UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Mr. John Patrick Parker
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Re: Case No. 18-3766, *John Collins v. Tim Shoop*
Originating Case No. 3:17-cv-02299

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Monica M. Page
Case Manager
Direct Dial No. 513-564-7021

cc: Ms. Sandy Opacich
Ms. Hilda Rosenberg

Enclosure

No. 18-3766

UNITED STATES COURT OF APPEALS
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JOHN R. COLLINS,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
TIM SHOOP, Warden,)
)
Respondent-Appellee.)

John R. Collins, an Ohio prisoner represented by counsel, applies for a certificate of appealability ("COA") in his appeal from the district court's judgment denying as untimely his 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A).

After the Ohio Internet Crimes Against Children task force identified Collins's IP address as sharing and downloading known images and videos of child pornography, the State of Ohio indicted Collins on twenty-five counts of pandering sexually oriented matter involving a minor, a second-degree felony. *See* Ohio Rev. Code § 2907.322(A)(1) or (2), (C). Collins also faced two other indictments that are not at issue in this appeal, one charging tampering with evidence and another charging bribery. On the eve of trial, Collins entered into a plea agreement in which the State dismissed the pending indictment and charged him with ten counts of fourth-degree-felony pandering sexually oriented matter involving a minor, *see* Ohio Rev. Code § 2907.322(A)(5) and (C), to which Collins pleaded guilty.

The trial court sentenced Collins to 170 months of imprisonment: consecutive sentences of 17 months on each count. He timely appealed, arguing that the trial court erred in denying his pretrial motion to suppress evidence seized from his computer and that his plea was not knowing and voluntary. The Ohio Court of Appeals affirmed his conviction and sentence. *See State v.*

Collins, Nos. 4–14–14, 4–14–15, 4–14–16, 2015 WL 2354309 (Ohio Ct. App. May 18, 2015). Collins filed a pro se motion for delayed appeal with the Ohio Supreme Court, which denied the motion. Over the next two years, Collins filed several more post-conviction motions and actions, all of them unsuccessful.

Collins then, through counsel, filed this § 2254 petition in federal court, raising four claims: (1) he never entered a guilty plea; (2) his appellate counsel was ineffective for not raising that claim on appeal; (3) he is actually innocent because he never pleaded guilty; and (4) the Antiterrorism and Effective Death Penalty Act ("AEDPA") is unconstitutional. A magistrate judge recommended denying the petition as untimely. The district court adopted that recommendation over Collins's objections, denied the petition, and declined to issue a COA. *Collins v. Shoop*, No. 3:17 CV 2299, 2018 WL 3490735 (N.D. Ohio July 20, 2018).

In his COA application, Collins argues that his actual innocence exempts him from the statute of limitations; that, because of his appellate counsel's ineffectiveness, equitable tolling should apply to make his petition timely; that the deference to state court decisions provided by 28 U.S.C. § 2254(d) should not apply; that the district court did not permit briefing on whether a COA should issue; and that AEDPA is unconstitutional.

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner[,]'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "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 district court has denied the petition 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 . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. "To meet [this] standard, it is not enough for a petitioner to allege claims that are

arguably *constitutional*; those claims must also be arguably *valid* or *meritorious*." *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017) (per curiam).

A § 2254 petition is subject to a one-year statute of limitations. *See* 28 U.S.C. § 2244(d). Collins does not argue that his petition was timely under § 2244(d), and, as the report and recommendation explained, it was not. Instead, in his first two arguments in his COA application, Collins asserts that the statute of limitations should not bar his petition on equitable grounds.

Collins first argues that the limitations period should not bar his petition because he is innocent. Under the equitable principle known as the fundamental-miscarriage-of-justice exception, a petitioner may escape the procedural bar of the statute of limitations by showing that he is actually innocent, that is, by presenting new evidence showing 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 v. Delo*, 513 U.S. 298, 327 (1995)).

Collins asserts that he is actually innocent because he never in fact pleaded guilty to the offenses. He raised a similar claim in state court on direct appeal, in the context of arguing that his plea was not knowing and voluntary. The Ohio Court of Appeals reviewed the plea hearing transcript and determined that Collins did plead guilty, knowingly and voluntarily. *See Collins*, 2015 WL 2354309, at *4-7. Regardless, Collins's argument does not satisfy the fundamental-miscarriage-of-justice exception, which requires a showing of "factual innocence, not mere legal insufficiency." *Bell v. Howes*, 703 F.3d 848, 854 (6th Cir. 2012) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). Collins has not even alleged, much less "demonstrate[d,] that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt." *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005). And he has also not presented new evidence that could establish his actual innocence, as the fundamental-miscarriage-of-justice exception demands. In sum, no reasonable jurist could debate that Collins does not satisfy the requirements of the fundamental-miscarriage-of-justice exception to the statute of limitations.

Collins next argues that the statute of limitations should be equitably tolled because his appellate attorney was ineffective. The statute of limitations for a § 2254 petition may be equitably tolled when a petitioner can show: "'(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)).

Collins asserts that he pursued his rights diligently but that he was thwarted when his appellate counsel failed to raise on direct appeal the argument that he presses now, that he is innocent because he never entered a guilty plea. But whether his attorney raised an argument in his state court appeal has no bearing on Collins's failure to file his § 2254 petition within the limitations period. It could not have, because the limitations period did not even begin to run until Collins's direct appeal ended. In any event, the district court held that Collins had not pursued his rights diligently, pointing out that he "fail[ed] to address several significant gaps in his filings" and "failed to appeal, or failed to timely appeal, several state court decisions." *Collins*, 2018 WL 3490735, at *2. No reasonable jurist could debate the district court's decision.

In his third argument in his COA application, Collins asserts that his claims were not adjudicated on the merits in state court and, thus, that this court should not give the state court decisions the deference called for by § 2254(d). Yet, because the district court denied Collins's petition on procedural grounds, whether deference should be given to the state court decisions is irrelevant.

Collins also argues that the district court did not permit briefing on whether a COA should issue, citing *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). But nothing in *Murphy*, AEDPA, the Federal Rules of Civil Procedure or Appellate Procedure requires briefing.

In his final argument, Collins claims that AEDPA is unconstitutional on either separation-of-powers grounds or as a violation of the Constitution's Suspension Clause. In support of his separation-of-powers argument, Collins quotes a concurring opinion in the Ninth Circuit's decision in *Irons v. Carey*, 505 F.3d 846, 855 (9th Cir. 2007). Yet that same opinion noted that "the Supreme Court has upheld the application of AEDPA in a multitude of cases, tacitly assuming its constitutionality." *Id*. at 857. And this court has held that AEDPA's statute

of limitations does not violate the Suspension Clause. *See Hill v. Dailey*, 557 F.3d 437, 438-40 (6th Cir. 2009). Thus, this claim does not present issues that are adequate to deserve encouragement to proceed further.

Accordingly, Collins's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk