

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HAROLD BLAKE,

Petitioner,

v.

Case No. 8:17-cv-2576-T-17TBM

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

This cause is before the Court on Petitioner Harold Blake's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus. Blake is represented by counsel. Blake is incarcerated pursuant to a judgment and sentence rendered in the Tenth Judicial Circuit, Polk County, Florida, in Case No. CF02-6050.

After review, the Court will dismiss the petition as time-barred and without merit.

PROCEDURAL HISTORY

Blake was convicted of first degree murder and attempted robbery with a firearm for the shooting and attempted robbery of Kelvin Young. (Exs. 1-3). The state trial court sentenced Blake to life in prison for the murder, and to fifteen years with a ten-year minimum

mandatory term for the attempted robbery. (Exs. 4 and 5). Blake's convictions and sentences were *per curiam* affirmed by the state district court of appeal on February 23, 2007. (Ex. 9). *Blake v. State*, 950 So. 2d 419 (Fla. 2d DCA 2007).

On January 14, 2008, Blake filed a Rule 3.850 motion for postconviction relief. (Ex. 10). The state trial court dismissed the motion March 27, 2008. (Ex. 11). On June 13, 2008, Blake again filed a Rule 3.850 motion. (Ex. 12). On July 27, 2010, Blake filed a notice of withdrawal of his motion and request for dismissal (Ex. 15), and his motion was dismissed (Ex. 16).

Blake did not file any further postconviction motions until April 6, 2012. (Exs. 17 and 18). On that date, he filed a Rule 3.850 motion through counsel. (Ex. 18). The motion was denied April 29, 2013. (Ex. 19). The state district court of appeal reversed and remanded for further proceedings. (Ex. 25). *See Blake v. State*, 152 So. 3d 66 (Fla. 2d DCA 2014)(2D13-2503).

On remand, the state trial court allowed Blake sixty days to amend claim three of his April 6, 2012, motion. (Ex. 35). On February 28, 2015, Blake, through counsel, filed a second amended Rule 3.850 motion. (Ex. 36). The motion was stricken without prejudice (Ex. 39) and, on December 7, 2015, Blake filed a third Rule 3.850 amended motion. (Ex. 40). The state trial court denied the motion January 19, 2016. (Ex. 42). Blake appealed and the state district court of appeal *per curiam* affirmed the denial of relief. (Ex. 47). *Blake v. State*, 205 So. 3d 597 (Fla. 2d DCA 2016). The mandate issued December 2, 2016. (Ex. 48).

Blake filed his present petition November 1, 2017. The petition is untimely.

TIMELINESS OF THE PETITION

Pursuant to 28 U.S.C. §2244(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a person in custody pursuant to the judgment of a state court has one year within which to file a §2254 federal habeas petition running 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.A. § 2244(d)(1). The "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the limitations period. 28 U.S.C. §2244(d)(2).

Blake makes no claim that § 2244(d)(1)(B) or (C) apply to the instant petition. Under § 2244(d)(1)(A) and § 2244(d)(1)(D), the petition is untimely. Blake's conviction and sentence became final May 24, 2007, when the time expired for petitioning for certiorari review following the February 23, 2007 affirmance of his convictions and sentences on direct appeal. See *Gonzalez v. Thaler*, 565 U.S. 134, 149 (2012). Under § 2244(d)(1)(A), he then had one year, absent any tolling motions, within which to file a timely federal habeas petition.

On January 14, 2008, 235 days after his convictions and sentences became final, Blake filed his first state postconviction motion, thereby tolling 130 days of the time for filing a federal petition. That motion was dismissed March 27, 2008, and the order dismissing the motion became final April 28, 2008, when the time expired for filing a notice of appeal. Another 46 untolled days expired before Blake again filed a Rule 3.850 postconviction motion June 13, 2008. That motion remained pending until it was dismissed at Blake's request July 27, 2010. Blake then had 84 days within which to file his federal petition, making the federal petition due on or before October 19, 2010.

Blake did not file any further postconviction motions until April 6, 2012. Thus, the time for filing a federal petition under § 2244(d)(1)(A) expired October 19, 2010 and Blake's petition, filed November 1, 2017, is untimely by more than seven years under § 2244(d)(1)(A).

Under § 2244(d)(1)(D), Blake would have one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence" within which to file his federal petition. Blake raises two claims in his petition. His first claim is that the State withheld evidence and/or presented false testimony. His second claim is that he is actually innocent.

In ground one, Blake asserts that the State withheld statements by Rosalind Mitchell; failed to disclose the State's conversations with Vanbossell Preston about potential benefits to Preston for his testimony against Blake; failed to disclose the extent of the assistance given to Demetrious Jones for his testimony; and presented false evidence through the testimony of Vanbossell Preston and Demetrious Jones.

In ground two, Blake asserts that the allegedly withheld statements and the recantation of trial testimony by Vanbossell Preston and Demetrious Jones demonstrate his actual innocence. Each claim is untimely under § 2244(d)(1)(D).

According to Blake's petition, the defense spoke to Rosalind Mitchell in November 2009, and discovered the information Blake alleges the State withheld related to Ms. Mitchell. Thus, under § 2244(d)(1)(D), Blake would have had one year from November 2009, absent any tolling, to file a timely federal habeas petition raising his claim related to Rosalind Mitchell. In November 2009, Blake's June 13, 2008, Rule 3.850 postconviction motion was pending and remained pending until Blake withdrew the motion July 27, 2010. Blake then had one year, absent any further tolling, within which to file a federal petition raising his claim related to Rosalind Mitchell, making the federal petition due on or before July 27, 2011. Blake did not file any further postconviction motions until April 6, 2012. Thus, the time for filing a federal petition raising his claim that the State withheld Rosalind Mitchell's statements expired July 27, 2011 and Blake's federal petition, filed November 1, 2017, is untimely with regard to that portion of his claims.

With regard to Blake's claim that the State failed to disclose the prosecutor's conversations with Vanbossell Preston, and failed to disclose the extent of the assistance given to Demetrious Jones, with due diligence, the defense could have discovered the facts upon which these claims are based prior to trial by deposing Preston and Jones. Thus, the federal petition is untimely with regard to these claims.

Finally, with regard to Blake's claims that the State presented false evidence through the testimony of Vanbossell Preston and Demetrious Jones, and his claim that he is actually

innocent, Blake relies on the fact that Preston and Jones have stated that their trial testimony was false. This fact was known to Blake in 2009.

In his petition, Blake asserts that his brother, James Blake, spoke to Petitioner Blake's investigator in 2009 and told the investigator that Preston told him in 2008 that he had lied at Blake's trial. (Doc. 1, pp. 8-9). Blake further asserts that Demetrious Jones told Blake's investigator in April 2009, that Blake did not request his assistance in getting rid of a gun, as he had testified at trial, and that another person, "Key", told him after trial that Richard Green was the shooter. (Doc. 1, p. 12). Thus, the factual basis of Blake's claims of false testimony and actual innocence, that Preston and Jones have disavowed their trial testimony, was known to Blake in 2009.

Because Blake had no tolling postconviction motions pending between July 27, 2010, when he withdrew his June 13, 2008, postconviction motion, and April 6, 2012, when he filed his second amended motion, more than one year of untolled time elapsed after Blake became aware of the factual basis for his claims and his federal petition is untimely.

Blake is not entitled to an actual innocence exception to AEDPA's time-bar.

Although Blake claims in ground two of his petition that he is actually innocent, he is not entitled on that basis to avoid the time bar of his claims. A petitioner can avoid the one year time bar by making a credible showing of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 386 (2013). A credible showing of actual innocence requires a petitioner to identify new evidence and "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* 569 U.S. at 397 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Blake has failed to make such a showing.

As evidence of his actual innocence, Blake points to the testimony of Vanbossell Preston and Demetrious Jones at a June 19, 2012, evidentiary hearing in Blake's other homicide case, Polk County, Florida, case number CF02-5203, related to the August 12, 2002, shooting of Maheshkumar Patel. At that hearing, Preston and Jones testified that they lied at Blake's trial in the present case. In denying relief on Blake's newly discovered evidence claim, the state trial court found that Preston's and Jones' evidentiary hearing testimony was not credible and that Blake therefore failed to prove that the newly discovered evidence would probably produce an acquittal on retrial. The state court's finding that the recantations were not credible is supported by the record. (See Ex. 38, pp. 19-24, 33, and 37-42.)

The state trial court agreed with the state's arguments and found that the recantations by Preston and Jones were inherently incredible and did not entitle Blake to a new trial. (Ex. 42). For the same reasons, the recantations do not establish a credible claim of actual innocence and do not provide Blake with an exception to AEDPA's time bar.

As further evidence of his actual innocence, Blake points to statements by Rosalind Mitchell. (Ex. 38, pp. 25, 28-29). Ms. Mitchell's statements do not establish a credible claim of actual innocence.

In addition to the evidence and testimony mentioned in the state's response to Blake's second amended postconviction motion, there was testimony at trial that Blake made statements to law enforcement indicating that he was with Richard Green at the time of the August 12, 2002, Patel murder, and originally told law enforcement that he fired a shot on that date. (Ex. 2, p. 279).

For the reasons set forth in the state's response to Blake's second amended postconviction motion (Ex. 38), Blake has failed to meet his burden of establishing a credible claim of actual innocence. Based on Richard Green's testimony as read at trial, Blake's statement to law enforcement admitting his presence at and/or participation in the Patel robbery and homicide; evidence connecting the Young homicide and the Patel homicide; and the fact that the recantations by Preston and Jones were not credible, Blake cannot demonstrate that it is more likely than not that no reasonable juror would have convicted him had they been aware of Preston's and Jones' recantations, or of Rosalind Mitchell's statements. Therefore, he is not entitled to an actual innocence exception to AEDPA's time bar and his petition will be dismissed as untimely.

Furthermore, Blake's claims are procedurally barred and/or without merit.

EXHAUSTION

Before seeking § 2254 habeas relief for a violation of federal law, a petitioner "must exhaust all state court remedies available for challenging his conviction." *Preston v. Sec'y, Fla. Dep't. of Corr.*, 785 F.3d 449, 457 (11th Cir. 2015) (quoting *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1351 (11th Cir. 2012), and citing 28 U.S.C. § 2254(b)(1)). Blake presents two grounds in his petition. Both grounds were raised, in part, in Blake's 2015 state postconviction motion, and on appeal from the denial of the motion. Blake's claims are exhausted only to the extent raised in state court.

STANDARD OF REVIEW

With regard to exhausted claims, a petitioner is not entitled to habeas relief unless he can establish that a habeas claim adjudicated by the state courts "resulted in a decision

that was contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent, or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). "An unreasonable application of federal law is different from an incorrect application of federal law[.]" *Williams v. Taylor*, 529 U.S. 362, 410 (2000). As long as "some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied." *Loggins v. Thomas*, 654 F.3d 1204, 1220 (11th Cir. 2011). A state court's findings of fact are presumed to be correct and the federal court must accept a fact found by the state court unless the petitioner rebuts the finding "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). See also *Burgess v. Comm'r, Ala. Dep't. of Corrs.*, 723 F.3d 1308, 1315 (11th Cir. 2013). Moreover, "[a] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Applying these principles to Blake's petition, he is not entitled to relief on either of his claims.

DISCUSSION

GROUND ONE

Blake claims that the State withheld exculpatory evidence and presented false evidence at trial. Specifically, Blake claims that the State withheld Rosalind Mitchell's statements regarding Melinda Watson; the State's conversations with Vanbossell Preston about potential benefits for his testimony; and the extent of assistance given to Demetrious

Jones for his testimony. Blake further asserts that the State presented false testimony through Vanbossell Preston and Demetrious Jones. Blake bases this contention on the fact that Preston and Jones testified at a 2012 evidentiary hearing in Blake's other homicide case that their testimony at trial in **this** case was false.

This claim, except for the allegation that the State withheld information related to the extent of the assistance given to Demetrious Jones, was raised in Blake's second and third amended postconviction motions (Ex. 36 and Ex. 40), and on appeal from the denial of the motions (Ex. 46). The claim is exhausted only to the extent raised in Blake's postconviction motions. Blake's claim that the State withheld information related to the extent of the assistance given to Demetrious Jones was not presented to the state courts and is unexhausted and procedurally barred for that reason.

Moreover, the entire claim is procedurally barred because Blake's failed to comply with state procedural rules. In addition, the claim is without merit.

The state trial court denied Blake's claims that the State withheld exculpatory evidence and presented false testimony both on procedural grounds and on the merits. (Ex. 42). The court denied the motion on procedural grounds based on Blake's failure to attach affidavits or explain why affidavits could not be obtained as required by Florida Rule of Criminal Procedure 3.850.

A claim is procedurally defaulted if it was rejected on the independent and adequate state ground of procedural bar or default. *Coleman v. Thompson*, 501 U.S. 722, 734-35 and n. 1 (1991). Blake's failure to comply with Florida's procedural rules was an independent and adequate basis for the state court's decision, foreclosing review of Blake's claim on federal

habeas review.

Furthermore, Blake's claim is without merit because he has not shown that the state court's denial of relief was either contrary to or an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state courts.

Claims of Suppressed Evidence

Claims that the State withheld favorable evidence are governed by *Brady v. Maryland*, 373 U.S. 83 (1963). Pursuant to *Brady*, the state has an obligation to disclose evidence favorable to the defense which is material either to guilt or punishment. However, to establish that his due process rights were violated by a failure to disclose, Blake must show: (a) the evidence in question was favorable to him, either because it was exculpatory or impeaching; (b) the prosecutor suppressed the evidence, either willfully or inadvertently; and (c) prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

To establish prejudice, Blake must show that there is a reasonable probability that the outcome of the trial would have been different had the evidence not been suppressed. *Id.* at 281.

Rosalind Mitchell's Statements

Based on the record before it, the state court reasonably found that Blake failed to show that Ms. Mitchell's statements were suppressed by the State, or that he suffered any prejudice. As pointed out in the state's response to Blake's second amended postconviction motion:

[Blake] thinks that [Mitchell's statements] would serve to impeach both

Preston and Watson, and that [they were] suppressed by the State. See [Ex. 36, p. 12]. He claims that in the postconviction hearing in [Blake]'s death penalty case, CF02-05303A-XX, ASA Castillo rendered testimony that the information was never disclosed to [Blake]. See *id.*, citing Record on Appeal, *Blake v. State*, No. SC12-2102 at Vol. IX, 1405-11 (Fla. Mar. 28, 2011)[Ex. 59].

[Blake] overstates ASA Castillo's testimony. At the postconviction evidentiary hearing in [Blake]'s death penalty case, ASA Castillo actually testified that

I don't know, frankly, if [Mitchell's information] was [disclosed] or not. It was -- it was so focused on the credibility of Ms. Watson, and that there wasn't anything exculpatory about what [Mitchell] was saying as it related to the [Young murder]. It seemed to be totally focused on Ms. Watson. I-I may not have done it, but then again, I might have said something to [Trial Counsel].

Exhibit [59] at 1409-10. ASA Castillo chose not to call Watson as a witness because he thought that Mitchell may have been truthful and Watson was not present. See *id.* at 1407. For his part, Trial Counsel did not recall Mitchell or Watson and only vaguely recalled Vanbossell Preston. See Record on Appeal, *Blake v. State*, No. SC12-2102 at Vol. X, 1655-56 (Fla. Mar. 28, 2011) (Exhibit [60]). Trial Counsel's testimony was of no assistance in determining whether the State suppressed Mitchell's information. Mitchell was disclosed as a witness, and [Blake] could have deposed her. See Supplemental List of Witnesses, [Ex. 54]. [Blake] provides no basis other than speculation that Mitchell's information was not disclosed

(Ex. 38, pp. 30-31). For the reasons set forth in the state's response, Blake failed to prove that the State suppressed Mitchell's statements, and thus, failed to meet the first *Brady* requirement.

Furthermore, Blake failed to establish prejudice. As argued in state court:

Let us take [Blake's allegations] at face value, and assume *arguendo* that ASA Castillo did not disclose this information to Trial Counsel, and [Blake] could not have discovered it by deposing Mitchell, despite the Record evidence to the contrary. If true, that would satisfy the first and second *Brady*

components. [citations omitted]. Her information would have been impeaching as to Watson, as ASA Castillo remarked. See Exhibit [59] at 1409-10. It had nothing to do with Preston. See *id.* Where [Blake]'s claim then fails is in the materiality component. See, e.g. *Jackson*, 345 F.3d at 74. This is a near-outcome determinative standard. [Blake] would not have been able to employ Mitchell to defeat testimony from Vanbossell Preston, Richard Green, or Demetrius Jones, because Mitchell by her own admission was not present for the discussion between Preston and [Blake]. Her sole relevance is to discount Watson, and Watson having later led detectives to Preston is of no moment; Preston's testimony stands on its own, and as discussed *supra*, [Blake] probably would not have been allowed to call Watson merely to impeach her with Mitchell on an irrelevancy. Mitchell's evidence therefore was inadmissible. . . . there simply existed no way for [Blake] to employ Mitchell's information even assuming that ASA Castillo failed to disclose it. Further, the Record conclusively refutes any claim that Mitchell was not disclosed as a witness in the first place. [Blake]'s claim regarding Rosalind Mitchell should be denied .

(Ex. 38, pp. 31-32). For the reasons set forth in the state's response, Blake failed to prove prejudice, the third *Brady* requirement, and the state court's denial of relief on Blake's claim as it related to Ms. Mitchell was neither contrary to nor an unreasonable application of federal law.

Conversations with Vanbossell Preston

As for that part of Blake's claim alleging that the State failed to disclose its conversations with Vanbossell Preston about potential benefits for his testimony, Blake cannot demonstrate that the State failed to disclose any conversations with Preston, and he cannot establish. Preston testified at trial that he had six prior felony convictions and a prior conviction for a crime of dishonesty. (Ex. 2, pp. 617-18). He admitted that he received five years probation for six felonies after giving his statement to law enforcement in this case, and that he subsequently violated probation and was again allowed out of jail. (Ex. 2, pp. 619-20). He testified that the agreement for him to get out of jail was to appear at Blake's

trial and testify truthfully. (Ex. 2, p. 620).

At the evidentiary hearing in Blake's other homicide case, when asked whether he received any benefit from the State for his testimony at Blake's trial in the Kelvin Young murder case, Preston testified that the State made promises and that his testimony was based on those promises. (Ex. 53, p. 110). Trial counsel, Gil Colon, testified at the evidentiary hearing and was not asked whether the State had informed him about any conversations with Preston. (Ex. 53, pp. 40-51). Based on the testimony presented at trial and at the June 2012, evidentiary hearing, Blake has not established that any benefits were discussed that were not disclosed to trial counsel. Moreover, based on Preston's admissions at trial that he was a six-time convicted felon; that he had received five years probation for six felonies after giving his statement to law enforcement in this case; that he subsequently violated probation and was again allowed out of jail; and that the agreement for him to get out of jail was to appear at Blake's trial and testify truthfully, Blake has not shown that any undisclosed conversations related to further benefits would have had any effect on the verdict. The denial of relief on this claim was neither contrary to nor an unreasonable application of clearly established federal law and Blake is not entitled to relief.

Demetrious Jones

With regard to Blake's claim that the State failed to disclose the extent of the assistance given to Demetrious Jones for his testimony, that claim was not raised in state court and is unexhausted and procedurally barred. Furthermore, Blake has shown neither that the State failed to disclose the extent of the assistance given to Jones, and Blake has not established nor prejudice.

Claims of False Testimony

Blake claims that the State presented false evidence in the form of Vanbossell Preston's and Demetrious Jones' trial testimony. Blake bases this claim on recantations by Preston and Jones. The state trial court found that the recantations were not credible and that Blake had failed to prove his claim. The state trial court's denial of relief was neither contrary to nor an unreasonable application of clearly established federal law. Claims that the State presented false testimony are governed by *Giglio v. United States*, 405 U.S. 150 (1972). "To prevail on a *Giglio* claim, a [defendant] must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material *i.e.*, that there is any reasonable likelihood that the false testimony could have affected the judgment." *United States v. Stein*, 846 F.3d 1135, 1147 (11th Cir. 2017) (quoting *Ford v. Hall*, 546 F.3d 1326, 1331-32 (11th Cir. 2008)). Blake has failed to establish that any perjured testimony was presented at his trial. Although he asserts that the trial testimony of Vanbossell Preston and Demetrious Jones was false, he bases this claim on the fact that those two witnesses testified at an evidentiary hearing in his other homicide case that their testimony in this case was false. However, as previously discussed, the state trial court reasonably found that their evidentiary hearing testimony was not credible. Because their evidentiary hearing testimony was not credible, Blake failed to establish that their trial testimony was false and the denial of relief on this claim was neither contrary to nor an unreasonable application of clearly established federal law.

Ground one does not warrant habeas corpus relief.

GROUND TWO

Blake claims that he is actually innocent. In support of this claim, Blake relies on the fact that Vanbossell Preston and Demetrious Jones recanted their trial testimony, and on Rosalind Mitchell's statements regarding Melinda Watson. Blake was raised this claim in his second and third amended postconviction motions, and on appeal from the denial of the motions. Ground two is exhausted for federal habeas purposes. However, the ground two is without merit.

"Claims of actual innocence . . . have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Because the United States Supreme Court has never recognized a freestanding claim of actual innocence, the denial of relief on this claim can be neither contrary to nor an unreasonable application of established Supreme Court precedent. See also *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007) ("Our precedent forbids granting habeas relief based upon a claim of actual innocence . . . at least in non-capital cases.").

Furthermore, Blake raised this claim in his postconviction motions and the state circuit court denied relief finding that the recantations in this case were not credible, and that Blake had failed to establish that the result of his trial would be different in light of those recantations. These findings were reasonable and the denial of relief on this claim was neither contrary to nor an unreasonable application of any clearly established federal law.

Finally, as discussed previously, a credible showing of actual innocence requires a

petitioner to identify new evidence and “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*, *supra* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Blake has not shown that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence (the recantations), and he is not entitled to relief on this claim.

Ground two does not warrant habeas relief.

BLAKE'S REPLY (Document 20)

Blake claims that his petition is timely. Blake asserts that under §2244(d)(1)(B), false testimony and inaccurate representations made by the State at Blake's trial constituted an impediment to filing his state postconviction motion. Title 28 U.S.C. § 2244(d)(1)(B) allows a person in custody pursuant to the judgment of a state court one year within which to file a §2254 federal habeas petition running from “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[.]” However, Blake has not established that the State presented any false testimony or made any inaccurate representations at trial that prevented his timely filing either his state postconviction motions or his federal petition. Although Vanbossell Preston and Demetrius Jones testified at an evidentiary hearing in Blake's other murder case that their testimony at trial in **this** case was false, that evidentiary hearing testimony was found to be **not credible**. Thus, that testimony did not prove that any testimony presented at trial was false.

As for Blake's assertion that testimony was presented at the March 2011, evidentiary hearing in Blake's capital case concerning the prosecutor's knowledge that Melinda

Watson's statements were false, Melinda Watson did not testify at Blake's trial in this case. Thus, Melinda Watson's statements cannot form the basis for a claim that the State presented false testimony.

Furthermore, once Blake allegedly learned, in 2009, the facts upon which he bases his claim that the State presented false evidence, any impediment was removed.

In his reply, Blake claims that he did not learn of the factual basis of his claim relating to Rosalind Mitchell and Melinda Watson until the March 2011, hearing in his capital case. The Court disagrees. For the reasons set forth above, the Court has determined that Blake learned the factual basis of this claim in 2009. However, even if Blake had not learned of the factual basis for the claim until March, 2011, the instant petition would be untimely. Blake had no tolling motions pending between March, 2011 and April 6, 2012. Thus, even if Blake learned the factual basis of his claim in March, 2011, more than one year of untolled time elapsed prior to the filing of his federal petition, and the petition is untimely.

In arguing that his petition is timely, Blake erroneously asserts that "Respondent also argues that Mr. Blake could have learned of Preston and Jones' inconsistent statements by deposing the witnesses. See Response at 6-7." (Doc. 20, p. 7). Blake then argues about whether he was entitled to discovery in postconviction proceedings. However, Respondent did not argue that Blake could have learned of inconsistent statements by deposing these witnesses during postconviction proceedings. Respondent argued that Blake could have learned the facts underlying his claim, that the State failed to disclose the prosecutor's conversations with Vanbossell Preston and failed to disclose the extent of the assistance given to Demetrious Jones, by deposing Preston and Jones prior to trial.

Blake also asserts that he did not learn the factual basis for his claims that Vanbossell Preston and Demetrious Jones testified falsely at trial until the June 2012, evidentiary hearing in his capital case. The Court disagrees. For the reasons set forth above, the Court finds that Blake learned the factual basis of these claims in 2009.

In his reply, Blake admits that the defense investigator in his capital case was informed, in 2009, that Preston made an inconsistent statement about his trial testimony. about his trial testimony. (See Doc. 20, at pp. 4-5.) However, he asserts that he had to obtain a statement from Preston himself before he could file a postconviction motion raising the claim. However, the limitations period under §2244(d)(1)(D) runs from “the date on which the factual predicate of the claim or claims presented could have been discovered” not the date on which the petitioner obtains sufficient evidence to prove the claims. The factual predicate of Blake’s claims was that Preston and Jones had made statements inconsistent with their trial testimony. This fact was known to Blake in 2009.

Blake is not entitled to an actual innocence exception to the time-bar.

In arguing for an actual innocence exception to the time-bar, Blake claims, in footnote 5 of his reply (Doc. 20, p. 8), that Respondent misrepresented Jones’ 2012 evidentiary hearing testimony by stating that Jones “had problems where he had to call the prosecutor’s investigator or law enforcement three times in 2012, once where a person came to his house on [Blake’s] behalf.” Blake argues that Jones never testified that it was anyone related to Blake who came to his house.

The quoted argument is a reasonable inference from Jones’ testimony at the 2012 evidentiary hearing. At that hearing, Jones testified that he had testified at Blake’s capital

trial involving the Patel Homicide (Ex. 53, p. 159); that Rosa Greenbaum, an investigator for Blake's defense counsel, talked to him while he was in jail in 2009 (Ex. 53, pp. 159-61); that the prosecutor talked to him in 2010 about his conversation with Greenbaum (Ex. 53, pp. 164-65); and that he did not want any more to do with the case at that time because he had been having a lot of problems and had been labeled a snitch for testifying in the case. (Ex. 53, p. 165). Jones further testified that the prosecutor told him the case was coming back to court and to make sure that he was able to be found because he normally tried to dodge both the prosecution and Ms. Greenbaum when they come to his house. (Ex. 53, p. 166).

When asked how many conversations he had with the prosecutor, Jones testified that he normally calls the prosecutor when he has a problem; that he talked to them more than three times after he talked to Ms. Greenbaum; and that he had a problem involving somebody coming to his house, so he called the prosecutor and the prosecutor told him to talk to the Police Department. (Ex. 53, pp. 168-69).

All of the foregoing testimony taken together supports the inference that the person who came to Jones' house was connected to Blake and/or the defense team. Had the problem been with the prosecution, as Blake suggests in his reply, it is not likely that the prosecution would have advised him to talk to the Police Department. Furthermore, Jones' assertion that he had trouble with someone coming to his house was made shortly after his assertion that he did not want any more to do with the case because he had been having a lot of problems and had been labeled a snitch for testifying in Blake's capital case, and could reasonably be taken to be related to that testimony.

Moreover, even if Jones' assertion that he had trouble with someone coming to his house does not support the inference that it was someone connected to the defense, the state trial court's determination that Jones' recantation of his trial testimony was not credible was still reasonable based on Jones' consistent testimony during three trials in this case -- Richard Green's trial, and [Blake]'s trial in the Patel case.

Based on Richard Green's testimony as read at trial, Blake's statement to law enforcement admitting his presence at and/or participation in the Patel robbery and homicide, evidence connecting the Young homicide and the Patel homicide, and the fact that the recantations by Preston and Jones were not credible, Blake cannot demonstrate that it is more likely than not that no reasonable juror would have convicted him had they been aware of Preston's and Jones' recantations, or of Rosalind Mitchell's statements and he is not entitled to an actual innocence exception to AEDPA's time bar.

GROUND ONE

In his reply, Blake incorrectly asserts that "Respondent asserts that the information concerning the benefits Demetrius Jones obtained from the State was not presented to the state courts." (Doc. 20, p. 11). In its response, Respondent asserts that Blake did not present a **federal** constitutional violation based on the state's allegedly withholding information related to the benefits provided Jones. The Respondent did not argue that information concerning the benefits was not presented to the state courts. (Doc. 13, pp. 19-20).

This claim is procedurally barred because it was denied by the state trial court on procedural grounds because Blake failed to attach affidavits or explain why affidavits could

not be obtained as required by Florida Rule of Criminal Procedure 3.850. Blake asserts that the state's procedural rule was not adequate to procedurally bar his claim from federal review because the rule was not firmly established and regularly followed. He is wrong.

The affidavit requirement in Rule 3.850 has been approved by the Florida Supreme Court and is included in Florida's published Rules of Criminal Procedure. See Fla.R.Crim.P. 3.850(c)(7); In re Amendments to Florida Rules of Criminal Procedure & Florida Rules of Appellate Procedure, 132 So. 3d 734, 738 (Fla. 2013). This renders the rule "firmly established." See *O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir. 1996), *as amended* (Dec. 9, 1996), *aff'd*, 521 U.S. 151 (1997) ("As a general matter, whenever a procedural rule is derived from state statutes and supreme court rules, as this one is, the rule is necessarily 'firmly established.'"); *Oxford v. Delo*, 59 F.3d 741, 745 (8th Cir. 1995) (finding verification requirement in Missouri Supreme Court Rule 29.15 to be firmly established where the requirement was "plainly stated in the rule and had been in effect for more than a year when Oxford filed his amended motion.") As in *Oxford*, the requirement at issue here was plainly stated in the rule and had been in effect for more than a year when Blake filed his second and third amended motions for postconviction relief. Thus, the requirement was "firmly established."

The affidavit requirement is also "regularly followed." The requirement has been enforced by the two state appellate courts that have addressed it. See *Robinson v. State*, 204 So. 3d 487, 488 (Fla. 5th DCA 2016); *Good v. State*, 200 So. 3d 185 (Fla. 5th DCA 2016); *Walker v. State*, 185 So. 3d 561, 562 (Fla. 1st DCA 2016), *reh'g denied* (Feb. 29,

2016).

Because the rule's affidavit requirement is "firmly established and regularly followed," the requirement constitutes an independent and adequate state ground for denial of Blake's claim and renders the claim procedurally barred from federal habeas review. *See Johnson v. Lee*, 136 S. Ct. 1802, 1803-04 (2016).

Blake also argues that the state's rule was applied in an inconsistent or manifestly unfair manner. His claim that the rule was applied in an inconsistent manner is conclusory and he offers no facts to support that claim. His claim that the rule was applied in a manifestly unfair manner is based on his assertion that the transcript pages he provided were more beneficial to the court than affidavits. This argument does not render the state trial court's enforcement of the rule unfair, particularly when the court dismissed Blake's second amended motion for failure to include the required affidavits and provided him time to re-file the motion in compliance with the rule.

Blake also asserts that the state trial court's finding a procedural bar was based on an erroneous factual determination. He quotes a portion of Rule 3.850 that states: "If the affidavit is not attached to the motion, the defendant shall provide an explanation why the required affidavit **could not** be obtained." (Emphasis added). Blake then quotes a section of his third amended motion for postconviction relief that explains why he chose to provide portions of a transcript rather than the required affidavits; he argues that the state trial court factually and legally erred in finding that his explanation was not in compliance with Rule 3.850. However, a review of Blake's explanation reveals that he explains only why Blake **chose not** to provide the required affidavits, not why he **could not** provide the

affidavits, as required by the rule. Although Blake asserts in his reply that he could not obtain affidavits because he was not provided with investigative funds, he did not make this assertion in the state court. Blake has shown not shown that the state trial court committed any factual or legal error.

GROUND TWO

In his reply, Blake asserts that although the United States Supreme Court has never recognized a freestanding actual innocence claim, various lower courts and legislatures have. However, to be entitled to habeas relief, Blake must show that the state court's decision denying his actual innocence claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, **as determined by the Supreme Court of the United States;**" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. S 2254(d)(1), (2)(Emphasis added). Because the United States Supreme Court has never recognized a freestanding claim of actual innocence, the state trial court's denial of relief on this claim is neither contrary to nor an unreasonable application of established Supreme Court precedent. *See also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007) ("Our precedent forbids granting habeas relief based upon a claim of actual innocence . . . at least in non-capital cases."). Nor has Blake shown that the state court's denial of relief on this claim was based on an unreasonable determination of the facts.

Accordingly, the Court orders:

That Blake's 28 U.S.C. § 2254 petition is denied. The clerk is directed to enter judgment for the Respondent and to close this case.

Petitioner is not entitled to a certificate of appealability (COA). He does not have the absolute right to appeal. 28 U.S.C. § 2253(c)(1). A COA must first issue. *Id.* To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. See 28 U.S.C. § 2254(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Petitioner has not made the requisite showing. Finally, because he is not entitled to a COA, he is not entitled to appeal in forma pauperis.

ORDERED at Tampa, Florida, on August 8th, 2018.



ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Counsel of Record