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

Jun 29, 2018

DEBORAH S. HUNT, Clerk

ARTHUR L. CAMPBELL,

)

Petitioner-Appellant,

)

v.

)

SHERMAN CAMPBELL, Warden,

)

Respondent-Appellee.

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)

O R D E R

Arthur L. Campbell, a Michigan prisoner proceeding pro se, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Campbell requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

After a bench trial in 1986, Campbell was found guilty of second-degree murder, assault with intent to murder, and possession of a firearm during the commission of a felony. He was sentenced to serve 65 to 100 years of imprisonment for the murder conviction, 50 to 75 years of imprisonment for the assault conviction, and two years of imprisonment for the firearm conviction. The Michigan Court of Appeals affirmed Campbell's convictions and remanded his case for resentencing on the second-degree murder conviction. Campbell was ultimately resentenced to serve life imprisonment for his second-degree murder conviction and his direct appeal concluded in 1995.

In 2012, Campbell filed a motion in state court for an evidentiary hearing in lieu of a motion for relief from judgment, and a motion to dismiss the criminal charges against him, claiming that newly discovered evidence revealed that his convictions were based on unreliable and tainted ballistics evidence processed by the Detroit crime laboratory. The state trial court initially granted Campbell's motion for an evidentiary hearing but, following hearings, reversed

that decision and denied the motion for an evidentiary hearing and the motion to dismiss, which the trial court labeled as a motion for a new trial. The Michigan Court of Appeals construed Campbell's motions as motions for relief from judgment and denied his delayed application for leave to appeal. The Michigan Supreme Court denied leave to appeal on June 24, 2014, and denied reconsideration on September 29, 2014. *People v. Campbell*, 853 N.W.2d 335 (Mich. 2014).

Campbell mailed this habeas corpus petition from prison on July 17, 2015, and it is considered filed on that date. *See Houston v. Lack*, 487 U.S. 266, 276 (1988); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Campbell's petition raised eleven grounds for relief. The district court dismissed Campbell's habeas corpus petition as time-barred and denied a certificate of appealability. The district court also denied Campbell's construed motion for reconsideration of the certificate of appealability denial.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 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 a habeas corpus petition is denied on procedural grounds, the petitioner must show "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 federal habeas corpus petition is subject to a one-year statute of limitations that begins to run from the latest of four possible circumstances. 28 U.S.C. § 2244(d)(1)(A)-(D). Most of the time, the statute of limitations begins to run from "the date on which the [state court] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Here, Campbell argued that the statute of limitations began to run on a later date—"the date on which the factual predicate of the claim or

claims presented could have been discovered through the exercise of due diligence.” *See* 28 U.S.C. § 2244(d)(1)(D). The remaining circumstances do not apply in this case. *See* 28 U.S.C. § 2244(d)(1)(B)-(C).

Campbell’s convictions became final before April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act. Thus, he is entitled to a one-year grace period from April 24, 1996, to April 23, 1997, in which to file a § 2254 petition. *See Stokes v. Williams*, 475 F.3d 732, 734 (6th Cir. 2007) (per curiam). Campbell did not file his habeas corpus petition within that one-year grace period.

Although Campbell filed a post-judgment motion for an evidentiary hearing in 2012, that motion did not toll the statute of limitations because it was filed after the statute of limitations had expired. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Because Campbell’s habeas corpus petition was filed on July 17, 2015, more than eighteen years after the expiration of the one-year statute of limitations on April 23, 1997, it is time-barred under § 2244(d)(1)(A).

Campbell argued that the statute of limitations did not begin to run until he discovered the possibility that his convictions were supported by tainted ballistics evidence. But, as discussed by the district court, Campbell did not exercise the due diligence required to discover the facts to support his tainted-ballistics-evidence claim. The district court noted that Campbell relied on evidence dated as early as 2000 and as late as 2012, “well before the filing date of his 2015 habeas petition.” The district court also pointed to evidence that Campbell “may have known the factual predicate of his claim even by the time of his trial.” This evidence included inferences that could be made from arguments raised in Campbell’s habeas corpus petition that he believed the ballistics evidence was tainted at the time of his trial; his complaint filed “with the Michigan Attorney Grievance Commission in 1987 against his” trial and appellate attorneys “regarding the admission of this allegedly false firearms evidence”; his federal civil rights lawsuit filed in 2003 in which he attacked “the manner in which the firearms evidence was handled in his criminal case”; and his motion to revive his federal civil rights lawsuit filed in 2010 based on an “audit of the Detroit Police Crime laboratory.”

The district court also concluded that a police report prepared by Officer Tayrn Higdon, in which the surviving victim told Higdon that the shooter was white, not African American like Campbell, was not new evidence that could trigger a later start date of the statute of limitations under § 2244(d)(1)(D). The district court emphasized that Campbell acknowledged “that he possessed a copy of Higdon’s report at trial,” and that Campbell was aware, in 1988, of evidence that the surviving victim may have been involved in a similar murder. Because Campbell was aware of the factual basis to support his tainted-ballistics-evidence claim by 2012, at the latest, and more than one year elapsed before July 17, 2015, the date on which his habeas corpus petition was filed, Campbell’s habeas corpus petition is time-barred under § 2244(d)(1)(D).

In his application for a certificate of appealability, Campbell asserts that the “heart of [his] habeas petition is a newly-discovered ‘property book,’” which “contains the chain-of-custody of the firearms evidence, and the location of files containing documents that have never been disclosed to [him].” He argues that he did not discover that the property book existed until 2011, that he “should not be faulted for failing to specifically discover” the property book when he was unaware of its existence, and that he “exercised diligence in attempting to discover all material relevant to his case.” Campbell also faults the district court for failing to presume as correct “the state trial court’s finding that the firearms evidence was ‘arguably tainted.’”

These arguments do not support a later start date of the statute of limitations under § 2244(d)(1)(D). Under § 2244(d)(1)(D), a habeas corpus petition must be filed within one year of the date that “the factual predicate of the claim or claims presented” in the petition is discovered. Campbell was aware of the factual basis for his tainted-ballistics-evidence claim before he discovered the existence of the property book in 2011. For instance, Campbell relied in part on Sarah E. Hunter’s 2000 affidavit, the Michigan State Police’s 2008 audit of the Detroit Police Department’s firearms laboratory, and Wayne County Prosecutor Kym Worthy’s 2008 press release—all of which pre-dated his 2011 discovery of the property book. “[N]ew information discovered ‘that merely supports or strengthens a claim that could have been properly stated without the discovery . . . is not a factual predicate for purposes of triggering the

statute of limitations under § 2244(d)(1)(D).” *Jefferson v. United States*, 730 F.3d 537, 547 (6th Cir. 2013) (alteration in original) (quoting *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012)). Moreover, read in proper context, the state trial court did not find that the firearms evidence in Campbell’s case was “arguably tainted,” as Campbell suggests. But even if the state trial court did so find in 2012, that finding has no bearing on the commencement of the statute of limitations under § 2244(d)(1)(D).

The one-year statute of limitations set forth in § 2244(d) “is subject to equitable tolling in appropriate cases.” *Holland v. Florida*, 560 U.S. 631, 645 (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 circumstance stood in his way’ and prevented timely filing.” *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The district court concluded that Campbell failed to show diligence that would support equitable tolling because he did not explain why he allowed approximately eighteen years to elapse before he initiated a state proceeding for post-judgment review and filed this habeas corpus petition. *See id.*

Campbell argues that equitable tolling is applicable because the state trial court found that he had shown cause and prejudice when initially granting his motion for an evidentiary hearing. He also argues that “the Detroit Police Department’s inability to locate the” property book constitutes “an external impairment that prevented him from previously raising the issues presented.” Campbell’s argument ignores the state trial court’s subsequent reversal of its initial order granting his motion for an evidentiary hearing and essentially finding that no cause and prejudice were demonstrated to warrant his post-conviction motion. In addition, the Detroit Police Department’s inability to locate the property book is not an extraordinary circumstance that prevented Campbell from filing his habeas corpus petition. Campbell possessed the factual basis necessary to assert his tainted-ballistics-evidence claim long before he discovered the existence of the property book.

Moreover, Campbell did not make a credible showing of actual innocence that would allow his habeas corpus petition to proceed despite its untimeliness. *See Schlup v. Delo*, 513

U.S. 298, 327 (1995). “[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass” when his habeas corpus petition is time-barred. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence “gateway should open only when a petition presents ‘evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.’” *Id.* at 401 (quoting *Schlup*, 513 U.S. at 316). Campbell presented no new, reliable evidence demonstrating his innocence of the crimes for which he was convicted. Instead, the district court noted that Campbell merely claimed to be innocent based on an unsubstantiated assertion that the ballistics evidence was tainted, amounting “to little more tha[n] an accusation.” The district court also found that Campbell’s attack on the evidence presented at trial failed to establish that no reasonable juror would have found him guilty.

In his application for a certificate of appealability, Campbell asserts that the testimony of two eyewitnesses was not credible and that his own testimony supported an alibi. These arguments are insufficient to show Campbell’s actual innocence. *See Sawyer v. Whitley*, 505 U.S. 333, 349 (1992); *see also McCray v. Vasbinder*, 499 F.3d 568, 573 (6th Cir. 2007).

To the extent that Campbell challenges the district court’s failure to conduct an evidentiary hearing before ruling on his habeas corpus petition, his challenge fails. An evidentiary hearing was not necessary because “the record refutes [Campbell’s] factual allegations or otherwise precludes habeas relief.” *See Schriro v. Landigan*, 550 U.S. 465, 474 (2007).

Reasonable jurists would not debate “whether the district court was correct in its procedural ruling” dismissing Campbell’s habeas corpus petition as time-barred. *See Slack*, 529 U.S. at 484. Accordingly, the application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARTHUR L. CAMPBELL,

Petitioner,

Case Number 15-12615
Honorable David M. Lawson

v.

DAVID BERGH,

Respondent,

**OPINION AND ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS
AND DENYING MOTIONS FOR BOND AND FOR EVIDENTIARY HEARING**

Petitioner Arthur L. Campbell was convicted of assault, murder, and weapons charges in 1986 by a judge sitting without a jury in Detroit, Michigan. He was sentenced to lengthy prison terms, and his convictions became final in 1995, after his direct appeals took their course. Campbell's present habeas petition, filed in this Court in 2015, came after he mounted a new challenge to his convictions in the state court in 2012. Those motions attacked the ballistics evidence, which he says was mishandled by the Detroit Police Department crime laboratory. Because the petition was filed well after the federal habeas corpus statute's one-year limitations period expired, the claim of newly discovered evidence does not provide a new statute of limitations commencement date, and neither equitable tolling nor the claim of actual innocence can save it, the Court must dismiss it as untimely.

I.

Campbell was charged with fatally shooting Michael Stanley Darson and assaulting Lester James Crawford (who did not die from the shotgun blast) in Detroit on July 8, 1986. He was charged with first-degree murder, assault, and a firearm offense, but the murder conviction was

reduced to second-degree murder by the trial judge who conducted the bench trial. He was sentenced to lengthy prison terms.

Campbell filed a direct appeal. His convictions were affirmed, but the court of appeals remanded for resentencing on the second-degree murder conviction. *People v. Campbell*, No. 97808 (Mich. Ct. App. Nov. 2, 1989); *lv. den.* No. 88311 (Mich. Sup. Ct. Mar. 27, 1990). After two rounds of resentencing, with an intervening appellate remand, the Michigan Court of Appeals denied appellate relief on Campbell's murder and assault sentences, and the Michigan Supreme Court denied leave to appeal. *People v. Campbell*, No. 164214 (Mich. Ct. App. June 2, 1994); *lv. den.* 447 Mich. 1018, 527 N.W.2d 508 (1994); *reconsideration den.* 530 N.W.2d 752 (1995); *People v. Campbell*, No. 166168 (Mich. Ct. App. Oct. 4, 1993); *lv. den.* 446 Mich. 852, 521 N.W.2d 614 (1994).

Campbell did not return to court again until February 2012, when he filed a motion for an evidentiary hearing, questioning the validity of the ballistics evidence admitted at trial. A few months later, he filed a motion to dismiss the charges. The trial judge initially scheduled the hearing, but he later changed his mind and denied both motions, based in part on the "overwhelming evidence of the defendant's guilt." Despite Campbell's characterization of those motions, the Michigan appellate courts view them as motions for relief from judgment governed by Michigan Court Rule 6.500, *et seq.*, and denied appellate relief. *People v. Campbell*, No. 314976 (Mich. Ct. App. Oct. 8, 2013), *lv. to appeal den.*, 496 Mich. 857, 847 N.W.2d 621 (2014), *reh'g den.*, 497 Mich. 872, 853 N.W.2d 335 (2014), *cert. den. sub nom Campbell v. Michigan*, 135 S. Ct. 2357, *reh'g denied*, 136 S. Ct. 11 (2015).

On July 17, 2015, Campbell signed and dated the present federal habeas petition; it was deemed filed on that date. *See Ingram v. Barrett*, No. 15-11074, 2015 WL 1966470, at *1 (E.D. Mich. Apr. 29, 2015) (“Under the ‘prison mailbox rule,’ papers mailed to the Clerk by a prisoner are deemed to be filed on the day they are dated and signed even if received and docketed on a later date.”) (citing *Williams v. Birkett*, 670 F.3d 729, 732 n.1 (6th Cir. 2012); *Hudson v. Martin*, 68 F. Supp. 2d 798, 800 n.2 (E.D. Mich. 1999)). The Warden says, among other things, that the filing was not timely and should be dismissed.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) became effective on April 24, 1996 and governs the filing date for this action because the petitioner filed his petition after the AEDPA’s effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA amended 28 U.S.C. § 2244 to include a one-year period of limitations for habeas petitions brought by prisoners challenging state court judgments. *Vroman v. Brigano*, 346 F.3d 598, 601 (6th Cir. 2003). The one-year statute of limitations runs 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.

28 U.S.C. § 2244(d)(1). A habeas petition filed outside the prescribed time period must be dismissed. *See Akrawi v. Booker*, 572 F.3d 252, 260 (6th Cir. 2009); *Wilson v. Birkett*, 192 F. Supp. 2d 763, 765 (E.D. Mich. 2002).

Campbell argues that the limitations period triggers stated in subparagraphs (A) and (D) apply here. The Court will discuss each of them in turn.

A. Finality of the Conviction

Campbell's convictions became final in 1995 when his direct appeal came to an end. That occurred when the time for filing a *certiorari* petition in the Supreme Court expired, following the state supreme court's denial of leave to appeal the last resentencing decision. *See Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). Because that occurred before the AEDPA was enacted, he was entitled to a one-year grace period, beginning on April 24, 1996, to file his habeas petition or a motion for post-conviction relief that would toll the limitations period. *Stokes v. Williams*, 475 F.3d 732, 734 (6th Cir. 2007). That period expired on April 24, 1997.

None of Campbell's post-conviction motions served to toll the federal statute of limitations, because he did not file any of them during the grace period. His first motion for an evidentiary hearing was not filed until 2012, well after the grace period lapsed. A state court post-conviction motion that is filed after the limitations period expires cannot toll that period because there is no period remaining to be tolled. *Hargrove v. Brigano*, 300 F.3d 717, 718 n.1 (6th Cir. 2002). The AEDPA's limitations period does not begin to run anew after the completion of state post-conviction proceedings. *Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001).

Campbell contends that his direct review did not conclude until his post-judgment motions for an evidentiary hearing and to dismiss were fully litigated. He criticizes the state courts for

recharacterizing those motions as motions for relief from judgment under Michigan Court Rule 6.500 *et seq.* That argument is a non-starter. The Michigan court rules allow a criminal defendant only one direct appeal. Mich. Ct. R. 7.205(F)(2); *see People v. Jackson*, 465 Mich. 390, 396, 633 N.W. 2d 825 (2001). All challenges to the conviction thereafter must be treated as a motion for relief from judgment under court rule chapter 6.500, regardless of the label the defendant assigns to it. *See People v. Kincade*, 206 Mich. App. 477, 481-82, 522 N.W. 2d 880 (1994); *see also Hudson v. Martin*, 68 F. Supp. 2d 798, 800 (E.D. Mich. 1999). Federal courts defer to the state court's characterization of their procedures. *See Redmond v. Jackson*, 295 F. Supp. 2d 767, 771 (E.D. Mich. 2003) (citing *Orange v. Calbone*, 318 F.3d 1167, 1170 (10th Cir. 2003)). None of Campbell's post conviction motions tolled the one-year habeas period of limitations under 28 U.S.C. § 2244(d)(1)(A), and his petition is untimely when measured by that subsection.

B. Newly Discovered Evidence

Under section 2244(d)(1)(D), the limitations period begins when the factual predicate for the claim could have been discovered through the exercise of due diligence. *Lott v. Coyle*, 261 F.3d 594, 605-06 (6th Cir. 2001); *Brooks v. McKee*, 307 F. Supp. 2d 902, 905-06 (E.D. Mich. 2004) (citing cases). The period begins when the petitioner knows or could have discovered the important facts for the claim, not when the petitioner recognizes the legal significance of those facts. *Brooks*, 307 F. Supp. 2d at 905-06. The start of the limitations period "does not await the collection of evidence which supports the facts." *Id.* at 906. A habeas petitioner bears the burden of showing that he exercised due diligence in discovering the factual predicate for his claims within the year preceding his petition filing. *DiCenzi v. Rose*, 452 F.3d 465, 471 (6th Cir. 2006).

Campbell argues that the state prosecutor failed to disclose material evidence to the petitioner prior to trial, in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). That evidence, he says, would establish that the police fabricated, planted, or mishandled the firearms evidence recovered in this case and committed perjury at his trial concerning the ballistics evidence. Campbell also points to a police report from Officer Tayrn Higdon, in which the surviving victim, Lester Crawford, informed the officer that the shooter was white (the petitioner is African-American). He also alleges that Crawford had been involved in a similar murder not long after the Campbell's conviction.

Campbell has not met his due diligence burden here. To support his contention that the police planted evidence and committed perjury, he relies heavily on a June 27, 2000 affidavit signed by attorney Sarah E. Hunter, stating that she had interviewed a suspended police officer named Ritchie Harrison. Harrison informed Ms. Hunter and a retired F.B.I. agent working for her that Gerald Stewart, the chief of the Detroit Police Department's Major Crimes Unit, engaged in illegal tactics by destroying or hiding exculpatory evidence in cases and instructed the other officers to testify falsely. Harrison supposedly told attorney Hunter that the officers in the homicide division were instructed to maintain two files for a single case, one to contain any inculpatory evidence needed to obtain a warrant, and a parallel file that contained any exculpatory evidence. Campbell also points to a Michigan State Police Department Audit of the Detroit Police Department's firearms laboratory from October 28, 2008, which found significant errors in 10% of the cases that were reviewed between 2003 and 2008. As a result of these errors, Wayne County Prosecutor Kym Worthy issued a press release on September 25, 2008 ordering the re-testing of past cases to ensure that the firearms evidence was accurate.

After learning of the audit, Campbell wrote the Wayne County Prosecutor's Office's Conviction Integrity Unit (CIU) and asked that the ballistics evidence in his case be re-tested. In an e-mail sent from Assistant Prosecutor Rebekah White to attorney Hugo Mack on June 24, 2011, White informed Mack that evidence from older cases like the petitioner's was not recorded in the police department's current property system or previous database, but was recorded in a property book that she was trying to locate. On August 9, 2011, White sent a letter to Mack stating that the property book could not be located, making it impossible to retest the firearms evidence in the petitioner's case. Campbell contends that before the scheduled evidentiary hearing, another assistant prosecutor, Suzy T. Tawee, informed him that she found records on the location of the property book. Campbell insists that the representation was confirmed in a letter from Ms. Tawee dated December 10, 2012. But that letter suggests that the Wayne County Prosecutor's Office was still unable to find the property book.

Regardless of the outcome of that search, however, Campbell certainly knew about this evidence in 2012, well before the filing date of his 2015 habeas petition. Moreover, he may have known the factual predicate of his claim even by the time of his trial. That inference can be drawn from several of the arguments he makes in his habeas petition. For instance, Campbell argues that his trial counsel was ineffective when she stipulated to Officer Dragan's July 14, 1986 laboratory report; he contends that Dragan's conclusion that the 16-gauge Western Super #5 shotgun shell admitted under evidence tag 320944 was fired from the same shotgun used in the murder was "forensically impossible" because the weapon used in the shooting had not been recovered at the time that this shotgun shell and the corresponding lead pellets "materialized six days later." Campbell argues that his trial counsel should have known from the evidence technician's report and

the laboratory analysis that she had received before trial that the firearms evidence had been tampered with because Officer Dragan's report was at odds with the evidence technician report and Officer Lloyd's testimony.

Next, Campbell contends that his trial attorney was ineffective by not objecting to the admission of a spent .16 gauge Winchester Western #1 buck shotgun shell admitted under evidence tag 320969, which supposedly was recovered from Campbell's store in Highland Park, Michigan. But there already was a stipulation that Officer Lloyd recovered that shell from the crime scene on July 8, 1986. The petitioner contends this evidence shows that Officer Lloyd planted this shotgun shell at the petitioner's store on July 10, 1986.

Campbell also asserts in his reply brief that he "has maintained since his 1986 conviction that the firearms evidence in his case was mishandled or fabricated."

In addition, Campbell contends that he asked his appellate counsel to raise a claim alleging that the firearms evidence had been fabricated. And in his reply to the respondent's explanation as to why certain Rule 5 materials could not be furnished, Campbell acknowledged that he filed a complaint with the Michigan Attorney Grievance Commission in 1987 against his original and replacement trial attorneys and his first appellate counsel regarding the admission of this allegedly false firearms evidence.

There's more. In February 2003, Campbell filed a civil rights lawsuit in this Court attacking the manner in which the firearms evidence was handled in his criminal case. *See Campbell v. City of Detroit*, No. 2:03-CV-70786 (E.D. Mich.). After the lawsuit was dismissed, Campbell filed a motion to revive it in 2010 referring to the prosecutor's press release and the State Police's audit of the Detroit Police Crime laboratory.

In December 2008, Brian Zubel, an attorney and firearms expert, sent Campbell a letter telling him about a March 2008 report from the National Research Council of the National Academy of Sciences that concluded that forensic science had not shown that the markings lifted from firearms were unique. According to Zubel, “[t]he significance of the NRC Report to your case is that the DPD laboratory’s conclusion that all four shotgun shells were fired from the same weapon is not scientifically defensible.”

✓ It is quite apparent that with the exercise of reasonable diligence, Campbell could have discovered the factual basis for his suppression and destruction of firearms evidence well before 2014, which makes his 2015 habeas petition untimely on those issues.

The same must be said for the claims based on Officer Higdon’s police report stating that surviving witness Crawford told him that the shooter was white. Campbell acknowledged in the reply brief he filed in this case that he possessed a copy of Higdon’s report at trial and gave it to his attorney. Similarly, the evidence that Crawford supposedly committed a similar murder in 1988 and blamed another suspect was available early on. The basis for that contention was a newspaper article that his attorney sent him on August 30, 1988. The article actually says that Crawford witnessed a murder committed by a 15-year-old juvenile in Taylor, Michigan. The article reported that the juvenile’s defense attorney argued at a hearing in juvenile court that Crawford and another witness may have killed the victim and then blamed her client, but Crawford denied these allegations under oath at the hearing in juvenile court. Campbell was aware of that “evidence” in 1988.

Campbell has not met the burden imposed upon him under 28 U.S.C. § 2244(d)(1)(D), to permit him to use that subsection as a trigger for the statute of limitations.

C. Equitable Tolling

AEDPA's limitations period is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). But "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 circumstance stood in his way' and prevented timely filing." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *see also Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749-50 (6th Cir. 2011) (adopting *Holland*'s two-part test for determining whether a habeas petitioner is entitled to equitable tolling). "Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003) (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000)).

Campbell has not demonstrated diligence. He has not explained why it took him almost 18 years after his convictions became final (15 years after the one-year grace period expired) to seek state post-conviction review (not starting until 2012), or why it took him more than 18 years after the one-year grace period expired to seek federal habeas review (in 2015). True, he is untrained in the law, he was proceeding without a lawyer for a period of time, and he may have been unaware of the statute of limitations. The Sixth Circuit has held, however, that none of that warrants tolling. *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012) (*pro se* status is not an extraordinary circumstance); *Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004) (ignorance of the law does not justify tolling); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) (illiteracy is not a basis for equitable tolling); *Rodriguez v. Elo*, 195 F. Supp. 2d 934, 936 (E.D. Mich. 2002) (the law is "replete with instances which firmly establish that ignorance of the law, despite a litigant's *pro*

se status, is no excuse" for failure to follow legal requirements); *Holloway v. Jones*, 166 F. Supp. 2d 1185, 1189 (E.D. Mich. 2001) (lack of professional legal assistance does not justify tolling); *Sperling v. White*, 30 F. Supp. 2d 1246, 1254 (C.D. Cal. 1998) (citing cases stating that ignorance of the law, illiteracy, and lack of legal assistance do not justify tolling). The petitioner cannot satisfy the equitable tolling requirements under *Holland*.

D. Actual Innocence

Both the Supreme Court and the Sixth Circuit have held that a credible claim of actual innocence may equitably toll the one-year statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Souter v. Jones*, 395 F.3d 577, 588-90 (6th Cir. 2005). The courts, however, have set the bar high for such a showing. “[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.” *McQuiggin*, 569 U.S. at 386 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)); *see also Souter*, 395 F.3d at 590.

A qualifying claim of actual innocence requires a petitioner “to support his allegations of constitutional error with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence — that was not presented at trial.” *Schlup*, 513 U.S. at 324. Furthermore, actual innocence means “factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). In keeping with the Supreme Court’s pronouncements, the Sixth Circuit has recognized that the actual innocence exception should “remain rare” and “only be applied in the ‘extraordinary case.’” *Souter*, 395 F.3d at 590 (quoting *Schlup*, 513 U.S. at 321).

Campbell has not presented evidence sufficient to surpass the threshold. The contention that his firearms evidence was mishandled or fabricated remains unsubstantiated and amounts to little more than an accusation. His postulate that Crawford was the real shooter and framed him is founded upon a newspaper article.

Moreover, two eyewitnesses positively identified Campbell as the shooter. Undray Lewis, who knew Campbell from the neighborhood, saw him chase Crawford out of the house where Michael Darson was shot to death, heard Campbell shout, "I'm going to kill you," and saw him fire another shot. Lester Crawford rented the house from Campbell. He testified that at about 10:30 p.m. on July 8, 1986, Campbell kicked the door open and shot him with a shotgun. Crawford ran into the bathroom and tried to break a window to escape. Darson ran into the dining room or kitchen, and Crawford heard a gunshot while he was in the bathroom. Crawford managed to run out of the house. Crawford had worked for Campbell at his store for around two months and had seen the shotgun there.

Two police officers who responded to the crime scene stated that Crawford identified Campbell as the shooter.

Several others witnessed Michael Darson being chased or shot. Although none of those witnesses could identify the petitioner as the shooter, two of the witnesses, Sandra Lockett and Elrita Haynes, testified that the shooter was African-American. A third witness, Fred Sutherland, did not identify the assailant by race but did not identify him as being white.

Campbell testified in his own defense and denied that he shot anyone, although he did acknowledge being present at the house that night and bringing a shotgun there. But "[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) (citing cases). And even if Campbell's attacks on the evidence against him might cast some doubt on the state's firearms and ballistics offerings, they fall far short of establishing that "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin*, 569 U.S. at 386. Campbell's claim of actual innocence will not toll the one-year limitations period.

III.

Campbell also has filed motions for an evidentiary hearing and to expand the record, and a renewed motion for bond. The bond motion will be denied as moot, in light of this opinion denying the habeas petition. The current federal habeas jurisprudence will not allow the petitioner to "expand" the record or conduct an evidentiary hearing. The Supreme Court held that habeas review under 28 U.S.C. § 2254(d)(1) must be "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The Sixth Circuit has taken the stance that *Cullen* "prohibits [federal courts] from considering new evidence in [a habeas] case." *Hodges v. Colson*, 727 F.3d 517, 541 (6th Cir. 2013). The court observed that the Supreme Court viewed the statute's language as "backward-looking"; therefore, habeas review "requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court." *Hodges*, 727 F.3d at 541 (quoting *Cullen*, 563 U.S. at 181). The court determined that evidentiary hearings under section 2254(e)(2) are available only in cases in which the deferential standard of review prescribed in section 2254(d)(1) does not apply. *Id.* at 541.

Campbell presented his arguments to the state courts. The trial court rejected them in part because of the overwhelming evidence adduced at trial. That decision is entitled to deference by

federal courts. And that dooms Campbell's request for an evidentiary hearing on his claims here under section 2254(d)(1). *See Campbell v. Bradshaw*, 674 F.3d 578, 590 n.3 (6th Cir. 2012) (considering affidavit submitted to the state courts on post-conviction review, but declining to consider testimony taken in federal evidentiary hearing because it was not part of the state court record).

IV.

The petitioner filed his habeas corpus petition long after the one-year statute of limitations expired. He is not entitled to equitable tolling of the limitations period. He has not shown that he is actually innocent of the crime for which he is imprisoned.

Accordingly, it is **ORDERED** that the petition for writ of habeas corpus is **DISMISSED**.

It is further **ORDERED** that the motions to expand the record and for an evidentiary hearing [dkt. #29, 28] are **DENIED**

It is further **ORDERED** that the renewed motion for bond [dkt. #36] is **DENIED**.

s/David M. Lawson
 DAVID M. LAWSON
 United States District Judge

Dated: February 5, 2018

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on February 5, 2018.

s/Susan Pinkowski
 SUSAN PINKOWSKI

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR L. CAMPBELL,

Petitioner-Appellant,

v.

SHERMAN CAMPBELL, WARDEN,

Respondent-Appellee.

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FILED
Oct 16, 2018
DEBORAH S. HUNT, Clerk

O R D E R

Before: SUTTON, DONALD, and THAPAR, Circuit Judges.

Arthur L. Campbell, a pro se Michigan prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR L. CAMPBELL,)
Petitioner-Appellant,)
v.)
SHERMAN CAMPBELL, WARDEN,)
Respondent-Appellee.)

FILED
Nov 01, 2018
DEBORAH S. HUNT, Clerk

O R D E R

Before: SUTTON, DONALD, and THAPAR, Circuit Judges.

Arthur L. Campbell petitions for rehearing en banc of this court's order entered on June 29, 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

*Judge Griffin recused himself from participation in this ruling.

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