United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 12, 2020
Decided June 18, 2020

Before

MICHAEL B. BRENNAN, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 19-3155

TIMOTHY N. HATTON,
Petitioner-Appellant,

v.

MARK R. SEVIER,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:19-cv-01737-SEB-TAB

Sarah Evans Barker,
Judge.

ORDER

Timothy Hatton has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Hatton's request for a certificate of appealability and his motion to proceed in forma pauperis are **DENIED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TIMOTHY N. HATTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:19-cv-01737-SEB-TAB
	)	
WARDEN,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

The Court now enters FINAL JUDGMENT in favor of the respondent and against the petitioner.

The petitioner's petition for writ of habeas corpus is denied and the action is dismissed with prejudice.

Date: 09/30/2019

Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TIMOTHY N. HATTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:19-cv-01737-SEB-TAB
	)	
WARDEN,	)	
	)	
Respondent.	)	

Order Granting Motion to Dismiss Petition for a Writ of Habeas Corpus and Denying Certificate of Appealability

Petitioner Timothy N. Hatton was convicted in an Indiana state court of child molesting in 2013. Mr. Hatton now seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondent argues that the petition must be denied because it is time-barred. Mr. Hatton has responded and the respondent has replied.[1] The motion is now ripe for review.

For the reasons explained in this Order, the respondent's motion to dismiss the petition for a writ of habeas corpus, dkt. [11], is **granted** and the action is dismissed with prejudice. In addition, the Court finds that a certificate of appealability should not issue. Mr. Hatton's motion to strike the motion to dismiss, dkt. [21], is **denied**. Mr. Hatton's motion to set hearing, dkt. [14], concerns his desire to present additional evidence on the merits of his claims and is **denied** because the Court is not able to reach the merits of his claims because his petition is untimely.

I. Background

On January 17, 2013, Mr. Hatton pleaded guilty to one count of child molesting and was sentenced to an aggregate of 20 years of incarceration with five years suspended to probation.

[1] Mr. Hatton responded on June 28, 2019. Dkt. 15. The respondent replied on July 5, 2019, but misidentified his response as a surreply. Dkt. 16. Mr. Hatton surreplied on July 29, 2019, but misidentified his surreply as a response. Dtk. 19.

Dkt. 12-1. He did not appeal. On June 28, 2013, Mr. Hatton filed a motion to modify his sentence which was denied the same day it was filed. He did not timely appeal this judgment, and, when he sought permission to file a belated appeal, his request was denied. Mr. Hatton filed a second motion to modify his sentence on June 5, 2014, which was denied on June 10, 2014. *Id.*

Mr. Hatton then filed a petition for post-conviction relief on December 1, 2014, which was denied on September 7, 2016. Mr. Hatton appealed and the Indiana Court of Appeals reversed, holding that the post-conviction court erred by failing to have a hearing or otherwise receive evidence. Dkt. 12-2. Mr. Hatton's post-conviction petition was reinstated and remained pending until it was again denied on March 15, 2018. Dkt. 12-3. Mr. Hatton appealed, and the Indiana Court of Appeals affirmed the denial of his petition on January 17, 2019. Dkt. 12-4. Mr. Hatton's petition to transfer to the Indiana Supreme Court was denied on April 11, 2019. He did not seek a writ of certiorari in the Supreme Court of the United States. Mr. Hatton signed the instant petition for a writ of habeas corpus seeking federal collateral review of his conviction on April 24, 2019. Dkt. 1.

II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a) (1996). In an attempt to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law," Congress, as part of Antiterrorism and Effective Death Penalty Act ("AEDPA"), revised several statutes governing federal habeas relief. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). "Under 28 U.S.C. § 2244(d)(1)(A), a state prisoner seeking federal habeas relief has just one year after his conviction becomes final in state court to file his federal petition." *Gladney v. Pollard*, 799 F.3d 889, 894 (7th Cir. 2015). "The one-year clock is

stopped, however, during the time the petitioner's 'properly filed' application for state postconviction relief 'is pending.'" *Day v. McDonough*, 547 U.S. 198, 201 (2006) (quoting 28 U.S.C. § 2244(d)(2)).

III. Discussion

Mr. Hatton's conviction and sentence became final on February 19, 2013, when the time to file a notice of appeal expired 30 days after his sentencing. 28 U.S.C. § 2244(d)(1)(A).[2] The one-year period of limitation began running on February 20, 2013. The limitations period continued to run until June 10, 2013, when it was tolled for one day while Mr. Hatton's first motion to modify sentence was pending. At that time, 131 days had elapsed. The limitations period resumed running until it expired on February 17, 2014. The petitioner filed a second motion to modify sentence on June 5, 2014, but his limitations period had already expired. *De Jesus v. Acevedo,* 567 F.3d 941, 943 (7th Cir. 2009) ("[A] state proceeding that does not begin until the federal year has expired is irrelevant [for tolling purposes].").

Although the limitations period is tolled during the time in which the petitioner has pending a "properly filed application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), the time period expired before Mr. Hatton filed his state petition for post-conviction relief on December 1, 2014.

Mr. Hatton signed and mailed his federal habeas petition on April 24, 2019, more than five years after the one-year limitations period had expired. Therefore, his petition is untimely. The following chart illustrates this:

Limitations Period Begins	February 20, 2013	365 days left in limitation period
First Motion to Modify Sentence Filed	June 10, 2013	255 days left in limitation period

[2] Thirty days after his sentencing was Saturday, February 16, 2013. Monday, February 18, 2013, was a holiday. Therefore, his time to fine a notice of appeal expired on Tuesday, February 19, 2019.

First Motion to Modify Sentence Denied	June 10, 2013	255 days left in limitation period
Federal Habeas Petition Due	February 21, 2014	0 days left in limitation period
State Post-Conviction Filed (statute of limitations expired)	December 1, 2014	
Federal Habeas Petition Mailed	April 24, 2019	5 years, 62 days beyond limitation period

Mr. Hatton asserts in his reply that he is entitled to equitable relief because his attorney failed to file a direct appeal and failed to provide him with a copy of his file. "[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010). These two "elements" are distinct. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). The diligence element "covers those affairs within the litigant's control; the extraordinary-circumstances prong, by contrast, is meant to cover matters outside its control." *Id.* It is the petitioner's "burden to establish both [elements]." *Socha v. Boughton*, 763 F.3d 674, 683 (7th Cir. 2015).

"Although not a chimera—something that exists only in the imagination, equitable tolling is an extraordinary remedy that is rarely granted." *Carpenter v. Douma*, 840 F.3d 867, 870 (7th Cir. 2016) (citations and quotation marks omitted); *see Socha*, 763 F.3d at 684 ("[T]olling is rare; it is reserved for extraordinary circumstances far beyond the litigant's control that prevented timely filing.") (citation and quotation marks omitted).

First, the statute of limitations is not tolled while seeking permission to file a belated appeal in state court unless the court accepts the appeal. *See Boutte' v. Superintendent*, 2015 WL 1902232, at *2 (N.D. Ind. Apr. 27, 2015); *cf. Powell v. Davis*, 415 F.3d 722, 726-27 (7th Cir. 2005). Furthermore, the failure of Mr. Hatton's trial attorney to initiate a direct appeal does not entitle

him to equitable relief. Mr. Hatton could have filed a notice of appeal pro se. He also could have stopped the limitations' clock by filing a petition for post-conviction relief in state court raising a claim of ineffective assistance of counsel. His failure to do so defeats any claim that he diligently pursued his rights.

To the extent Mr. Hatton argues that he is entitled to equitable tolling because his counsel failed to provide him with a copy of his file, he has failed to provide any evidence of his efforts to get his file from counsel during the limitations period, or during any other period. Without such evidence, he cannot establish his diligence. *See Socha*, 763 F.3d at 679.

Mr. Hatton has failed to demonstrate that he is entitled to equitable tolling. He has not shown the existence of circumstances permitting him to overcome the untimeliness of his petition. The respondent's motion to dismiss, dkt. [11], is therefore **granted** and the petition for a writ of habeas corpus is **dismissed with prejudice**. *Pavlovsky v. VanNatta*, 431 F.3d 1063, 1064 (7th Cir. 2005) ("[t]he dismissal of a suit as untimely is a dismissal on the merits, and so should ordinarily be made with prejudice").

Judgment consistent with this Order shall now issue.

IV. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the petitioner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Where a claim is resolved on procedural grounds (such as untimeliness), a certificate of appealability should issue only if reasonable jurists could disagree about the merits of the

underlying constitutional claim and about whether the procedural ruling was correct. *Flores-Ramirez v. Foster*, 811 F.3d 861, 865 (7th Cir. 2016) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." No reasonable jurist could dispute that Mr. Hatton's claims are time-barred. Therefore, a certificate of appealability is **denied**.

IV. Conclusion

The respondent's motion to dismiss, dkt. [11], is therefore **granted** and the petition for a writ of habeas corpus is **dismissed with prejudice**. Mr. Hatton's motion to strike the motion to dismiss, dkt. [21], is **denied**. Mr. Hatton's motion to set hearing, dkt. [14], is also **denied**.

IT IS SO ORDERED.

Date: 09/30/2019

Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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United States Court of Appeals

For the Seventh Circuit
Office of the Clerk
219 South Dearborn Street, Room 2722
Chicago, Illinois 60604
312-435-5850

August 13, 2020

Dear Sir or Madam,

We are returning these documents to you unfiled. The Court has issued the mandate in your appeal, which means your case is now closed. The only filing we are able to accept at this time is the, "motion to recall the mandate." The other items you sent are being returned to you unfiled.

Sincerely,

Pro Se Clerk

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

August 18, 2020

Before

AMY J. ST. EVE, *Circuit Judge*

No. 19-3155	TIMOTHY N. HATTON, Petitioner - Appellant v. MARK R. SEVIER, Superintendent, Respondent - Appellee
Originating Case Information:	
District Court No: 1:19-cv-01737-SEB-TAB Southern District of Indiana, Indianapolis Division District Judge Sarah Evans Barker	

Upon consideration of the **MOTION TO RECALL THE MANDATE**, filed on August 13, 2020, by the pro se appellant,

IT IS ORDERED that the motion is **DENIED**.

form name: **c7_Order_3J**(form ID: **177**)

Copy

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

NO. 19-3155

TIMOTHY N. HATTON, Petitioner - Appellant,	)	An Appeal from the United States District Court
v.	)	USDC No. 1:19-cv-01737-SEB-TAB
MARK SEVIER, Superintendent, Respondent - Appellee.	)	The Honorable Sarah Evans Barker, Judge.

MOTION TO RECALL THE MANDATE

Timothy N. Hatton
DOC #: 231193
Appellant, *pro-se*
New Castle Correctional
Facility
P.O. Box A
New Castle, IN 47362-1041

A3
1 of 16

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Constitution and Statutes:

JURISDICITONAL STATEMENT

Hatton brings the instant action pursuant to 28 USC 2254(d), which provides for Federal collateral review of confinement based on a judgment of a State Court where that confinement violates the Constitution or laws of the United States.

The District Court dismissed the habeas corpus, claiming Hatton's statute of limitations to file a Habeas Corpus relief, 365 days, has lapsed. However, Hatton had to first exhaust his state remedies for relief, has adequate reason for equitable tolling time to be granted, is actual innocent, and has shown due diligence. Hatton is currently in custody at the New Castle Correctional Facility and is projected to be released in September 2024.

STATEMENT OF THE ISSUES

- Did Hatton's statute of limitations, 365 days, lapse.
- Did Hatton have to first exhaust his state remedies for relief before filing for habeas corpus relief and has Hatton shown due diligence to remedy his issues.
- Should there be equitable tolling to file for habeas corpus relief.
- Hatton's rights were violated by the state of Indiana to obtain a conviction and upon seeking relief.

STATEMENT OF THE CASE

On February 13th, 2019, Hatton's habeas corpus was filed with the Southern District of Indiana. Within were claims Hatton is actual innocent and his Constitutional rights were violated. The habeas corpus was dismissed, claiming the statute of limitations has lapsed.

Hatton now appeals that decision, claiming he had to first exhaust his state remedies, that he should also be granted equitable tolling, and that he has shown due diligence. Hatton also respectfully requests this Court will address his post-conviction issues and grant relief so he can finally clear his name. In the least, Hatton requests a re-trial.

SUMMARY OF THE ARGUMENT

Hatton was misled and coerced into a plea agreement for crimes he did not commit by his appointed counsel just before he was suppose to go to trial. Other rights were violated in the process as well. Hatton has diligently been trying to get relief through the state court as instructed by court rules, case law, and jail-house attorneys.

After Hatton had exhausted his state remedies, he filed a habeas corpus in the Southern District of Indiana. His calculated tolling was 331 days, the State's was about 460 days, and Judge Sara Evans Barker's calculation was 5 years and 60 days, thus showing a huge discrepancy in calculations. Judge Sara Evans Barker ultimately dismissed Hatton's habeas corpus as a result.

By law, Hatton had to first exhaust his state remedies, should be granted equitable tolling, and has shown due diligence.

ARGUMENT

Hatton's calculated tolling periods include (78) days from February 19th, 2013 to May 8th, 2013 with initiation modification proceedings, (31) days from the denial of modification, June 28th, 2013, to initiation of Belated Appeal on July 29th, 2013, (105) days from the denial of Belated Appeal to the second modification, and (117) days from denial of modification to initiation of PCR **totaling (331 days)**. Hatton has been diligently seeking relief for his post-conviction issues. Hatton's time for filing a timely habeas application has *not* expired and is in compliance with statute of limitations, 28 U.S.C. §2244(d)(1).

Hatton should also be entitled to equitable tolling. Hatton has diligently tried to obtain relief in the state courts. Hatton is also actual innocent. In addition, his appointed counsel refused to file motions and an appeal, refused to send the attorney-client file, and refused to respond to

interrogatories. This caused many delays and difficulties that has impeded Hatton's progress in seeking relief.

The Third Circuit Court of Appeals, has recognized equitable tolling – defined by the two elements of extraordinary circumstances and diligent pursuit -- in the context of the AEDPA limitations period. See, e.g., Miller v. New Jersey State Dep't of Corrections,145 F.3d 616, 618-19 (3d Cir. 1998). It is clear from each CCS that Hatton has been diligently seeking relief for his wrongful conviction.

In Holland v. Florida, 560 U.S. 631 (2010), the Court ruled, as had "all 11 Courts of Appeals that have considered the question," that AEDPA's nonopt-in statute of limitations, "28 U.S.C. § 2244(d) is subject to equitable tolling in appropriate cases." Id. at 645. In reaching this conclusion, the Court interpreted AEDPA--and Congress's intentions in adopting AEDPA--as consistent with "basic habeas corpus principles," "prior law," and the writ's " 'vital role in protecting constitutional rights.' " Id. at 649. The state had argued in Holland that the Court's endorsement of the equitable tolling mechanism recognized by the lower courts would "undermine AEDPA's basic purposes." The Court emphatically rejected that argument, stating:

[W]e disagree with respondent that equitable tolling undermines AEDPA's basic purposes. We recognize that AEDPA seeks to eliminate delays in the federal habeas review process. See Day, 547 U.S., at 205-206 Copyright Cases or Patent Cases; Miller-El v. Cockrell, 537 U.S. 322, 337 (2003). But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles. See Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions ... incorporate earlier habeas corpus principles"); see also Day, 547 U.S., at 202, n. 1 Copyright Cases or Patent Cases; id., at 214 Copyright Cases or

Patent Cases (Scalia, J., dissenting); 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 24.2, pp. 1123-1136 (5th ed.2005). When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the "writ of habeas corpus plays a vital role in protecting constitutional rights." Slack, 529 U.S., at 483. It did not seek to end every possible delay at all costs. Cf. id., at 483-488. The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open.

Id. The Court also rejected the state's argument that AEDPA must be "interpreted to foreclose equitable tolling because the statute sets forth 'explicit exceptions to its basic time limits' that do 'not include equitable tolling.' " Id. at 647. The Court "concede[d]" that the statute "is silent as to equitable tolling while containing one provision that expressly refers to a different type of tolling," id. at 647-48 (section 2244(d)(2)'s statutory tolling provision, which is discussed infra § 5.2b(ii)). The Court nonetheless concluded that the statute can be construed consistently with equitable principles and prior law, explaining:

The fact that Congress expressly referred to tolling during state collateral review proceedings is easily explained without rebutting the presumption in favor of equitable tolling. A petitioner cannot bring a federal habeas claim without first exhausting state remedies--a process that frequently takes longer than one year. See Rose v. Lundy, 455 U.S. 509 (1982); § 2254(b)(1)(A). Hence, Congress had to explain how the limitations statute accounts for the time during which such state proceedings are pending. This special need for an express provision undermines any temptation to invoke the interpretive maxim inclusio unius est exclusio alterius (to include

one item (i.e., suspension during state-court collateral review) is to exclude other similar items (i.e., equitable tolling)). It has taken years for Hatton to exhaust his state remedies, but shows due diligence.

Id. at 648. Finally, in reviewing the 11th Circuit's application of the equitable tolling doctrine to the facts of the case, the Court in Holland rejected the 11th Circuit's "overly rigid per se approach" of categorically foreclosing equitable tolling to excuse late filing caused by the prisoner's lawyer unless the prisoner presents "proof of [counsel's] bad faith, dishonesty, divided loyalty, mental impairment or so forth." Id. at 649, 654. See infra § 5.2b n.84. Although the Court refrained from resolving the propriety of equitable tolling on the facts of the case, instead remanding the case to the court of appeals to "determine whether the facts in this record entitle Holland to equitable tolling" (id. at 654), the Court identified a number of factors that militated in favor of equitable tolling including that "in this case, the failures [of counsel] seriously prejudiced a client who thereby lost what was likely his single opportunity for federal review of the lawfulness of his imprisonment and of his death sentence" (id.).

In Lawrence v. Florida, 549 U.S. 327 or (2007), the Court majority in Lawrence observed that, in such a situation, "equitable tolling may be available, in light of the arguably extraordinary circumstances and the prisoner's diligence." Id. at 335 Copyright Cases or Patent Cases (majority opinion). For further discussion of Lawrence, see infra § 5.2b n.75.

Hatton is actual innocent. In McQuiggin v. Perkins, 569 U.S. 383 (2013), the Court held that AEDPA's statute of limitations is subject to an "actual innocence" exception even though no such exception appears in the AEDPA provisions establishing and defining the statute of limitations. The dissenting Justices objected strenuously, stating that "the Constitution vests legislative power only in Congress, which never enacted the exception the Court creates today"

(id. at 402 (Scalia, J., dissenting)), that "this Court is duty bound to enforce AEDPA, not amend it" (id. at 403), and that "suspending the statute because of a separate policy that the court believes should trump it ('actual innocence') is a blatant overruling" (id. at 409). The majority dismissed the dissent's "strident" assertions, explaining that "[a]t the time of AEDPA's enactment, multiple decisions of this Court applied the miscarriage of justice exception to overcome various threshold barriers to relief," and "[i]t is hardly 'unprecedented,' therefore, to conclude that 'Congress intended or could have anticipated [a miscarriage of justice] exception' when it enacted AEDPA." Id. at 398 n.3. The majority also reasoned from "Congress' incorporation of a modified version of the miscarriage of justice exception in § 2244(b)(2)(B) and § 2254(e)(2)," governing respectively "second-or-successive petitions and the holding of evidentiary hearings in federal court," to "the ... rational inference" that "in a case not governed by those provisions, i.e., a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted." Id. at 396-97. After inventorying the variety of contexts in which "[w]e have applied the miscarriage of justice exception to overcome various procedural defaults" (id. at 392) in order to " 'seek to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," the majority observed that "sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations." Id. at 393. The Court found further support for its reading of the statute in Holland v. Florida's description of the equitable foundations of habeas corpus law and in the absence from AEDPA's statute of limitations provisions of any "clear command countering the courts' equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition." Id. at 397.

In construing AEDPA's "certificate of appealability" provision, the Court has ensured that habeas corpus petitioners who are denied relief in the district court have a meaningful opportunity for appellate review of the district court's ruling. In Slack v. McDaniel, the state asked the Court to construe the "certificate of appealability" provision--which conditions the issuance of a certificate upon a "substantial showing of the denial of a constitutional right" (28 U.S.C. § 2253(c)(2) (2006) (emphasis added))--to limit appeals to "constitutional" rulings and thereby forbid the issuance of a certificate of appealability when a district court denies a petition on procedural grounds without reaching the underlying constitutional claim. The Court "reject[ed] this interpretation" because of its obviously deleterious effect on the writ's ability to fulfill its "vital role in protecting constitutional rights."

In Miller-El v. Cockrell, 537 U.S. 322 (2003), the Court, referring back to its earlier ruling in Slack v. McDaniel, and "reiterat[ing]" the limited nature of the burden a habeas corpus petitioner must satisfy at the COA stage (see id. at 327), again definitively rejected a circuit court's attempt to construe AEDPA's COA provision in a manner that would unduly limit habeas corpus petitioners' ability to appeal an adverse ruling by the district court. The Court held that the 5th Circuit had elided two separate stages of the process--the determination whether to issue a certificate of appealability (COA) and the assessment of the merits (id. at 335-36). The Court explained that the process the lower court used to deny relief--"first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits"--"side step[ped]" proper procedure. Id. "Before the issuance of a COA," the Supreme Court stated, "the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims." Id. at 336-37. Moreover, the 5th Circuit's procedure of "[d]eciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a

COA." Id. at 342. Observing that it "may or may not be the case" that, as the State contended, "petitioner will not be able to sustain his burden" on the merits, the Court declared that this "is not ... the question before us" at the COA stage. Id. at 348. Under the applicable threshold standard for a COA, which "asks only if the District Court's decision was debatable," the 5th Circuit should have granted a COA. Id. See also id. at 338 ("a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail").

In Buck v. Davis, 137 S. Ct. 759 (2017), the Court strictly applied the reasoning of Miller-El v. Cockrell to reverse a circuit court for " 'sidestep[ping] [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits.' " Id. at 773 (quoting Miller-El v. Cockrell, 537 U.S. at 336-37). The issue in Buck was whether the district court had properly denied the habeas corpus petitioner's motion under Fed. R. Civ. P. 60(b)(6) to re-open a previous denial of federal habeas corpus relief on the ground that two intervening decisions of the Supreme Court "had changed the law in a way that provided an excuse for his [previous] procedural default, permitting him to litigate his claim on the merits" despite the previous determination "under then-governing law ... that Buck's claim was procedurally defaulted and unreviewable." Id. at 767. For discussion of Rule 60(b)(6), see infra § 34.3. As the Supreme Court related, "[t]he court [of appeals] below phrased its determination in proper [COA] terms--that jurists of reason would not debate that Buck should be denied relief ...--but it reached that conclusion only after essentially deciding the case on the merits" by concluding that "'[Buck] has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6),' " and relying on that conclusion to deny the COA. Id. at 773. This was improper, the Court explained, because:

the question for the Fifth Circuit [at the COA stage] was not whether Buck had "shown extraordinary circumstances" [under Rule 60(b)(6)] or "shown why [Texas's broken promise] would justify relief from the judgment [pursuant to that rule]." ... Those are ultimate merits determinations the [COA] panel should not have reached. We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable."

Id. at 774 (quoting Miller-El v. Cockrell, 537 U.S. at 327). The Supreme Court majority, in an opinion authored by Chief Justice Roberts, rejected the argument in Justice Thomas's dissenting opinion that "a reviewing court that deems a claim nondebatable 'must necessarily conclude that the claim is meritless.' " Id. Chief Justice Roberts explained:

Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. ... Miller-El flatly prohibits such a departure from the [COA] procedure prescribed by § 2253.

In Hohn v. United States, 524 U.S. 236 (1998), the issue was "whether the Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability" under AEDPA. Id. at 238-39. As Justice Scalia pointed out in his dissenting opinion, a strict construction of AEDPA would have required that the Court answer this question

in the negative. See id. at 254 (Scalia, J., dissenting) ("This Court's jurisdiction under 28 U.S.C. § 1254(1) is limited to '[c]ases in the courts of appeals.' Section 102 of AEDPA provides that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding under section 2255,' that is, a district court habeas proceeding challenging federal custody. Petitioner, who is challenging federal custody under 28 U.S.C. § 2255, did not obtain a certificate of appealability (COA). By the plain language of AEDPA, his appeal 'from' the district court's 'final order' 'may not be taken to the court of appeals.' Because it could not be taken to the Court of Appeals, it quite obviously was never in the Court of Appeals; and because it was never in the Court of Appeals, we lack jurisdiction under § 1254(1) to entertain it."). Eschewing a literal interpretation, the Court undertook a lengthy analysis of relevant precedents and jurisprudential considerations, which led it to preserve its pre-AEDPA practice of "grant[ing] writs of certiorari to review denials of certificate applications without requiring the petitioner to move for leave to file for an extraordinary writ ... and without requiring any extraordinary showing or exhibiting any doubts about our jurisdiction to do so" (a practice that, the Court acknowledged, was inconsistent with one of its prior precedents, which the Court in Hohn thereupon overruled). Id. at 251-52 (discussed in detail infra § 35.4b nn.65-70 and accompanying text). In the course of this analysis, the Court interpreted AEDPA's "certificate of appealability" requirement as permitting issuance of a certificate by a panel of circuit judges and not just an individual judge. See id. at 241-45. In this respect too, as Justice Scalia pointed out, the Court did not, strictly speaking, adhere to the plain meaning of a provision of AEDPA. See id. at 255 ("Most of the Court's analysis is expended in the effort to establish that petitioner made his request for a COA to the Court of Appeals as such, rather than to the circuit judges in their individual capacity ... . Even that effort

is unsuccessful, since it comes up against the pellucid language of AEDPA to the contrary. Section 102 does not permit application for a COA to a court of appeals; it states that the application must be made to a 'circuit justice or judge.' That this means precisely what it says is underscored by § 103 of AEDPA, which amends Rule 22 of the Federal Rules of Appellate Procedure: 'If [a COA] request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate.' ").

In considering the possible effects of AEDPA upon the preexisting, judicially created standard that permits a petitioner to overcome a procedural default by showing "actual innocence"--a standard that is discussed infra § 26.4--the Court in House v. Bell, 547 U.S. 518 (2006) unequivocally rejected the state's argument that AEDPA "has replaced the ... [judge-made] standard with a stricter test." Id. at 539. Examining the AEDPA provisions cited by the state, the Court found them inapplicable to "the type of petition at issue here--a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." Id. The Court reiterated its previous admonition that " '[d]ismissal of a first federal habeas petition is a particularly serious matter.' " Id. (quoting Lonchar v. Thomas, 517 U.S. 314, 324 (1996)).

CONCLUSION

Hatton prays this court will remand this cause with instructions to grant his habeas corpus relief. There was a substantial denial of constitutional rights and Hatton is innocent. He is not an attorney and has no formal legal training, but since the day of his incarceration he has been doing everything he can to prove he did not commit this crime. That was about nine years ago. He had serious and obvious ineffective assistance of counsel claims and believes his court appointed

counsel and the trial court intentionally ignored or impeded relief. Hatton's constitutional rights, Amendments 4th, 5th, 6th, and 14th, among other rights, were violated to obtain the wrongful conviction. His requests for a military attorney was denied, his requests for speedy trial were ignored, and his appointed counsel was ineffective and misled and coerced him into the plea agreement by claiming false remedies to prove his innocence. The appointed counsel lied to Hatton, telling him if he signed the plea, he would be released and able to prove his innocence once he could hire an attorney. Appointed counsel refused to file pretrial motions and prepare for trial because Hatton was not a paid client. Appointed counsel told Hatton he had no choice but to sign a plea for crimes he did not commit.

Hatton attempted to get relief and has exhausted his state remedies, but he was never granted adequate assistance of counsel, a full fact hearing, necessary evidence, the attorney-client file, interrogatories from his appointed trial counsel, and other means to prove his innocence. This has violated Hatton's due process rights and his rights to effective assistance of counsel. Many of Hatton's claims are obvious just by looking at the CCS. His issues are also clear and legitimate in his PCR and appeals.

Hatton prays this court will remand this cause with instructions to grant his habeas corpus relief. There was a substantial denial of constitutional rights and Hatton is innocent. Hatton was still serving as a combat medic in the Indiana National Guard and training to be a physician in the active duty Army. He has always served honorably and requests his name be cleared so he can get back into the Army and move on finally. Hatton is innocent. Please help him to be freed and to clear his name by granting this appeal and habeas corpus relief. In the least, Hatton prays this Court will grant him a new full and fair trial.

Timothy N. Hatton
Appellant, *pro-se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

TIMOTHY N. HATTON, *Petitioner*	)	
v.	)	No. 1:19-cv-01737-SEB-TAB
KIETH BUTTS, *Respondent*	)	

PETITIONER'S TRAVERSE TO RESPONDENT'S ANSWER TO ORDER TO SHOW CAUSE

Comes now the Petitioner, Timothy N. Hatton, *pro se*, pursuant to 28 U.S.C. 2248 and Rule 5 of the Rules governing Sec. 2254 cases, and files his Traverse to defend his Petition for Writ of Habeas Corpus. In support thereof, Petitioner states the following:

1. That the Petitioner hereby denies Respondent's assertions contained in their Motion to Dismiss as is contrary to, and an unreasonable application of, Federal Laws as set forth by the U.S. Supreme Court.

2. Petitioner is in compliance with statute of limitations, 28 U.S.C. §2244(d)(1).

3. Respondent miscalculated the timeline and ignored entitled equitable tolling as listed in Ineffective Assistance of Counsel sub-claim for failing to file an appeal, as instructed.

4. That the Petitioner's claims have been clearly established. State failed to address these claims because they are in direct, and obvious, violation to the U.S. Supreme Court Law.

5. That the Petitioner requests temporary injunction until this matter before the Court can be fairly and fully litigated.

6. That this matter before the Court is reasonable, proper, and timely.

7. That a Memorandum of Law in support of this Traverse is filed contemporaneously with this Traverse and the arguments contained therein are incorporated herein.

Wherefore, the Petitioner respectfully requests this Honorable Court **Grant** Petitioner's request for Habeas Corpus relief, and for all other relief just and proper within the premises.

Respectfully Submitted,

Timothy N. Hatton
Petitioner, *pro-se*

CERTIFICATE OF SERVICE

I, Timothy N. Hatton, declare under penalty of perjury that a true and accurate copy of the foregoing Petitioner's Traverse has been duly served upon the following:

Clerk of the United States District Court
105 Birch Bayh Courthouse
46 East Ohio Street
Indianapolis, IN 46204

Indiana Attorney General
Government Center S.
302 W. Washington St. 5th Floor
Indianapolis, IN 46204

by personally handing the same to the appropriate staff at the New Castle Correctional Facility to be placed in the facility's prison legal mail system and deposit in the United States mail, First-Class postage prepaid, on this day 26th day of June, 2019.

_____

Timothy N. Hatton
DOC #: 231193
Petitioner, *pro-se*
New Castle Correctional Facility
P.O. Box A
New Castle, IN 47362-1041

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

TIMOTHY N. HATTON, *Petitioner*	)	
v.	)	No. 1:19-cv-01737-SEB-TAB
KIETH BUTTS, *Respondent*	)	

MEMORANDUM OF LAW
IN SUPPORT OF PETITIONER'S TRAVERSE

Comes now the Petitioner, Timothy N. Hatton, *pro se*, and files his Memorandum of Law in support of his Traverse to his Petition for Writ of Habeas Corpus under 28 USC 2254.

JURISDICTION

Hatton brings the instant action pursuant to 28 USC 2254(d), which provides for Federal collateral review of confinement based on a judgment of a State Court where that confinement violates the Constitution or laws of the United States.

STATEMENT OF THE FACTS

A Statement of the Facts is within the State's response to Show Cause. Hatton, however, did instruct his appointed counsel to file a direct appeal. Counsel ignored his request, granting entitled equitable tolling and showing a valid sub-claim of ineffective assistance of counsel.

Hatton also wishes to correct Respondent's calculations regarding the Belated Appeal. Hatton filed his Belated Appeal July 29th, 2013. Then filed a Notice of Appeal, maintaining the stoppage of the clock toll. This state remedy was not resolved until February 25th, 2014. Respondent also fails to mention that Hatton started collection of attorney-client file to his PCR June 10th, 2014. Appointed counsel still has not forwarded any portion of the attorney-client file.

The corrected tolling periods are (78) days from February 19th, 2013 to May 8th, 2013 with initiation modification proceedings, (31) days from the denial of modification, June 28th, 2013, to initiation of Belated Appeal on July 29th, 2013, (105) days from the denial of Belated Appeal to the second modification, and (117) days from denial of modification to initiation of PCR **totaling (331 days)**. Hatton has been diligently working PCR and sentencing issues since. Hatton's time for filing a timely habeas application has *not* expired.

STANDARD OF REVIEW

The Standard of Review is contained within the previous Petition filed by the Petitioner.

PROCEDURAL HISTORY AND RECORDS

Conviction Issues:

See CCS and previous documents.

Sentencing Issues:

In February 2013, Petitioner first became aware of the credit restricted felon (CRF) status while awaiting placement in an IDOC facility at RDC (never mentioned in the plea agreement or sentencing transcripts). In free time while working on conviction issues, Petitioner informally tried to resolve improper designation and erroneous sentencing since 2014.

On December 13th, 2018, DOC Classification Division denied Petitioner's Classification Appeal.

On December 14th, 2018, NCF's Classification Supervisor, Mr. Fetz, replied to Petitioner's request for interview, but did not correct Petitioner's designation as a CRF.

On December 17th, 2018, Petitioner filed a Motion to Remove Designation as a CRF (Motion to Correct Erroneous Sentence).

On December 18th, 2018 the Court Denied Petitioner's motion claiming "Classification left to the determination of IDOC."

On December 28th, 2018, Ms. Jennifer French, Assistant Superintendent of NCF, replied to Petitioner's request claiming determination was in fact made by the Court.

On January 10th, 2019, Petitioner filed a Notice of Appeal.

On January 31st, 2019, Petitioner filed Brief of Appeal.

In March 2019, State filed a Motion to Dismiss.

On March 18th, 2019, Petitioner filed a Reply to State's Motion to Dismiss.

On April 22nd, 2019, Appellate Court files Order.

SUMMARY

Hatton's detention is illegal. The State's decisions are contrary to the clearly established Federal Law as decided by the U.S. Supreme Court.

1. Conviction Issues:

a. Petitioner was not afforded effective assistance of counsel and denied speedy trial upon request, violating U.S. 6th Amendment.

b. Federal Law and U.S. Constitution requires a plea must be knowingly, voluntarily, and intelligently entered. Appointed counsel coerced and failed to present actual consequences of the plea to force Petitioner into a plea for crimes he did not commit.

c. During Post-Conviction Relief, Petitioner was not permitted an evidentiary hearing. Petitioner was denied Attorney-Client Files, Interrogatories, and other evidence.

d. All the above issues also fall under Due Process Violations, U.S. 5th Amendment.

2. Sentencing Issues:

a. Petitioner does not meet the criteria to be designated as a CRF under IC 35-41-1-5.5.

b. Petitioner was not designated as a CRF at the time of sentencing as in IC 35-38-1-7.8 and was sentenced beyond the presumptive of 10 years (B Felony).

c. The credit restriction and collateral consequences violate Ex Post Facto clauses of U.S. Constitution Article I, 10.

ARGUMENT

Ineffective assistance of counsel (IAC) and speedy trial claims are established and the State Court's decision is contrary to U.S. Supreme Court law and the 6th Amendment.

Appointed counsel's performance was both deficient and prejudiced towards Hatton's defense, Strickland v. Washington, 80 L. Ed. 2d 674 (1984). "In the defense of sex crimes, counsel will encounter more evidentiary hurdles and pitfalls than in any other kind of case," (*Criminal Defense Techniques: Chapter 53*). Counsel did not research facts, call alibi witnesses, or investigate exculpatory evidence to prove the allegations were indeed false. Lack of defense surmounts to dereliction of professional duty, Garza v. Idaho, 203 L. Ed. 2D 77 (2018). Harris v. Reed, 894 F.2d 871 (7th Cir. 1990): counsel's overall performance, including his decision not to call any witnesses was so great that it resulted in a total lack of communication.

Counsel failed to file pretrial motions and an appeal despite being instructed to. Petitioner has sufficient prejudice resulting from counsel's failure to investigate entitled petitioner to habeas relief for ineffective assistance of counsel, Medina v. Barnes, 71 F.3d 363 (10th Cir. 1995). Counsel and his secretary told Hatton and his family they were "too busy with paid clients."

Court could not conclude that attorney's decision not to investigate was reasonable thus, defendant's conviction should be vacated, Lee v. United States, 137 S. Ct. 1958 (2017), Trevino v. Davis, 138 S. Ct. 1793 (2018): no experts used, alibi witnesses not called, no strategy. Erroneous advice implicates the KVI standard for pleas. Failure to properly advise is brought under the U.S. 14th and 6th Amendments. Counsel failed to advise Hatton of a proper defense and the actual terms/consequences of the plea. Failure to advise renders a guilty plea involuntary and unintelligent, Sexton v. Beaudreaz, 138 S. Ct. 2555, (2018).

Speedy trial issues are raised as IAC. A jailed defendant may demand trial within 70 calendar days; a defendant must be tried within one year. Starting in August 2011, Hatton requested a speedy trial. When counsel neglected to file for speedy trial and refused to respond, Hatton wrote the court and requested a speedy trial, Barker v. Wingo, 92 S. Ct. 2183 (1973), Klopfer v. North Carolina, 87 S. Ct 988 (1967) (many letters disappeared and never made it on record). Bland v. California, 20 F. 3d 1469 (9th Cir. 1994): conflict between the defendant and attorney resulted in a total lack of communication. Counsel finally came to see Hatton, but only to tell him to stop writing the court. Hakeem v. Beyer, 990 F.2d 750 (3rd Cir. 1993): Deliberate attempts to delay (or prevent) trial to hamper the defense should be weighted heavily against the government. Hatton awaited trial 18 months with no delay on his part. A defendant not brought to trial in 12 months must be discharged and charges must be dismissed. Constitution guarantees speedy trial, U.S. Const., 6th & 14th Amend.; Speedy Trial Act of 1974, 18 U.S.C.S. § 3161 et seq.

It is the position of the Petitioner that all of the forgoing claims of IAC amount to a cumulative error requiring the reversal/vacation of the convictions. In United States v. Ewell (1966) 383 US 116, 15 L Ed 2d 627, 86 S Ct 773, the constitutional guaranty of a speedy trial is an important safeguard (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation, and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself. (United States Supreme Court Reports, 71 L Ed 2d 983, Speedy Trial). Absence of effective counsel violates a state prisoner's rights under the 14th Amend. and U.S. 6th Amend.

Federal Law and Constitution requires a plea must be knowingly, voluntarily, and intelligently (KVI) entered. The plea agreement was not knowing or voluntarily entered.

The plea was not KVI. Counsel coerced and misrepresented actual terms and consequences to obtain a guilty plea for crimes Hatton did not commit, alleging false remedies for acquittal (*see* Affidavit January 18th, 2018). In U.S. v. Sanderson, 595 F.2d 1021 (5th Cir. 1979), plea lacked the voluntariness and understanding. Counsel's advice lacked effectiveness required by the 6th Amend. The court vacated and remanded solely on defendant's claims of IAC. Counsel breached duty by pressuring, misrepresenting facts, and withholding information from defendant to induce a plea of guilty, Bradshaw v. Stumpf, 545 U.S. 175 (2005). To satisfy due process, a plea must be KVI with awareness of circumstances and consequences, Parke v. Raley, 506 U.S. S. Ct. 517 (1992); Brady v. United States, 397 U.S. S. Ct. 1463 (1970).

Counsel's misrepresentation of facts, withheld information, exerted pressure to induce plea, constitutes IAC. McMann v Richardson, 397 U.S. S Ct 1441 (1970); *see* Tollett v Henderson, 411 U.S. S Ct 1602 (1973). Federal Constitution requires a plea must be KVI. "Knowing" means defendant understood the charge, rights waived, and consequences. "Voluntary" means defendant chose to plea without coercion, threats, or improper promises.

Hatton told his counsel he did not want to plead guilty for crimes he did not commit. Counsel told him it was the only option. Counsel then told Hatton he would be acquitted once he could hire an attorney. When counsel crossed out the entire section "Time to be Served" and said he would be released once the proceedings resolved, Hatton reluctantly agreed. A plea must be voluntarily with full knowledge of the actual consequences. "Collateral" consequences were not in the plea agreement or at the sentencing hearing, (United States Supreme Court Reports, 50 L Ed 2d 876, Plea Bargaining, § 3 Validity & § 4 Failure to Fulfill a Promise). In U.S. v. Taylor, 139 F.3d 924 (D.C. Cir. 1998), a plea is not voluntary or intelligent if misadvised by counsel.

The Supreme Court has long recognized the involuntary nature of a guilty plea obtained by subjecting a defendant to coercion, holding that a guilty plea obtained in such a manner is invalid as violating the defendant's constitutional rights (25 L Ed 2d 1025 Validity of Guilty Pleas, § 2 Validity of guilty pleas, § 5. Factors bearing on character of plea as voluntarily made).

In an illusory plea, defendant enters an open plea with an expectation that he will receive a particular resolution, but instead gets the maximum. Counsel told Hatton if he signed the plea, he would be released and able to prove his innocence once he could hire an attorney. Instead,

Hatton was maxed out. Conviction and sentence were vacated because sentence was illegal and the plea was not knowingly or voluntarily entered due erroneous advisement, (50 L Ed 2d 876 Plea Bargaining, § 3 Validity and Propriety), Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990).

Santobello v New York, (1971) 404 US 257, 30 L Ed 2d 427, 92 S Ct 495, Supreme Court stated that USCS Rules of Criminal Procedure Rule 11 made clear the sentencing judge had to develop factual basis for the plea. The Supreme Court has indicated that evidence-such as a coerced confession (§4, infra), or an invalid prior conviction (§8, infra) or guilty plea (§9, infra)-is in violation of a federal constitutional exclusionary rule. Admission is automatically grounds for reversing a conviction.

Petitioner was not allowed evidentiary hearing(s). Petitioner was denied collection of Attorney-Client Files, Interrogatories, and other evidence necessary violating Due Process.

Denial of an evidentiary process is a violation of Rule PC 1. Section 4.(g) and Due Process. PC Court ordered Hatton to proceed with his PCR by Affidavit, but he was denied evidentiary collection. In PC Rule 1(a), petitioner is required to include every ground known to him for vacating, setting aside or correcting his conviction and sentence. It is impossible to know all issues without the Attorney-Client File and cross examination of counsel with IAC claims.

Appointed counsel never sent the Attorney-Client File and has not responded or objected to interrogatories. The PC Court should have granted Hatton's Motions to Compel. Questions are directly related to Hatton's issues in his PCR. Requests for Attorney-Client File and interrogatories fall under Trial Rules, PC Rules, and Due Process. These materials are essential so Hatton can raise all issues and for full evidentiary discoveries. The PC Court denied these processes because it shows Hatton was indeed forced into a plea for crimes he did not commit.

IAC claims often require evidentiary development. For example, a grant of summary judgment on the issue of trial counsel's effectiveness without an evidentiary hearing is necessary because typically an IAC claim revolves around the unique facts that case and many of those facts may exist outside of the record, Townsend v Sain, 9 L. Ed.2d 770, 372 US 293 (1963). Defendant's attorney (a) misinformed him of the ultimate sentence attached to his guilty plea; (b) failed to properly investigate; (c) lured him into pleading guilty, Salas v. US, 996 F. Supp 826 (E.D. III 1998). Petitioner coerced to plead guilty is entitled to an evidentiary hearing on 2255 motion, Fontaine v. US, 411 US 213, 93 S Ct 1461, 36 L.Ed.2d 169 (1973).

Had counsel prepared the case adequately, facts were properly presented to the Court, and if counsel had not intentionally misled Hatton, counsel would have presented a viable defense, a defense that if Hatton had been aware of, would have led him to not pleading guilty and most assuredly would have gained him acquittal.

Petitioner's Due Process claims are established and the State Court's decision is contrary to U.S. Supreme Court law.

The Hatton objects to the State's use of decisional case law to anything other than U.S. Supreme Court case law. In this case, the State has usurped such precedent as used by this Court citing "insufficient legal ground." However, Hatton uses Jackson v. Denno, 378 US 368, 12 L Ed 2d 908, 84 S.Ct 1774, AR3d 1205, to reassert that the State is contrary to decisional case law as used by the U.S. Supreme Court: "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his [sentence] is founded, in whole or in part upon and [unknowing], involuntary [plea], without regard for the truth or falsity of the [plea], and even though there is ample evidence aside from the [plea] to support the [sentence].

A defendant in a criminal case has a constitutional right to object to the use of an [unknowing] and involuntary [plea] and to have a fair hearing and a reliable determination on the voluntariness, a determination influenced by the truth... if the evidence presents a fair question as to its knowing and voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts.

Due process requires that procedures for determination of the voluntariness of a [plea] must be fully adequate to insure a reliable and clear-cut determination, including the resolution of disputed facts upon which the [knowing] and voluntariness issue may depend. The Federal Constitution does not require that a state prisoner whose [hearing] did not comport with constitutional standards as to the admission of an allegedly involuntary [plea] be granted a new [hearing] to determine the voluntariness of the [plea] under valid procedures..."Id

In Boykin v. Alabama, 395 US 238,243-44 89 m S Ct 1709 23 L.ed.2d 274-1969, a guilty plea could not be accepted unless there was affirmative evidence that it was voluntary entered into by the defendant. A trial court must use the utmost solicitude in canvassing the matter with the accused to make sure he has full understanding of what the plea connotes and consequences. Such "consequences" were never discussed with the Hatton.

The Hatton assures this Court he only pled guilty because counsel told him this was the only way to prove his innocence. Hatton never voluntarily or knowingly agreed to collateral consequences, SVP status, or CRF designations. The State added all of these after the plea was accepted; even after already sentenced. The only thing the Hatton agreed to was to be released so he could hire an attorney to prove his innocence, as instructed by his appointed counsel.

The State Court's decision regarding Petitioner's Ex Post Facto claim is contrary to the clearly established Federal law as decided by the U.S. Supreme Court.

State Court's decision arrived at an opposite conclusion to that reached by the U.S. Supreme Court. The State Court confronted facts that are materially indistinguishable from a relevant U.S. Supreme Court precedent, and arrived at an opposite conclusion (USC 2254(d)(1)).

By it's own admission, the State Court's decisional law is not consistent with U.S. Supreme Court's decisional case law. Under Gonzalez v. State, 980 N.E.2d 312, Ind. 2013, the Ind. Supreme Court admits: "...the defendant is correct in his assertion that Indiana does not use the heightened standard of clearest proof...as used by the United States Supreme Court...; Wallace, 905 N.E.2d at 378n.7. "The heightened standard of clearest proof is not consistent with this State's decisional law."

Therefore, it should seem apparent to this Court that the State Court would always be at odds with the U.S. Supreme Court in decisions that could not be anything but contrary to this Court's or the U.S. Supreme Court's decisions and interpretations of the law and what constitutes an Ex Post Facto claim. The State arrived at an "opposite conclusion" to that of the U.S. Supreme Court by "not being consistent" with U.S. Supreme Court conclusions.

During the plea and sentencing, Hatton was not designated as a CRF. The State relies on Section 35-38-1-7.8, which provides: (a) At the time of sentencing a court shall determine if a person is a CRF (as defined in IC 35-31.5-2-72). Applying the CRF statute to Hatton after he was already sentenced violates Ex Post Facto clauses of U.S. Const., art. I, 10 and Ind. Const., art. 1, § 24. Because the statute reduced the credits defendant could receive, it lengthened his prison time and made his punishment more onerous; *see*: Kring v. Missouri, 27 L.Ed. 506, (1882), Malloy v. South Carolina, 59 L.Ed. 905, (1915), Lindsey v. Washington, 81 L.Ed 1182, (1937), Peugh v. United States, 186 L.Ed.2d 84, (2013).

Petitioner does not meet the criteria to be designated as a CRF under IC 35-41-1-5.5.

In McCoy v. State, 96 N.E.3d 95 (2018 Ind.App.), McCoy was not convicted of an offense under subsection (a) of the child-molesting statute, Section (c) cannot apply to him, and the trial court erred by designating him a CRF. On remand, the trial court must remove that designation and notify the Department of Correction accordingly. Hatton was not involved in intercourse, sexual deviant conduct, serious bodily injury, nor murder. Hatton does not meet criteria to be designated as a CRF.

Petitioner was not designated as a CRF at the time of sentencing as in IC 35-38-1-7.8 and was sentenced beyond the presumptive of 10 years (B Felony).

The State relies on Section 35-38-1-7.8, which provides: (a) At the time of sentencing, a court shall determine whether a person is a CRF (as defined in IC 35-31.5-2-72). On January 17th, 2013, at the time of sentencing, the Court did not designate Hatton being a CRF (*see* Sentencing Transcripts pg. 27, line 8 to pg. 29, line 3).

The trial court abused it's discretion in placing Hatton as a CRF, sentencing beyond the presumptive, for a B felony (10 years), and denying Hatton's Motion Correct Designation as a CRF (Motion to Correct Erroneous Sentence), Miller v. Florida, 482 US 423, 96 L Ed 2d 351, 107 S Ct 2446.

In the plea agreement and at sentencing, Hatton was not designated a CRF and there was no mention being convicted under IC 35-42-4-3(a)(1). The State Court did all of this after the plea was accepted and after already being sentenced, violating Ex Post Facto.

- The Petitioner has always stated claims for which relief should be granted. The State has failed to acknowledge those claims, and has failed to grant relief that was available.

- The State has continuously used diversionary tactics to move this Court's attention away from the facts of the case, continues to to disregard U.S. Supreme Court's conclusions, and attempts to hide, or ignore, the truth of Petitioner's claims.

CONCLUSION

Hatton prays this Honorable Court will help correct this and clear his name so he can finally move on and rebuild his life. Hatton is innocent and has served over eight years for crimes he did not commit. With the credit restriction being removed, he would have been released in January 2019; January 2015 with time cuts. If the restriction was removed and sentenced properly, he would have been released July 2016; as early as July 2013 with time cuts.

Hatton was still serving in the Army National Guard when this happened. He has served in the Army collectively for seven years and was attending college to obtain prerequisites for the Army's Physician's Assistant (PA) program, then returning to active duty Army upon completion. He received a full scholarship because of his academic successes. Hatton plans on going back into active duty and finishing his training to be a PA so he can continue to serve once his name is cleared. He has always served honorably and still maintains the highest reenlistment code, an RE1 code, which means he can get right back in. Hatton is innocent and just wants to move on.

Hatton has enclosed documents to prove his issues have merit for relief. However, an Evidentiary Hearing may be necessary. If this Court deems an evidentiary hearing necessary, Hatton requests the appointment of counsel. Habeas Corpus § 121, Fontaine v. U.S., 411 U.S. 13, 93 S. Ct. 1461, 36 L.Ed.2d 169 (1973), and Townsend v. Sain, 9 L. Ed.2d 770, 372 US 293 (1963). The state refused to allow collection of exculpatory evidence and evidentiary hearings. Already a difficult task for the incarcerated, this makes it impossible for Hatton to have had a full, fair fact hearing during state proceedings. Hatton's requests to have an evidentiary hearing and the appointment of counsel to assist with the collection of evidence and the hearing.

WHEREFORE, Timothy N. Hatton, respectfully requests this Honorable Court to issue the writ: withdraw the plea agreement, vacate the conviction and sentence, order the trial court to remove designation as a credit restricted felon, and be released from custody.

Respectfully submitted,

_____

Timothy N. Hatton
Petitioner, *pro-se*

IN THE

COURT OF APPEALS OF INDIANA

Timothy Neal Hatton,

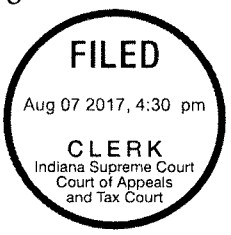
Appellant,

v.

State of Indiana,

Appellee.

Court of Appeals Cause No.
50A03-1609-PC-2178



Order

[1] Appellant's pro se petition for post-conviction relief alleged that he received ineffective assistance of counsel and that his guilty plea was involuntary. Although neither party moved for summary disposition pursuant to Post-Conviction Rule 1(4)(g), the post-conviction court summarily denied Appellant's petition without issuing findings of fact and conclusions of law. Appellant appealed and has filed Appellant's Brief.

[2] Appellee, by counsel, has now filed a Verified Motion to Remand, which cites *Kelly v. State*, 952 N.E.2d 297 (Ind. Ct. App. 2011). Appellee seeks a remand with instructions to either hold an evidentiary hearing or order the cause to be submitted by affidavit and to issue findings of fact and conclusions of law as required by Post-Conviction Rule 1(6).

[3] Having reviewed the matter, the Court finds and orders as follows:

1. Appellant's Verified Motion to Remand is granted.
2. This appeal is dismissed without prejudice and remanded to the trial court with instructions to either hold an evidentiary hearing or order the cause to be submitted by affidavit and to issue findings of fact and conclusions of law as required by Post-Conviction Rule 1(6).
3. The Clerk of this Court is directed to send this order to the parties, Judge Robert O. Bowen of the Marshall Superior Court, and the Marshall Circuit and Superior Courts Clerk. .

EXHIBIT B

C 1
1 of 2

4. The Marshall Circuit and Superior Courts Clerk is directed to file a copy of this order under Cause Number 50D01-1107-FA-24, and, pursuant to Indiana Trial Rule 77(D), the Clerk shall place the contents of this order in the Record of Judgments and Orders.

[4] Ordered 8/7/2017.

Barnes, J., Shepard, Friedlander, Sr.JJ., concur.

For the Court,

Nancy Harris Vaidik

Chief Judge

C 1
2 of 2

MEMORANDUM DECISION

APPELLANT PRO SE

Timothy N. Hatton
New Castle, Indiana

ATTORNEYS FOR APPELLEE

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Attorney General

Angela N. Sanchez
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Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Timothy N. Hatton,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

January 17, 2019

Court of Appeals Case No. 18A-PC-749

Appeal from the Marshall Superior Court

The Honorable Robert O. Bowen

Trial Court Cause No. 50D01-1107-FA-24

Vaidik, Chief Judge.

C2
185

Case Summary

[1] Timothy N. Hatton appeals the denial of the petition for post-conviction relief he filed after pleading guilty to Class B felony child molesting. We affirm.

Facts and Procedural History

[2] In July 2011, the State charged Hatton with Class A felony child molesting, Class B felony criminal deviate conduct, Class C felony child molesting, Class D felony sexual battery, and Class B misdemeanor battery. In October 2012, Hatton, who was represented by a court-appointed attorney, pled guilty to only one count of Class B felony child molesting in exchange for the State dismissing the remaining charges. The trial court imposed a sentence of twenty years, with fifteen years to serve and five years suspended to probation.

[3] In December 2014, Hatton filed a petition for post-conviction relief claiming that his attorney had been ineffective and that his guilty plea was invalid. The post-conviction court ordered the case submitted by affidavit. Hatton then moved to compel his attorney to provide a copy of his file from the underlying criminal case, alleging that he had requested the file and had only received "the discovery in November 2011." Appellant's App. Vol. II p. 127. Hatton also sent his attorney a set of fourteen interrogatories. After receiving no responses to the interrogatories, Hatton filed a second motion to compel. The post-conviction court denied both motions. Regarding the case file, the court determined that the attorney had already given Hatton the relevant documents

from his office. Regarding the interrogatories, the court concluded that "it does not appear that answers to the questions posed have any relevance to the issues presented in the Petition, are not presentable in the form of a Summary Affidavit or appear to be a 'fishing expedition' into trial strategy." *Id.* Shortly thereafter, Hatton filed his affidavit in support of his petition. He did not file affidavits from his attorney or any other witnesses. The post-conviction court denied Hatton's petition.

[4] Hatton now appeals.

Discussion and Decision

[5] Hatton has failed to demonstrate any error by the post-conviction court. The facts section of his opening brief focuses on his substantive claims for relief ("Ineffective Assistance of Counsel," "Guilty Plea (Ineffective Assistance)," "Speedy Trial Issues," "Newly Available Evidence," and "Due Process"), Appellant's Br. pp. 5-11, while the argument section primarily addresses procedural decisions made by the post-conviction court. He makes a number of general assertions in both sections but does not develop any of them. For example, in the facts section, Hatton claims that "[f]alse statements, dismissed charges, and other irrelevant factors were used against Hatton and [counsel] did not suppress or object," *id.* at 6, but he does not identify any such "false statements" or "irrelevant factors" or explain how they were "used" against him. The remainder of the facts section includes more of the same. *See id.* at 6-11. To the extent he has articulated any specific arguments, his only record

citations are to "CCS," his own affidavit ("Affidavit filed January 18th, 2018"), "Transcripts for October 24th, 2012, January 22nd, 2013," "CCS entry for November 22, 2011" (which simply says "Court receives a letter from the defendant"), and "Plea Agreement October 24th, 2012" (which Hatton did not include in his appendix on appeal). Such general citations are entirely unhelpful, especially when accompanied by general claims of error. If Hatton's argument is that the post-conviction court should have believed the self-serving factual allegations in his affidavit, there is nothing we can do for him. "[T]he [post-conviction] judge is the sole judge of the credibility of witnesses." *Ward v. State*, 969 N.E.2d 46, 66 (Ind. 2012), *reh'g denied.*

[6] The argument section of Hatton's brief is similarly deficient. He asserts that the post-conviction court should have held an evidentiary hearing before ruling on his petition. However, other than generically urging that he "has raised obvious issues in his PCR," Appellant's Br. p. 11, Hatton fails to explain why such a hearing was necessary. When the post-conviction court orders a case submitted by affidavit, the court has discretion to decide whether to hold an evidentiary hearing, and we will reverse only for an abuse of that discretion. *Smith v. State*, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005), *trans. denied.* Hatton has not shown such an abuse in this case.

[7] Hatton also argues that the post-conviction court should have granted his motions to compel his attorney to provide a complete copy of his file and to respond to Hatton's interrogatories. Whether to grant a motion to compel is a decision we leave to the discretion of the post-conviction court, and we will

reverse only for an abuse of that discretion. *Pannell v. State*, 36 N.E.3d 477, 493 (Ind. Ct. App. 2015), *reh'g denied, trans. denied.* Here, when the post-conviction court denied Hatton's motions, it reasoned that Hatton's attorney had already given Hatton the relevant documents from his file and that the interrogatories did not appear to "have any relevance to the issues presented in the Petition, are not presentable in the form of a Summary Affidavit or appear to be a 'fishing expedition' into trial strategy." Hatton briefly mentions the post-conviction court's reasoning but does not explain why he thinks it was wrong, other than vaguely asserting that "[t]hese materials are essential so Hatton can raise all issues and for full evidentiary discoveries." Appellant's Br. p. 12. In short, Hatton has identified no basis on which we could conclude that the post-conviction court abused its discretion by denying his motions to compel.

[8] Affirmed.

Mathias, J., and Crone, J., concur.

In the
Indiana Supreme Court

Timothy Neal Hatton,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
18A-PC-00749

Trial Court Case Nos.
50D01-1107-FA-24
50D01-1412-PC-3

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 4/11/2019.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

C 3
1 of 1

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