15-cv-3069, 2016 WL 4505765, at *3 (S.D. Ohio Aug. 29, 2016) (citing *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) ("The tolling provision does not...'revive' the limitations period (*i.e.,* restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations."). Moreover, the state courts dismissed Petitioner's October 22, 2015 post-conviction petition as untimely. "A post-conviction petition that is rejected as untimely by the state courts is not "properly filed" within the meaning of § 2244(d)(2) and does not toll the running of the statute of limitations. *See Henderson v. Bunting*, 698 F. App'x 244, 246-47 (6th Cir. 2017) (citing *Allen v. Siebert*, 552

U.S. 3, 7 (2007). Thus, the statute of limitations expired in November 2013. Petitioner waited more than three years later, until January 21, 2018, to execute this habeas corpus petition. (ECF No. 1, PageID# 29.)

According to the Petitioner, this action nonetheless is timely because he filed his post-conviction petition on the basis of newly discovered evidence that was not submitted at trial, and his court-appointed counsel was working with the State to secure his convictions and refused to provide him with paperwork that would establish that the State fabricated or tampered with evidence. Additionally, Petitioner claims that his convictions are the result of fraud upon the court, and the one-year statute of limitations therefore does not apply. He asserts that he is actually innocent and the victim of a manifest miscarriage of justice. He further argues that the trial court's failure to order a competency evaluation constitutes grounds for equitable tolling of the statute of limitations. (PageID# 29.) Petitioner's arguments are not persuasive.

Petitioner alleges that police tampered with a tape recording of a telephone conversation he had with the alleged victim in which he made incriminating statements regarding the allegations against him. (*See* ECF No. 1-1, PageID# 60.) He claims that police "planted" the evidence of drugs and child pornography in his home, and that some of the photographs of the alleged victim show that they were taken in the bedroom of his son, who recanted his testimony against Petitioner prior to trial. (ECF No. 1, PageID# 8-9.) Petitioner alleges that his attorney helped to conceal this exculpatory evidence from him. (PageID# 10.) However, Petitioner's allegations are entirely without support. Moreover, the record does not indicate that Petitioner could not have earlier raised these claims, or that he was prevented from doing so for the time period at issue here. In a letter dated October 3, 2016, the Licking County prosecutor noted that Petitioner's allegations of fraud and prosecutorial misconduct could have been raised at trial and

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that Petitioner knew of the factual basis for his claims as early as in March 2000, but at that time he absconded from the authorities and remained "on the run for many years" before he was re-arrested on September 12, 2011. (ECF No. 1-1, PageID# 41-44.)

Under the provision of 28 U.S.C. § 2244(d)(1)(D), the statute of limitations does not begin to run until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." The question is not when the petitioner first learns of the factual predicate for his claim but, rather, when the petitioner should have learned of the basis for his claim had he exercised reasonable care. *Townsend v. Lafler*, 99 F. App'x 606, 608 (6th Cir. 2004) (citations omitted). "Section 2244(d)(1)(D) . . . does not convey a statutory right to an extended delay while a habeas petitioner gathers evidence that might support a claim." *Brooks v. McKee*, 307 F. Supp. 2d 902, 906 (E.D. Mich. 2004) (citation omitted). It is the petitioner's burden to establish that he exercised due diligence in searching for the factual predicate for his habeas corpus claim. *Redmond v. Jackson*, 295 F.Supp.2d 767, 772 (E.D. Mich. 2008) (citing *Stokes v. Leonard*, 36 F. App'x 801, 804 (6th Cir. 2002)). He has failed to meet this burden.

Further, the record does not indicate that Petitioner acted diligently in pursuing relief or that some extraordinary circumstances prevented him from timely filing such that equitable tolling of the statute of limitations would be appropriate. *See Holland v. Florida*, 560 U.S. 631, 650 (2010) (A petitioner is entitled to equitable tolling only if he shows "1) that he has been pursuing his rights diligently, and 2) that some extraordinary circumstances stood in his way" and prevented timely filing) (citing *Pace*, 544 U.S. at 418). While a petitioner's mental incompetence that prevents him from timely filing a habeas petition may warrant equitable tolling of the statute of limitations, "a blanket assertion of mental incompetence is insufficient to

toll the statute of limitations . . . . Rather, a causal link between the mental condition and untimely filing is required." *Ata v. Scutt,* 662 F.3d 736, 742 (6th Cir. 2011) (citing *McSwain v. Davis*, 287 F. App'x 450, 456 (6th Cir. 2008)).

The one-year statute of limitations may be equitably tolled upon a "credible showing of actual innocence." *See Cook v. Ohio*, No. 2:15-cv-02669, 2016 WL 374461, at *10 (S.D. Ohio Feb. 1, 2016) (citing *Souter v. James*, 395 F.3d 577, 602 (6th Cir. 2005)). Accordingly, "a petitioner whose claim is otherwise time-barred may have the claim heard on the merits if he can demonstrate through new, reliable evidence not available at trial, that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt." *Yates v. Kelly*, No. 1:11-cv-1271, 2012 WL 487991, at *1 (N.D. Ohio Feb. 14, 2012) (citing *Souter*, 395 F.3d at 590). Actual innocence means factual innocence, not mere legal sufficiency. *See Bousely v. United States,* 523 U.S. 614, 623 (1998). However, the Petitioner must overcome a high hurdle in order to establish his actual innocence.

> The United States Supreme Court has held that if a habeas petitioner "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, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup*, 513 U.S. at 316, 115 S. Ct. 851, 130 L.Ed. 2d 808. Thus, the threshold inquiry is whether "new facts raise[ ] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317, 513 U.S. 298, 115 S. Ct. 851, 130 L.Ed.2d 808 .... "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup,* 513 U.S. at 324, 115 S. Ct. 851, 130 L.Ed.2d 808. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321, 513 U.S. 298, 115 S. Ct. 851, 130 L.Ed.2d 808.

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Souter, at 589-90 (footnote omitted). "To invoke the miscarriage of justice exception to AEDPA's statute of limitations . . . a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup*, 513 U.S. at 327). Petitioner has failed to provide credible evidence of actual innocence. He has provided no new reliable evidence supporting his claim of actual innocence. Thus, Petitioner has failed to establish he is entitled to equitable tolling under this exception.

Additionally, Petitioner's claim that the state court abused its discretion by dismissing his post-conviction petition does not provide him a basis for relief. "The Sixth Circuit has consistently held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review." *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007) (citing *Kirby v. Dutton,* 794 F.2d 245, 246-47 (6th Cir. 1986); *Roe v. Baker*, 316 F.3d 557, 571 (6th Cir. 2002)). *See also Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 854-55 (6th Cir. 2017) (declining to revisit the issue) (citations omitted).

Recommended Disposition

For the reasons set forth above, it is **RECOMMENDED** that this action be **DISMISSED.**

Procedure on Objections

If any party objects to this *Report and Recommendation*, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is

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made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. 636(B)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo,* and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn,* 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE

Appendix B C

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

ROBERT L. BURNS, JR.,

Petitioner,

Case No. 2:18-CV-00055
Chief Judge Edmund A. Sargus, Jr.
Magistrate Judge Chelsey M. Vascura

v.

WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION,

Respondent.

OPINION AND ORDER

On February 1, 2018, the Magistrate Judge issued a *Report and Recommendation* pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts recommending that this action be dismissed as barred by the one-year statute of limitations provided for under 28 U.S.C. § 2244(d). (ECF No. 4.) Petitioner has filed an *Objection* to the Magistrate Judge's *Report and Recommendation*. (ECF No. 5.) Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For the reasons that follow, Petitioner's *Objection* (ECF No. 5) is **OVERRULED**. The *Report and Recommendation* (ECF No. 4) is **ADOPTED** and **AFFIRMED.** This action is hereby **DISMISSED**.

Petitioner's *Motion for Leave to Proceed in forma pauperis* (ECF No. 6) is **DENIED** as moot. Petitioner already has paid the filing fee.

The *Motion for Discovery* (ECF No. 7) is also **DENIED.**

The Court **DECLINES** to issue a certificate of appealability.

In April 2012, Petitioner was convicted after a jury trial in the Licking County Court of Common Pleas on three counts of illegal use of a minor in nudity oriented performance, three counts of corruption of a minor, and one count of corrupting another with drugs. The Ohio Fifth

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District Court of Appeals affirmed the judgment of the trial court. *State v. Burns*, No. 2012-CA-37, 2012 WL 4831630 (Ohio Fifth App. Dist. Oct. 9, 2012). Petitioner did not file an appeal to the Ohio Supreme Court. In February and October of 2015, he unsuccessfully pursued post-conviction relief. He now asserts that the state courts improperly denied his petition for post-conviction relief and that he was denied the effective assistance of trial and appellate counsel due to the admission of tainted evidence, suppression of exculpatory and impeachment evidence, prosecutorial misconduct, and his attorney's failure to file a request for competency evaluation or motion to dismiss. The Magistrate Judge recommended dismissal of this action as time-barred and because claim one fails to provide a basis for federal habeas corpus relief. Petitioner objects to the recommendations of the Magistrate Judge.

According to Petitioner, the statute of limitations does not apply because his convictions resulted from fraud, prosecutorial misconduct, and racism. Petitioner claims that police fabricated and tampered with evidence. Additionally, he complains that his attorney refused to turn over certain records, including information regarding investigative services. Petitioner further alleges that defense counsel conspired with the prosecution to suppress evidence establishing that police fabricated or tampered with evidence by marking certain documents as "counsel only" and sealing other evidence which would have established that the alleged victim lied. Petitioner asserts that he has acted diligently in pursuing relief. He argues that his mental health issues, as can be shown after a competency evaluation and expansion of the record or discovery on this issue, may warrant equitable tolling of the statute of limitations. Petitioner claims that he is actually innocent. In support, he states that a report by Diamond Boggs, a computer forensic specialist, was excluded from trial, and Vicky King, his ex-wife, provided inconsistent statements against him.

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Request for Discovery

Petitioner has filed a motion for discovery pursuant to Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts, which provides as follows:

> (a) Leave of Court Required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
>
> (b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

Under this "good cause" standard, a district court should grant leave to conduct discovery in habeas corpus proceedings only "'where specific allegations before the court show reason to believe that the petitioner may, if the facts are more fully developed, be able to demonstrate that he is. . . entitled to relief. . . .'" *Bracy*, 520 U.S. at 908-909 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). *See also Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001), *cert. denied*, 537 U.S. 831 (2002).

> "The burden of demonstrating the materiality of the information requested is on the moving party." *Stanford*, 266 F.3d at 460. Rule 6 does not "sanction fishing expeditions based on a petitioner's conclusory allegations." *Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir.1997); *see also Stanford*, 266 F.3d at 460. "Conclusory allegations are not enough to warrant discovery under [Rule 6]; the petitioner must set forth specific allegations of fact." *Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994).

Williams v. Bagley, 380 F.3d 932, 975 (6th Cir. 2004), *cert. denied*, 544 U.S. 1003 (2005).

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Petitioner apparently seeks to obtain discovery of an unspecified nature in support of his claim of "police tampering" and "corruption of the judicial process." (ECF No. 7, PAGEID #119.) Petitioner asserts that he has been unable to obtain evidence in support of these allegations and refers in support to various exhibits he has attached to the *Petition,* including discovery material previously provided to him, an Amended Bill of Particulars, a letter from his former attorney, Diane M. Menashe, and a letter from the Licking County prosecutor's office rejecting Petitioner's request that charges be filed against police for tampering with evidence and purportedly planting the pornographic images found on his computer. The letter from the prosecutor's office is dated October 3, 2016, and indicates in relevant part that Petitioner was on the run for many years but that before he absconded, in 1999, his attorney requested a continuance of the trial date based on the alleged unavailability of a "tape specialist." (ECF No. 1-1, PAGEID #44.) However, the prosecutor goes on to indicate that

> [n]o report of any such "tape specialist" then ever surfaces as far as I can see. Thus I am left to conclude that there is no forensic opinion that supports your claims that any recordings were tampered with and that this may very well be because the "tape specialist" retained by your former attorney was not willing to provide you with a forensic opinion that supported your claims.

Id. Petitioner also refers to a Supplemental Discovery document provided to him upon the re-filing of charges in Case Number 12-CR-116, wherein the State indicated that "witnesses in this matter have differing recollections as to the number of photographs of J.W. and manner in which the photographs of J.W. were placed into the custody of the Newark Police Department." (ECF No. 1-1, PAGEID #47.) The letter from his attorney, Diane M. Menashe, is dated February 10, 2017, and indicates that she provided him with a complete copy of his case files:

> Enclosed you will find a complete copy of the discovery filed by the State in the above-referenced case files minus any audio that either is on CD Rom and/or cassette disc. (I have however

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> enclosed my attorney notes of all the witness interviews which were audio recorded.) Not enclosed are materials which were marked "counsel only" by the prosecutor's office. Those documents are not enclosed as I am not allowed to disclose them to you. Of course, you and I reviewed the "counsel only" documents together during the course of my representation, as is my policy with all clients and all such documents.

(ECF No. 1-1, PAGEID #51.)

Contrary to Petitioner's allegation here, none of the foregoing documents, and nothing in the record whatsoever, supports his claim that any unidentified additional discovery material will assist him in establishing his unsupported allegations that police fabricated or tampered with the evidence against him or that his attorney colluded with the prosecutor to prevent the discovery of such evidence. Petitioner does not indicate the nature of the discovery material he seeks. His discovery request constitutes the type of fishing expedition discouraged by the rules governing habeas corpus cases. Moreover, and most fatally to Petitioner's request, the discovery sought by Petitioner is not relevant to the sole issue presently before the Court, *i.e.*, whether the one-year statute of limitations forecloses this Court's review of the merits of Petitioner's claims.

Petitioner's request for discovery therefore is **DENIED**.

Objections

Petitioner's objections likewise are not well-taken. As discussed by the Magistrate Judge, applying the provision of 28 U.S.C. § 2244(d)(1)(A), the statute of limitations expired in November 2013. Petitioner waited more than four years, until January 22, 2018, to file this habeas corpus petition. Further, the record does not indicate either that Petitioner acted diligently in pursuing relief, or that equitable tolling of the statute of limitations is warranted. "The burden of production and persuasion rests on the petitioner to show he or she is entitled to equitable tolling." *Kitchen v. Bauman*, 629 F. App'x 743, 747 (6th Cir. 2015) (citing *Ata v.*

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Scutt, 662 F.3d 736, 741 (6th Cir. 2011)), *cert. denied*, 136 S. Ct. 1462 (2016). Petitioner has failed to meet this burden here. As discussed above, Petitioner's allegations of fraud and collusion, and his claim that police planted or fabricated evidence against him are entirely without support.[1] Additionally, and as discussed by the Magistrate Judge, the record does not indicate that Petitioner can establish that he is actually innocent of the charges. The state appellate court made the following findings of fact regarding the charges against Petitioner:

> A. Use of a Minor in a Nudity Oriented Performance.
>
> Three images of a nude juvenile ("J.W.") were presented in connection with three counts that alleged violations of illegal use of a minor in nudity-oriented performance. Two of the images were Polaroid camera photographs of a fully nude J.W. posing in Burns' bedroom. The third photograph was recovered from a zip disc seized from Burns" bedroom by police during the search warrant and later analyzed by the Ohio Bureau of Criminal Investigation. ["BCI"].
>
> J.W. confirmed that Burns had both a computer camera and Polaroid camera in his bedroom. Burns had requested J.W. to perform on the Internet and engage in sexual activity with him. While performing J.W. could view her own image on Burns' computer screen. J.W. identified all three nude images as her in 1999 and as having been taken in Burns' bedroom. J.W. also identified three other witnesses to Burns' behavior: his son, Ashlin O'Neal; his wife, Vicky Faye (fka Vicky Burns); and a friend, Oneida Roseberry.
>
> Diamond Boggs, computer forensic analyst with B.C.I. found a single nude image of J.W. on a zip disk recovered from Burns' bedroom. Boggs stated that where she recovered the image was not a default location and someone would have physically transferred it to that location. Boggs also found evidence of video streaming software on Burns' computer.

[1] The state appellate court affirmed the trial court's denial of Petitioner's June 2017, "motion to compel disclosure of exculpatory material and information" regarding items marked "counsel only" and other documents that Petitioner claimed had been sealed or excluded from trial, noting that the trial court had determined that "[t]here appears to be nothing in [appellant's] request that he did not or does not have access to through his own counsel." *State v. Burns*, No. 17 CA 0069, 2018 WL 355162, at *2 (Ohio App. 5th Dist. Jan. 8, 2018).

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Burns' cousin, Donna Glover, stated that in 1999 Burns dropped off his son, Ashlin O'Neal, at her home in Columbus. Burns told Glover that he was leaving O'Neal with her because O'Neal had been accused of taking nude photographs of a fourteen-year-old female and his biological mother was abusing O'Neal.

Oneida Roseberry, Woods' friend, confirmed that she was present in Burns' bedroom with J.W. in 1999 and observed a computer camera. Burns asked J.W. and Roseberry to perform on the Internet. J.W. did perform and took off her top.
Faye, Burns' ex-wife, confirmed that a computer camera and Polaroid camera were present in the bedroom. She further confirmed Burns was the most knowledgeable household member concerning operation of computers.

Burns' daughter, Alyssa Burns, confirmed the family had a Polaroid camera and that Burns was the most computer savvy individual in the home. She also testified regarding a recorded conversation she had with Burns when he was being held at the Licking County jail. During the recording, which was played for the jury, Burns stated he had fled and lived in Mexico for the past decade; placed blame on J.W., stating J.W. had constantly walked around his home naked; and reported that the entire case was a set up by his former employer, the Newark police, his brother, his wife and J.W.

Two members of the Newark Police Department, Timothy Elliget and William Hatfield, confirmed that unrelated Polaroid photographs, a computer camera and the zip drive were recovered during execution of the search warrant at Burns' residence in 1999.

Detective Kenneth Ballantine, lead detective on the case, interviewed Burns after his arrest on March 18, 1999. Burns claimed during the interview that the nude photographs of J.W. were taken for her boyfriend. Prior to the arrest Detective Ballantine had J.W. engage in a controlled call to Burns. During the call, J.W. told Burns that she had some brandy, was planning to get drunk, and wanted to take some pictures like before. J.W. noted that she did not have sex with anyone before and was not going to do so this time, either. Burns initially ignored her and told her to tell her mother that he would come over later to pick-up something. Nevertheless, J.W. continued to push about the photographs, so Burns eventually told her that he would check with some other people to see if they wanted to do the photographs.

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B. Corruption of a Minor.

J.W. relayed that Burns had sexual conduct with her in at least three specific locations when she was fourteen in support of three counts of Corruption of a Minor in violation of R.C. 2907.04(A). In one instance, Burns engaged in sexual conduct with her at the University Inn hotel on her birthday. J.W. and Burns also engaged in sexual conduct at a location known as Staddens Bridge and in Burns' home. Multiple other witnesses confirmed J.W.'s testimony and Burns' sexual behavior toward J.W.

The former owner of the University Inn, Praven Patel, confirmed that he had personally checked in a "Robert Burns" on November 3, 1998.

Roseberry testified that she had viewed Burns sucking on J.W.'s breast the night she was present in Burns' bedroom. Faye was present with Burns in the bedroom once and recalled Burns requesting J.W. take her shirt off.

J.W. did not report these allegations to the police until March 1999. J.W. claimed she was frightened because Burns had made comments that if he were caught, he would leave and make sure no was able to speak about the incidents. J.W. provided the police with some Polaroid pictures of her nude that she claimed Burns had taken.

J.W. admitted at trial that she did not tell the police everything at once, but gave them bits of information at a time. J.W. gave the police three handwritten statements, on March 17, 1999, May 6, 1999, and June 17, 1999. J.W. never mentioned the Staddens Bridge incident in any of her statements. In her second statement, J.W. noted the University Inn incident, but merely claimed that she had sex with O'Neal, not Burns. J.W.'s statement indicated that she did not know if she had sex with Burns because she blacked out. J.W.'s statement also indicated that she could not recall the date of the University Inn incident, even though she subsequently claimed that it occurred on her birthday.

C. Corruption of a Minor with Drugs.

Burns was also charged with two counts of corruption of a minor with drugs in violation of R.C. 2925.02. Burns had regularly furnished J.W. with Valium, marijuana and alcohol during the time he knew her. The Valium was kept in a headboard cabinet in his

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> bedroom in a prescription bottle. Faye confirmed that a Valium prescription was present in the headboard and that marijuana was regularly in the house. Timothy Elliget, a criminalist with the City of Newark Police Department photographed Burns' headboard during execution of the search warrant and observed an empty prescription bottle of Valium. By the time of trial, several items of evidence were lost by the police and were not available for use at trial. This included the empty Valium bottle, the Polaroid camera, and the computer web cam.
>
> The jury found Burns not guilty of Count 7, Corrupting Another with Drugs (Valium) in violation of R.C. 2925.04(A)(4)(a), a felony of the second degree. The jury found Burns guilty of Count 8 Corrupting Another with Drugs (Marijuana) in violation of R.C. 2925.02(A)(4), a felony of the fourth degree.

State v. Burns, No. 2012-CA-37, 2012 WL 4831630, at *1-3 (Ohio App. 5th Dist. Oct. 9, 2012). In short, the record fails to reflect that this is a rare and extraordinary case where the Petitioner has demonstrated that his actual innocence justifies consideration of the merits of his otherwise time-barred claims. *See Souter v. James*, 395 F.3d 577, 602 (6th Cir. 2005).

For all of the foregoing reasons, and for the reasons already detailed in the Magistrate Judge's *Report and Recommendation*, Petitioner's *Objection* (ECF No. 5) is **OVERRULED**. The *Report and Recommendation* (ECF No. 4) is **ADOPTED** and **AFFIRMED.** This action is hereby **DISMISSED**.

Petitioner's *Motion for Leave to Proceed in forma pauperis* (ECF No. 6) is **DENIED,** as moot. Petitioner already has paid the filing fee.

Petitioner's *Motion for Discovery* (ECF No. 7) is **DENIED.**

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court." *Jordan v.*

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Fisher, 135 S. Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal.)

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4 (1983)). When a claim has been denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes 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.*

This Court is not persuaded that reasonable jurists would debate the dismissal of Petitioner's claim as failing to provide a cognizable issue for relief. Therefore, the Court **DECLINES** to issue a certificate of appealability.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that the appeal would not be in good faith and that an application to proceed *in forma pauperis* on appeal should be **DENIED**.

The Clerk is **DIRECTED** to enter final **JUDGMENT**.

IT IS SO ORDERED.

3-6-2018

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE