No. USCA6 No 19-5181

IN THE

Supreme Court of the United States

SHAWN R. BOUGH,

Petitioner,

v.

KEN HUTCHISON, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For the Sixth Circuit

APPENDIX A-K

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APPENDIX A-

Shawn R. Bough, Petitioner, v. Kevin Hampton, Warden, No. 19-5181 (6th Cir. June 10, 2019)(Denial of the request for a COA).

Bough v. Hampton
United States Court of Appeals, Sixth Circuit. | June 10, 2019 | Not Reported in Fed. Rptr. | 2019 WL 4017414 (Approx. 3 pages)

2019 WL 4017414
Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.

Shawn R. BOUGH, Petitioner-Appellant,

v.

Kevin HAMPTON, Respondent-Appellee.

No. 19-5181
FILED June 10, 2019

Attorneys and Law Firms

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Thomas Austin Watkins, Office of the Attorney General, Nashville, TN, for Respondent-Appellee.

ORDER

*1 Shawn R. Bough, a pro se Tennessee prisoner, appeals a district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He has applied for a certificate of appealability and has moved to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 22(b), 24(a).

In 2001, a jury convicted Bough of felony murder and especially aggravated robbery of a hotel clerk. *See* Tenn. Code Ann. §§ 39-13-202(a)(2), 39-13-403. Bough was sentenced to life in prison. His co-defendant, Craig Shears, was convicted of the same offenses at a separate trial. *State v. Shears*, No. E2004-00797-CCA-R3-CD, 2005 WL 2148625 (Tenn. Crim. App. Sept. 7, 2005) (unpublished opinion). Shears testified at his own trial that he saw Bough shoot the victim and that Bough stated, "I think I might have killed him." *Id.* at *5.

The Tennessee Court of Criminal Appeals affirmed Bough's convictions on direct appeal. *State v. Bough*, No. E2002-00717-CCA-R3-CD, 2004 WL 50798 (Tenn. Crim. App. Jan. 12, 2004) (unpublished opinion). The Tennessee Supreme Court affirmed the decision in part, vacated the decision in part, and remanded the action. *State v. Bough*, 152 S.W.3d 453 (Tenn. 2004). On remand, the Tennessee Court of Criminal Appeals again affirmed Bough's convictions. *State v. Bough*, No. E2004-02928-CCA-RM-CD, 2005 WL 100842 (Tenn. Crim. App. Jan. 19, 2005) (unpublished opinion), *perm. app. denied* (Tenn. May 23, 2005).

On May 16, 2006, Bough filed a petition for post-conviction relief. The trial court denied the petition, and the Tennessee Court of Criminal Appeals affirmed the decision. *Bough v. State*, No. E2007-00475-CCA-R3-PC, 2007 WL 3026395 (Tenn. Crim. App. Oct. 18, 2007) (unpublished opinion), *perm. app. denied*, No. E2007-00475-SC-R11-PC (Tenn. Feb. 25, 2008) (order). Bough pursued state habeas proceedings from March 30, 2010, to May 24, 2011.

On March 7, 2016, Bough filed a state petition for a writ of error coram nobis, presenting an affidavit from Shears as newly discovered evidence. Shears stated in his affidavit, dated October 23, 2015, that he was solely responsible for the murder and robbery and that Bough had left the hotel before the crimes occurred. After an

evidentiary hearing, where Shears testified, the trial court denied the petition because Shears was not credible and other evidence supported Bough's convictions. The Tennessee Court of Criminal Appeals affirmed the denial. *Bough v. State*, No. E2017-00015-CCA-R3-ECN, 2017 WL 3017289 (Tenn. Crim. App. July 17, 2017) (unpublished opinion), *perm. app. denied* (Tenn. Oct. 3, 2017).

In his § 2254 petition, placed in the prison mailing system on May 15, 2018, and later amended, Bough asserted that: (1) the state courts' denial of a new trial based on his newly discovered evidence violated his right to due process and a fair trial; (2) he is entitled to habeas relief based upon this freestanding claim of actual innocence; (3) his criminal convictions are not supported by sufficient evidence; (4) trial counsel rendered ineffective assistance by failing to conduct an adequate investigation; (5) trial and appellate counsel rendered ineffective assistance by failing to challenge properly the felony-murder instruction as a constructive amendment to the indictment; (6) trial counsel rendered ineffective assistance by failing to challenge properly the admission of a recording of a 911 call by the victim and a police detective's testimony about the victim's utterances; and (7) trial and appellate counsel rendered ineffective assistance by failing to challenge properly certain comments by the prosecutor. Bough contended that his petition should be deemed to be timely because it was based on newly discovered evidence and further delay was due to misleading advice by his coram nobis counsel.

***2** The district court denied the § 2254 petition, reasoning that it was untimely and that equitable tolling did not apply. The court declined to issue a COA.

An individual seeking a COA is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the appeal concerns a district court's procedural ruling, a COA should issue when the petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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

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

Jurists of reason would agree that Bough's § 2254 petition is time-barred under § 2244(d)(1)(A). Direct review of Bough's convictions in state court ended on May 23, 2005, when the Tennessee Supreme Court denied permission to appeal. His convictions became final on Monday, August 22, 2005, when the ninety-day period for filing a certiorari petition with the United States Supreme Court expired. *See Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009); *Sherwood v. Prelesnik*, 579 F.3d 581, 585 (6th Cir. 2009).

The one-year limitations period then began to run, but was tolled 267 days later when Bough filed his post-conviction petition on May 16, 2006. *See* 28 U.S.C. § 2244(d)(2). The limitations period began to run again when the Tennessee Supreme Court denied leave to appeal on February 25, 2008. At this point, Bough had ninety-eight days, or until June 2, 2008, to file a timely § 2254 petition, but did not do so. He instead waited nearly ten years, until May 15, 2018. Bough's other attempts to obtain collateral relief in state court were filed after the expiration of the limitations period and did not revive it. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Thus, his petition is not timely under § 2244(d)(1)(A).

***3** The timeliness of Bough's § 2254 petition under § 2244(d)(1)(D) does not deserve further consideration. Bough failed to explain the circumstances behind obtaining Shears's affidavit and, thus, did not establish "the date on which the factual predicate" of his claims "could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

Jurists of reason would further agree that Bough is not entitled to equitable tolling. He does not allege that he was prevented from timely filing his § 2254 petition by an extraordinary circumstance. *See Holland*, 560 U.S. at 649. Nor has he made a substantial showing that no reasonable juror would have convicted him in light of Shears's affidavit and testimony. *See Perkins*, 569 U.S. at 399. Courts regard recantation testimony with extreme suspicion, especially where, as here, it occurs many years after the original testimony and no explanation for the delay is given. *See id.*; *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring); *Thomas v. United States*, 849 F.3d 669, 678 (6th Cir. 2017). Additionally, the coram nobis court's finding that Shears was not credible is entitled to great deference on habeas review. *See Howell v. Hodge*, 710 F.3d 381, 386 (6th Cir. 2013). Moreover, witnesses at trial indicated that Bough and Shears were together at the time of the shooting, that Bough told two people that he had shot someone, and that the victim indicated that two men robbed and shot him. *Bough*, 152 S.W.3d at 456-58.

The court declines to consider Bough's new arguments regarding discrepancies in testimony because he did not raise them below, and no exceptional circumstances exist that merit their consideration. *See Dealer Comput. \Servs., Inc. v. Dub Herring Ford*, 623 F.3d 348, 357 (6th Cir. 2010).

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

All Citations

Not Reported in Fed. Rptr., 2019 WL 4017414

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APPENDIX B-

Shawn R. Bough, Petitioner, v. Kevin Hampton, Warden, No. 19-5181 (6th Cir. September 25, 2019) (Denial of Petition to Rehear Enbanc the Denial of COA).

No. 19-5181

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 25, 2019
DEBORAH S. HUNT, Clerk

SHAWN R. BOUGH,

Petitioner-Appellant,

v.

KEVIN HAMPTON,

Respondent-Appellee.

ORDER

Before: CLAY, DONALD, and LARSEN, Circuit Judges.

Shawn R. Bough petitions for rehearing en banc of this court's order entered on June 10, 2019, 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

APPENDIX C-

Shawn R. Bough, Petitioner, v. Kevin Hampton, Warden, No. 19-5181 (6th Cir. September 10, 2019) (Denial of Petition to Rehear the Denial of COA).

No. 19-5181

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 10, 2019
DEBORAH S. HUNT, Clerk

SHAWN R. BOUGH,

Petitioner-Appellant,

v.

KEVIN HAMPTON,

Respondent-Appellee.

ORDER

Before: CLAY, DONALD, and LARSEN, Circuit Judges.

Shawn R. Bough, a pro se Tennessee 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

APPENDIX D-

Shawn R. Bough, Petitioner, v. Darren Settles, Respondent, No. 3:18-cv-00204, 2019 WL 430906 (E.D. Tenn. February 4, 2019) (Denial-dismissal of habeas corpus petition).

Bough v. Settles
United States District Court, E.D. Tennessee, Northern Division, at Knoxville. | February 4, 2019 | Slip Copy | 2019 WL 430906 (Approx. 6 pages)

2019 WL 430906
Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee, Northern Division,
at Knoxville.

Shawn R. BOUGH, Petitioner,

v.

Darren SETTLES, Respondent.

No.: 3:18-cv-00204 REEVES/POPLIN
Filed 02/04/2019

Attorneys and Law Firms

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MEMORANDUM OPINION

PAMELA L. REEVES, UNITED STATES DISTRICT JUDGE

*1 This is a pro se prisoner's petition for a writ of habeas corpus under 28 U.S.C. § 2254. Now before the Court are Petitioner's motion to amend the petition [Doc. 11] and Respondent's motion to dismiss the petition as time-barred [Doc. 13]. Petitioner filed a response in opposition to the motion to dismiss [Doc. 16]. The Court will address these motions in turn.

I. MOTION TO AMEND

For good cause shown therein, Petitioner's motion to amend [Doc. 11] will be **GRANTED**. As such, Petitioner's amended § 2254 petition [Doc. 11-2] is the operative pleading for all purposes, including the Court's consideration of Respondent's motion to dismiss.

II. MOTION TO DISMISS

A. BACKGROUND

1. Factual Background[1]

Throughout the night of December 19, 1998, and the next morning, Petitioner and Craig Shears, both college students, made several visits to hotel room 207 at the Expo Inn in Knoxville in which two female college students were staying. During one of these visits, one of the female college students noticed a gun under the bed where Petitioner was sitting. She told Petitioner not to forget his gun and Petitioner thanked her and put the gun in his sock.

Approximately an hour after Petitioner and Shears left the hotel room for the final time around nine a.m. on December 20, 1998, the female college students heard gunshots in the hotel lobby area. After multiple calls from Petitioner and shortly after the gunshots, Dante Smith came to the hotel in his car to pick up Petitioner and Shears. Smith saw Petitioner and Shears running from the lobby, and Petitioner was carrying a plastic tub with envelopes. According to Smith, Petitioner was

talking a lot in the car and stated that he had shot someone and was not sure if he had killed him or not.

Petitioner and Shears later visited Smith's apartment and counted money from the plastic container. During this visit, Petitioner asked Smith to hide the gun for him and for a ride to a bus stop or the airport, both of which Smith refused to do.

When police arrived at the scene of the shooting, the victim told a detective that two tall and slender black males with a small amount of facial hair had come from room 207, asked him for money, and shot him.

Also, a long-time friend of Petitioner's told police that at some point after the robbery and shooting, Petitioner told the friend that Petitioner had tried to "pull a heist" but that the man took too long, so "he let him have it." Further, after Petitioner was arrested, he told police that he had left the hotel around 9 or 9:30 a.m. with Shears by getting a ride from a guy named Ted who had taken them straight to Nashville.

*2 At Petitioner's trial, Shears chose to invoke his Fifth Amendment right not to incriminate himself, rather than testify [Doc. 12-3 p. 36–38]. Shears specifically stated that one of the reasons that he wished to remain silent during Petitioner's trial even though he had already testified under oath about the underlying incident at his own trial was his "safety in prison" [*Id.* at 39–40].

2. Procedural Background

In 2001, a jury convicted Petitioner of one count of felony first-degree murder and one count of especially aggravated robbery [Doc. 12-1 p. 68]. The trial court imposed a sentence of life for the felony murder conviction and a concurrent twenty-one-year sentence for the aggravated robbery conviction [*Id.* at 71, 75]. The TCCA ultimately affirmed these convictions. *State v. Bough*, No. E2002-00712CCA-R3-CD, 2004 WL 50798 (Tenn. Crim. App. Jan 12, 2004); *State v. Bough*, No. E2004-02928-CCA-RM-CD, 2005 WL 100842 (Tenn. Crim. App. Jan 19, 2005), perm. app. denied (Tenn. May 23, 2005). Petitioner subsequently filed both a petition for post-conviction relief and a petition for a writ of habeas corpus and the TCCA affirmed the denials of relief for these petitions. *Bough v. State*, No. E2007-00475-CCA-R3-PC, 2007 WL 3026395 (Tenn. Crim. App. Oct. 18, 2007), perm. app. denied (Tenn. Feb. 25, 2008); *Bough v. Morrow*, No. E2010-01194-CCA-R3-HC, 2011 WL 2118965 (Tenn. Crim. App. May 24, 2011).

On March 7, 2016, Petitioner filed a petition for a writ of error coram nobis in the state court asserting that an affidavit that Shears signed in 2015 exonerated Petitioner for the murder and robbery underlying his convictions [Doc. 12-44 p. 4]. After an evidentiary hearing, the trial court denied the motion based on its finding that Shears' testimony regarding Petitioner's innocence was not credible, specifically noting that Shears was "quite evasive" at the evidentiary hearing and that Shears' statement that if he had testified at Petitioner's trial, he would have testified that he shot the victim himself, was "in complete contradiction of virtually all other evidence" presented at both Petitioner's trial and Shears' trial [*Id.* at 10–12]. The TCCA affirmed the denial of this petition. *Bough v. State*, No. E2017-00015-CCA-R3-ECN, 2017 WL 3017289 (Tenn. Crim. App. July 17, 2017), perm. app. denied (Tenn. Oct. 3, 2017).

On May 15, 2018, Petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 [Doc. 1 p. 14]. In his memorandum in support of his amended petition [Doc. 11-2], Petitioner acknowledges that his petition would normally be considered time-barred, but asserts that Shears' affidavit and

testimony stating that he acted alone with regard to the murder and robbery is newly-discovered evidence establishing that Petitioner is actually innocent that entitles Petitioner to equitable tolling [Doc. 11-2 p. 15–17]. In the alternative, Petitioner asserts that he is entitled to equitable tolling because his attorney told him that he was pursuing an action in federal court based on the denial of the writ of error coram nobis and/or that Petitioner could do so himself [*Id.* at 17–18]. Petitioner also sets forth a freestanding claim of actual innocence based on Shears' affidavit and testimony and other claims for relief under § 2254 in his petition [*Id.* at 5–12].

B. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), codified in 28 U.S.C. § 2254, *et. seq.*, a district court may not grant habeas corpus relief for a claim that a state court adjudicated on the merits unless the state court's adjudication of the claim:

***3** (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) 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).

The § 2254(d) standard is a hard standard to satisfy. *Montgomery v. Bobby*, 654 F.3d 668, 676 (6th Cir. 2011) (noting that "§ 2254(d), as amended by AEDPA, is a purposefully demanding standard ... 'because it was meant to be' ") (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)). Further, where the record supports the state court's findings of fact, those findings are entitled to a presumption of correctness which may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

C. ANALYSIS

1. Equitable Tolling

a. Actual Innocence

As set forth above, Petitioner first asserts that a 2015 affidavit and testimony from Shears establishes Petitioner's actual innocence of the murder and robbery underlying his convictions and therefore entitles him to equitable tolling of the AEDPA statute of limitations for his § 2254 claims [Doc. 11-2 p. 17]. The AEDPA statute of limitations is not jurisdictional and is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010); *Perkins v. McQuiggin*, 670 F.3d 665, 670 (6th Cir. 2012). One way that a petitioner can demonstrate that he is entitled to equitable tolling of the AEDPA statute of limitations is by presenting "a credible claim of actual innocence." *Cleveland v. Bradshaw*, 693 F.3d 626, 632–33 (6th Cir. 2012) (citing *Souter v. Jones*, 395 F.3d 577, 601 (2005)). In order to establish such a claim:

> a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. The Court has noted that "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 [ ] (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical

> evidence—that was not presented at trial." *Schlup [v. Delo*, 513 U.S. 298, 324 (1995)]. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.' " *Id.* at 321 [.]

Souter, 395 F.3d at 590. Thus, the threshold inquiry in assessing whether a claim of actual innocence is credible is "whether new facts raise sufficient doubt about the petitioner's guilt to undermine confidence in the result of the trial." *Id.* (citing *Schlup*, 513 U.S. at 316).

In Shears' affidavit and testimony upon which Petitioner relies to support his claim of actual innocence, Shears recants the testimony he gave at his own criminal trial regarding Petitioner's participation in the murder and robbery and now states that Petitioner was not present during these events [Docs. 11-1 and 12-45]. Courts, however, generally view recantation testimony with great suspicion. *United States v. Willis*, 257 F.3d 636, 645 (6th Cir. 2001) (noting that "affidavits by witnesses recanting their trial testimony are to be looked upon with extreme suspicion"). The timing and circumstances surrounding such recantations is also relevant to determining their credibility. *See McQuiggin*, 133 S. Ct. at 1935–36 (noting that the timing of newly discovered evidence of innocence is relevant to its reliability); *Freeman v. Trombley*, 483 F. App'x 51, 61–64 (6th Cir. 2012) (finding that recantation evidence presented ten years after the witness first testified under oath was insufficient to support gateway actual innocence claim where there was no explanation for the significant delay).

***4** Petitioner repeatedly asserts that Shears' new testimony regarding his innocence is credible, but does not explain Shears' significant delay in coming forward with these new allegations. Moreover, the trial court correctly found that even if Shears had testified at Petitioner's trial that Petitioner was not involved in or present at the scene of the murder and robbery at Petitioner's trial in a manner consistent with his 2015 affidavit, any such testimony would have lacked credibility due to Shears' prior testimony under oath at his own trial that Petitioner, not Shears, had committed the murder and robbery, as well as the substantial other evidence of Petitioner's involvement in the murder and robbery. Further, the coram nobis court specifically found that Shears' testimony at the evidentiary hearing was not credible and habeas courts generally defer to trial court credibility findings, as the trial court is in the best position to determine witness credibility. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003); *see also Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (holding that § 2254 does not give habeas courts "license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them").

In short, nothing in the record allows the Court to overcome its great suspicion about Shears' decision to recant his testimony under oath approximately fifteen years after he gave that testimony or to find that Shears' affidavit and testimony raise doubts about Petitioner's innocence that undermine confidence in the jury's finding that Petitioner is guilty. As such, Petitioner has not met his burden of establishing that newly-discovered evidence of his actual innocence entitles him to equitable tolling of the AEDPA statute of limitations.

b. Attorney Negligence

Petitioner also argues that he is entitled to equitable tolling of the statute of limitations because his attorney[2] misled him by stating that he was pursuing Petitioner's case in federal court and/or that Petitioner could file a motion in federal

court based upon the denial of the petition for a writ of error coram nobis [Doc. 11-2 p. 17].

A habeas petitioner may be entitled to equitable tolling of the statute of limitations if he establishes that he has been "pursuing his rights diligently" and "some extraordinary circumstance stood in his way and prevented timely filing." *Hall v. Warden*, 662 F. 3d 745, 749 (6th Cir. 2011) (quoting *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010)). "The doctrine of equitable tolling is applied sparingly by federal courts," and is typically used "only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *See Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003) (citations and internal quotations marks omitted).

Even if the Court assumes that Petitioner's allegations regarding his attorney's actions are true, they do not entitle Petitioner to equitable tolling, as Petitioner's time to file his § 2254 petition had run out long before those events occurred. The AEDPA provides a one-year statute of limitations for the filing of an application for a federal writ of habeas corpus that begins to run when the judgment became final at the conclusion of direct review. 28 U.S.C. § 2244(d)(1).

Petitioner's AEDPA clock began to run on August 22, 2005, ninety days after the day after the Tennessee Supreme Court declined to review the TCCA's order affirming Petitioner's convictions, as that is the last day on which Petitioner could have filed an application for the United States Supreme Court to review his convictions. The clock ran for two-hundred and sixty-nine days until May 18, 2006, at which time Petitioner paused the clock by filing his petition for post-conviction relief [Doc. 12-28 p. 4, 58]. The clock then began to run again on February 26, 2008, the day after the Tennessee Supreme Court denied Petitioner's application for permission to appeal the TCCA's denial of Petitioner's post-conviction petition. At that point, Petitioner had ninety-six days to file a § 2254 petition or to pause the clock by properly filing any other application for collateral relief from the state court. As the ninety-sixth day was a Sunday, however, Petitioner's AEDPA statute of limitations did not expire until ninety-seven days later on June 2, 2008.

***5** Petitioner, however, did not file his petition for a writ of error coram nobis with the state court until March 7, 2016 [Doc. 12-44 p. 4]. As such, none of Petitioner's attorney's actions regarding this filing could have affected the AEDPA statute of limitations. *See Vroman*, 346 F.3d at 602 (holding that while a properly filed application for state post-conviction or other collateral relief may toll the statute of limitations, it "does not ... 'revive' the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run").

Thus, even accepting Petitioner's allegations regarding his attorney's actions with regard to the petition for a writ of error coram nobis as true, nothing in the record indicates that Petitioner was pursuing his rights diligently and some extraordinary circumstance prevented him from timely filing a § 2254 petition. As such, Petitioner is not entitled to equitable tolling of the AEDPA statute of limitations based on these allegations.

2. Freestanding Claim of Actual Innocence

Petitioner also alleges that he is entitled to relief under § 2254 based on a "freestanding" claim of actual innocence as established by the newly-discovered evidence from Shears. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation in the underlying state criminal proceeding," however. *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (citing *Townsend v. Sain*,

372 U.S. 293, 317 (1963)); *Cress v. Palmer*, 484 F.3d 844, 854–55 (6th Cir. 2007) (holding that a free-standing innocence claim is not cognizable without allegations of constitutional error at trial). Moreover, even if such a claim were cognizable in this action, the newly-discovered evidence from Shears is not credible and does not undermine the Court's confidence in the jury's finding that Petitioner is guilty for the reasons set forth above. As such, Petitioner has not made the "extraordinarily high" threshold showing of actual innocence that such a claim would require. *Herrera*, 506 U.S. at 417.

D. CERTIFICATE OF APPEALABILITY

Finally, the Court must consider whether to issue a certificate of appealability ("COA") should Petitioner file a notice of appeal. Under 28 U.S.C. § 2253(a) and (c), a petitioner may appeal a final order in a habeas proceeding only if he is issued a COA, and a COA may only be issued where a Petitioner has made a substantial showing of the denial of a constitutional right. When a district court denies a habeas petition on a procedural basis without reaching the merits of the underlying claim(s), a COA should only issue if "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); *see also Dufresne v. Palmer*, 876 F.3d 248, 253 (6th Cir. 2017).

In this case, reasonable jurists would not debate the correctness of the Court's decision that Petitioner is not entitled to equitable tolling of the statute of limitations and to dismiss the § 2254 petition as time-barred. Accordingly, the Court will **DENY** issuance of a COA and **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b), 24(a)(1), 24(a)(4).

III. CONCLUSION

***6** For the reasons set forth above:

1. Petitioner's motion to amend/revise his petition [Doc. 11] will be **GRANTED**;
2. Respondent's Motion to Dismiss [Doc. 13] will be **GRANTED**;
3. This action will be **DISMISSED**;
4. No COA shall issue; and
5. The Court **CERTIFIES** that any appeal from this action would not be taken in good faith.

AN APPROPRIATE ORDER WILL ENTER.

All Citations

Slip Copy, 2019 WL 430906

Footnotes

1 Unless otherwise noted, the background facts are taken from the Tennessee Court of Appeals' ("TCCA") opinion affirming the denial of Petitioner's petition for a writ of error coram nobis, in which the TCCA quoted the Tennessee Supreme Court's opinion summarizing the facts of the case. *Bough v. State*, No. E2017-00015-CCA-R3-ECN, 2017 WL 3017289, at * 1–2 (Tenn. Crim. App. July 17, 2017), *perm. app. denied* (Tenn. Oct. 3, 2017).

2 While it is somewhat unclear, it appears that Petitioner is referring to his counsel for the petition for a writ of error coram nobis.

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