CASE No. ____

# In The Supreme Court of the United States

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JAMES SAYLOR,

*Petitioner*,
v.

TAGGART BOYD,

*Respondent*.

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On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Eighth Circuit

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## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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# APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES M. SAYLOR,

Petitioner,

v. 8:17CV442

JEFF WOOTEN,

Respondent.

## MEMORANDUM AND ORDER

This matter is before the Court on petitioner James M. Saylor's ("Saylor") Second Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Filing No. 40) and respondent Jeff Wooten's ("Wooten") Motion for Summary Judgment (Filing No. 46). Saylor is an inmate at the Lincoln Correctional Center ("LCC") within the Nebraska Department of Correctional Services. Saylor has identified Wooten as the Interim Warden of LCC. For the reasons stated below, Wooten's motion is granted, and Saylor's petition is denied.

## I. BACKGROUND[1]

On April 27, 1984, Saylor's grandmother was found dead in her home. A neighbor saw a young, white male leave the house early that morning, hop the fence, and run away. As the police began to investigate, two of Saylor's friends told the police that before the death, Saylor told them he had thought about killing his grandmother to get an expected inheritance. With some coaxing from the police, the friends agreed to wear a wire and meet with Saylor at his mother's home. After a few beers, Saylor made some incriminating statements, including that he had hired someone to kill his grandmother.

Saylor and his alleged accomplice, Michael Sapp ("Sapp"), were arrested and charged with first-degree murder. Saylor moved to suppress his statements to his friends to no avail. Before trial, Sapp pled guilty to lesser charges. Saylor did not reach a full plea agreement with the prosecutor but did agree to waive his right to a jury trial and proceed before a judge on stipulated facts in

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[1]Unless otherwise noted, the background is drawn from the parties' submissions and the Nebraska Supreme Court's opinions in State v. Saylor, 392 N.W.2d 789, 791 (Neb. 1986) (direct appeal), and State v. Saylor, 883 N.W.2d 334, 340 (Neb. 2016) (post-conviction appeal).

exchange for the state reducing the charge against him to second-degree murder. The agreement also allowed Saylor to appeal the denial of his motion to suppress.

At trial, the judge received the recordings of Saylor's incriminating statements in evidence over Saylor's objection. The parties also stipulated that David Kutsch, M.D. ("Dr. Kutsch"), the pathologist who performed the autopsy, would testify the cause of death was respiratory arrest, "most probably" caused by smothering but possibly the result of natural causes. Saylor was convicted and sentenced to ten years to life.

Saylor appealed, arguing his incriminating statements should have been suppressed. The Nebraska Supreme Court rejected Saylor's arguments and affirmed his conviction on August 29, 1986. Saylor's subsequent petition for a writ of certiorari was denied. See Saylor v. Nebraska, 481 U.S. 1038 (1987).

On August 22, 2012, Saylor filed a pro se Verified Motion for Postconviction Relief (Filing No. 45-3) pursuant to Neb. Rev. Stat. § 29-3001 et seq. With the help of counsel, he amended his motion February 3, 2013 (Filing No. 40-2). In his amended motion, Saylor alleged ineffective assistance of counsel at trial and on appeal, prosecutorial misconduct, and prejudicial conduct by the trial judge. The district court held an evidentiary

hearing that lasted several days. During the hearing, the district court heard testimony from Saylor, one of his attorneys,[2] the prosecutor, several of the investigators, and others, including Michael Baden, M.D. ("Dr. Baden") and Werner Spitz, M.D. ("Dr. Spitz"), two forensic pathologists Saylor hired to review the medical findings in the case. Both opined that Saylor's grandmother likely died of natural causes.

One testified that neither smothering nor a chronic lung condition could be eliminated as the cause of death, but that lung disease was more likely given her medical history and the surrounding circumstances. The other agreed with Dr. Kutch's 1984 deposition testimony that whether death resulted from natural causes or smothering was "indeterminate." Drs. Baden and Spitz also questioned some of Dr. Kutch's other methods and findings. The district court also took evidence that Saylor attempted to solicit the murders of his former friends to prevent the use of his recorded statements to them.

The district court denied relief, finding that any evidence of prejudice was overwhelmed by Saylor's admission that he hired someone to kill his

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[2]The other had died.

grandmother and the evidence that he tried to solicit the murder of two witnesses against him. The district court also noted Sapp "was waiting in the wings to testify against [Saylor]."

Saylor again appealed to the Nebraska Supreme Court, raising more than eleven assignments of error. See Saylor, 883 N.W.2d at 340. The Supreme Court again affirmed, concluding, among other things, that "Saylor's counsel was not ineffective by agreeing to a stipulated trial in an attempt to reduce the first degree murder charge" and that Saylor's assigned errors relating to prejudice lacked merit. Id.at 348-50. On October 2, 2017, the United States Supreme Court denied Saylor's petition for a writ of certiorari. See Saylor v. Nebraska, 583 U.S. ___, 138 S. Ct. 167, reh'g denied, 583 U.S. ___, 138 S. Ct. 571 (2017).

On November 15, 2017, Saylor filed a pro se Petition for a Writ of Habeas Corpus in this Court. After a couple of amendments and changes of counsel, Saylor filed the present Second Amended Petition. On April 18, 2019, Saylor moved (Filing No. 43) for an order directing Wooten to show cause why his petition should not be granted. After conducting a preliminary review, the magistrate judge assigned to this case issued an Order (Filing No. 44) granting Saylor's motion and ordering Wooten to "answer or otherwise respond to Saylor's Second Amended Petition."

On September 27, 2019, Wooten moved for summary judgment. Saylor opposes that motion.

## II. DISCUSSION

### A. Propriety of a Motion for Summary Judgment

In opposing Wooten's motion, Saylor first argues "a motion for summary judgment is not [procedurally] proper in a § 2254 proceeding."Saylor further contends that because the motion is not a proper answer, the Court should deem the allegations in Saylor's petition as admitted. Neither point is convincing. The magistrate judge ordered Wooten to "answer or otherwise respond" to the petition. He did that by filing a motion for summary judgment. Rule 12 of the Rules Governing § 2254 Cases in the United States District Courts provides that the Federal Rules of Civil Procedure "may be applied to a" § 2254 proceeding "to the extent that they are not inconsistent with any statutory provisions or these rules." And the Eighth Circuit and this Court routinely consider motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 in appropriate habeas cases. See, e.g., Risdal v. Mathes, 340 F.3d 508, 510 (8th Cir. 2003); Haynes v. Hansen, No. 8:19CV87, 2019 WL 2582559, at *1 (D. Neb. June 24, 2019). The court therefore rejects Saylor's assertion that a motion for summary judgment is categorically improper. What's more, Saylor has not shown that a motion for summary

judgment is somehow improper or unworkable under either the habeas rules or the particular facts of this case. To the contrary, the Court finds the record in this case is sufficient to allow the Court to properly evaluate the pertinent issues the parties raise—Wooten's statute-of-limitation argument and Saylor's gateway actual-innocence claim.

### B. Actual-Innocence Exception

Saylor's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104–132, 110 Stat. 1214 (1996). The thrust of Wooten's motion is that Saylor's petition is "wildly" outside AEDPA's one-year statute of limitation for such petitions. See 28 U.S.C. § 2244(d)(1). Saylor acknowledges his petition is "otherwise untimely" but asserts an exception applies because he can make a gateway actual-innocence claim as recognized by the Supreme Court in McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). In McQuiggin, the Supreme Court held "that actual innocence, if proved, serves as a gateway through which a petitioner may pass," despite "expiration of the statute of limitations." Id. But "tenable actual-innocence pleas are rare," id., and an "[u]nexplained delay in presenting new evidence" can weaken the petitioner's claim, id. at 399.To succeed, Saylor must persuade this "[C]ourt, that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id.at 386

(quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). In other words, Saylor "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327; accord McCoy v. Norris, 125 F.3d 1186, 1191 (8th Cir. 1997) (applying the same standard to a case tried to a judge). Saylor does not meet this demanding standard. As he did in state court, Saylor cites as grounds for post-conviction relief the "new" opinion testimony from Drs. Baden and Spitz that Saylor's grandmother more likely died of natural causes than from smothering. Agreeing with the state post-conviction court that Dr. Kutch's stipulation testimony was "weak and inconsistent" and asserting "the case against [him] was always circumstantial," Saylor contends "all [he] needed was one juror to accept Dr. Baden and/or Spitz's proposed testimony." As Saylor sees it, "had the testimony of Drs. Baden and Spitz been available at the time of [his] trial, it is more likely than not that at least one juror would have treated Dr. Baden and Spitz's testimony as reasonable doubt of Saylor's guilt." Saylor misunderstands the standard for an actual-innocence claim. To prove his claim, Saylor need not merely prove that one juror might have had a reasonable doubt based on his new evidence, he must persuade the 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 (emphasis added) (quoting Schlup, 513 U.S. 298, 329 (1995)). He has not done that. The Court

is simply not persuaded that Saylor's proffered medical evidence—which does not definitively rule out smothering as the cause of death—was so strong or decisive as to make it unreasonable for a judge conducting a trial on stipulated facts to rely on Saylor's incriminating statements and the mountain of other compelling evidence against him and find him guilty of second-degree murder. See McCoy, 125 F.3d at 1191-92 (concluding the petitioner could not "make his way through the actual innocence gateway" because even if "new," his "evidence would not have affected [the judge's]credibility determination, or his [guilty] verdict"). It is not unreasonable to think Saylor's conviction had far more to do with his own startling admissions and conduct and the other corroborating evidence of murder than with any indeterminacy in the medical evidence. See id.Because Saylor's "new" evidence is insufficient under the circumstances of this case "to show that, had it been presented at trial, no reasonable [factfinder] would have convicted [him]," his petition is denied.[3] McQuiggin, 569 U.S. at 401.

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[3] Saylor also makes a brief legal argument based on the corpus delecti rule as described in State v. Plastow, 873 N.W.2d 222, 226 (S.D. 2015). His reliance on Plastowis misplaced. Although Saylor cites Plastow as establishing Nebraska law at the time of his conviction, the case was actually decided by the South Dakota Supreme Court on

### C. Certificate of Appealability

"[A] state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition." Miller-El v. Cockrell, 537 U.S. 322, 335 (2003) (citing 28 U.S.C. § 2253). Before he can take an appeal, the petitioner must have a certificate of appealability ("COA"). Id.at 336; Fed. R. App. P. 22(b). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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.

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[3] now-discarded principles of South Dakota law. Id. at 229-31. At any rate, "'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998); see also Embrey v. Hershberger, 131 F.3d 739, 741 (8th Cir. 1997) (en banc) ("[I]n noncapital cases the concept of actual innocence is 'easy to grasp' because 'it simply means the person didn't commit the crime.'" (quoting United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993))).

473, 484 (2000). Having carefully reviewed the record in this case, the Court concludes Saylor has not made that showing. No COA will issue. Based on the foregoing, IT IS ORDERED:

1. Respondent Jeff Wooten's Motion for Summary Judgment (Filing No. 46) is granted.

2. Petitioner James M. Saylor's Second Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody (Filing No. 40) is denied.

3. This case is dismissed with prejudice.

4. No certificate of appealability shall issue.

5. A separate judgment shall be entered in this case. Dated this 23rd day of December 2019.

BY THE COURT:
Robert F. Rossiter, Jr.
United States District Judge

# APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

20-1133

James Saylor
Plaintiff – Appellant

v.

Taggart Boyd

Defendant – Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha(8:17-cv-00442-RFR)

## JUDGMENT

Before COLLOTON, KELLY, and STRAS, Circuit Judges. This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

June 02, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**APPENDIX C**

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

20-1133

James Saylor
Plaintiff – Appellant

v.

Taggart Boyd

Defendant – Appellee

Appeal from U.S. District Court for the District of
Nebraska - Omaha(8:17-cv-00442-RFR)

ORDER

The petition for rehearing by the panel is denied.

August 24, 2020

/s/ Michael E. Gans