N.D.N.Y.
16-cr-63
20-cv-572
Mordue, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of November, two thousand twenty-one.

Present:

John M. Walker, Jr.,
Richard C. Wesley,
Joseph F. Bianco,
Circuit Judges.

Gurpreet Singh,

Petitioner-Appellant,

v. 21-1649

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, appointment of counsel, a stay of removal, and to proceed in forma pauperis. Upon due consideration, it is hereby ORDERED that the motions are DENIED, and the appeal is DISMISSED because Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," as to the untimeliness of the Appellant's motion filed pursuant to 28 U.S.C. § 2255. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

"Appendix A"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GURPREET SINGH,

Petitioner,

v. **5:16-CR-00063 (NAM)**

UNITED STATES OF AMERICA,

Respondent.

APPEARANCES:

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Hon. Norman A. Mordue, Senior United States District Court Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Now before the Court is Petitioner Gurpreet Singh's motion under 28 U.S.C. § 2255 to vacate his conviction for unlawful procurement of naturalization and the Court's order of

'Appendix B'

denaturalization. (Dkt. No. 76). The Government opposes the motion, and Petitioner has filed a reply. (Dkt. No. 90; Dkt. No. 100). Petitioner's motion is denied, for the reasons that follow.

II. BACKGROUND

Petitioner applied for naturalization to become a U.S. citizen in December 2011. (Dkt. No. 63, Presentence Investigation Report ("PSR"), ¶ 3). In his application, Form N-400, Petitioner answered "no" to the question: "Have you ever committed a crime or offense for which you were not arrested?" ("Question 15"). (*Id.*). Petitioner signed and dated Form N-400 on December 9, 2011. (*Id.*). A U.S. Citizen and Immigration Services ("USCIS") officer interviewed Petitioner on March 2, 2012 and reviewed with him the Form N-400; Petitioner made two corrections but did not change his answer to Question 15, and he again signed the form. (*Id.*, ¶ 4). On April 19, 2012, Petitioner completed another naturalization form, Form N-455, and answered "no" to the question: "Since your interview, have you knowingly committed any crime or offense, for which you have not been arrested?" (*Id.*, ¶ 5). Petitioner was thereafter sworn in as a U.S. citizen. (*Id.*).

The following day, April 20, 2012, Petitioner was arrested by police in Watertown, NY and charged with Sexual Abuse in the First Degree (Felony), after a nine-year-old female reported to school officials that she had been sexually abused by Petitioner. (Dkt. No. 63, ¶ 6). (*Id.*). When Petitioner was questioned in police custody, he admitted to inappropriately touching the victim. (*Id.*). His confession was videotaped by police and resulted in a signed, written confession. (*See* Government's Trial Exs. 1, 11). In the written confession, Petitioner admitted that:

> Approximately in the first week of March 2012 I was at my residence with some family members. Myself and my two nieces [redacted] who is about nine years old, and [redacted] who is about four years old, played a game on the computer that was located in

> my room. They then went to their room while I was finishing playing a game on the computer. I went into their bedroom and they were playing. I sat on the baby chair and [redacted] came and sat on my lap and started to read a book like she has always done. I put of [sic] my hands underneath her clothes and placed them on her butt. I took my left hand and grabbed her left hand and placed it on my genital. I lightly rubbed for about one or two minutes. . . . My penis was erect during this time . . . .

(Dkt. No. 90-1, p. 117). On August 16, 2012, Petitioner pleaded guilty in Jefferson County Court to Sexual Abuse, Second Degree (Misdemeanor). (Dkt. No. 63, ¶ 7).

On February 25, 2016, Petitioner was indicted on one count of unlawful procurement of naturalization in violation of 18 U.S.C. § 1425(a) and (b). (Dkt. No. 1). The indictment charged Petitioner with providing false and fraudulent information to USCIS because he knew during the application process for naturalization that he had committed the crime of sexual abuse of a minor. (*Id.*).

On January 19, 2017, following a two-day trial, the jury found Petitioner guilty of unlawful procurement of naturalization in violation of 18 U.S.C. § 1425(a) and (b). (Dkt. No. 55). Petitioner's videotaped confession, written confession, and state conviction for sexual abuse were used by the Government as evidence at trial. (*See generally* Dkt. No. 90-1). On July 11, 2017, the Court sentenced Petitioner to a three-month term of imprisonment, with a three-year term of supervised release to follow. (Dkt. No. 66). On July 13, 2017, the Court issued an order revoking Petitioner's citizenship and cancelling his naturalization. (Dkt. No. 68). Petitioner appealed his conviction to the Second Circuit, but he later withdrew the appeal. (Dkt. No. 71; Dkt. No. 74). On August 14, 2017, the Circuit granted Petitioner's motion to withdraw his appeal with prejudice. (Dkt. No. 74; *see also* Dkt. No. 90-2).

On February 6, 2019, Jefferson County Court Judge Kim Martusewicz vacated Petitioner's conviction for sexual abuse and allowed him to withdraw his guilty plea. (Dkt. No.

76, pp. 21–28). Judge Martusewicz found that Petitioner received ineffective assistance of counsel because his attorney failed to inform him of the potential immigration consequences of his guilty plea. (*Id.*, p. 27). Judge Martusewicz cited *Padilla v. Kentucky*, which held that "counsel must inform [a] client whether his plea carries a risk of deportation." 559 U.S. 356, 374 (2010); (*see* Dkt. No. 76, p. 27). Judge Martusewicz stated that Petitioner's "decision to enter a plea was based upon a failure by defense counsel to provide him with meaningful representation as to whether or not he would suffer any direct or indirect consequences as a result of the plea on his immigration status." (Dkt. No. 76, p. 28). On September 3, 2019, a state grand jury returned a "no bill" on the sexual abuse charges, and the case was dismissed and sealed. (*Id.*, pp. 15, 19). On May 26, 2020, Petitioner filed the instant motion. (Dkt. No. 76).

III. STANDARD OF REVIEW

Under 28 U.S.C. § 2255, "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a).

A "collateral attack on a final judgment in a federal criminal case is generally available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt

hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). "If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

In general, a motion for habeas relief must be made within one year, and this limitation period runs from the latest of the following:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

In "rare and exceptional circumstances," the limitations period may be subject to equitable tolling. *Harper v. Ercole*, 648 F.3d 132, 136 (2d Cir. 2011) (internal quotations and citations omitted). To be entitled to equitable tolling, "a petitioner must show that extraordinary circumstances prevented him from filing his petition on time, and he must have acted with reasonable diligence throughout the period he seeks to toll." *Rivera v. United States*, 448 F.

App'x 145, 146 (2d Cir. 2011) (internal quotations and citations omitted). A petitioner must also "demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances." *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000).

IV. DISCUSSION

Petitioner claims that his trial attorney in this case provided ineffective assistance by: (1) failing to investigate and challenge his state conviction for sexual abuse; (2) preventing him from testifying at trial; and (3) failing to appropriately advise him in the appellate process. (Dkt. No. 76, pp. 13–14, 17; Dkt. No. 100, pp. 2–6). Petitioner asserts that because his state conviction for sexual abuse has been vacated, the answers he provided during the naturalization application process are "all truthful and correct." (Dkt. No. 76, pp. 14–16). The Government opposed the motion, arguing that it is untimely, and further, lacks merit. (Dkt. No. 90). Petitioner then retained counsel, who filed a reply adding to his arguments about ineffective assistance of counsel and asserting that his motion is timely because it was filed within one year of the dismissal of the state case on September 3, 2019. (Dkt. No. 100).

A. Timeliness

The Government argues that Petitioner's motion must be dismissed as time-barred because it was filed more than a year after the judgment of conviction became final on August 14, 2017. (Dkt. No. 90, pp. 7–8). According to the Government, Petitioner knew all of the facts relevant to his motion the moment that he was convicted. (*Id.*). The Government further

contends that even if the Court equitably tolled the limitation period until the state conviction was overturned on February 6, 2019, Petitioner's motion would still be untimely. (*Id.*, p. 8).

In contrast, Petitioner argues that the facts central to his claims fundamentally changed upon the dismissal of the state case on September 3, 2019, and the one-year period should run from that date. (Dkt. No. 76, p. 14). According to Petitioner, he "did not realize the deficiencies of trial counsel until his state guilty plea was vacated and the charges were dismissed." (Dkt. No. 100, p. 1). Petitioner claims that the dismissal/sealing of the state case proves his innocence and that he received ineffective assistance of counsel. (*Id.*, p. 2).

As discussed above, Petitioner's conviction in this case became final on August 14, 2017, when he withdrew his appeal. (Dkt. No. 74; Dkt. No. 90-2). The one-year limitation period for a habeas claim would begin on that date, unless Petitioner can demonstrate a later relevant date under Section 2255(f) or a basis for equitable tolling. Although Petitioner contends that he did not realize the deficiencies of trial counsel until his state case was dismissed on September 3, 2019, the record shows that Judge Martusewicz vacated his sexual abuse conviction on February 6, 2019. (Dkt. No. 76, pp. 21–28). This event constitutes the crucial "new" fact underpinning most of Petitioner's habeas claims. *See* 28 U.S.C. § 2255(f)(4). Indeed, the Supreme Court has held that a "state-court vacatur is a matter of fact for purposes of the limitation rule in the fourth paragraph [of § 2255(f)]." *Johnson v. United States*, 544 U.S. 295, 302 (2005). Under such circumstances, "the limitation period will run from the date of notice of the eventual state-court vacatur." *Id.*, at 310, n. 8.

After careful review of the record, the Court finds that the state court vacatur, dated February 6, 2019, triggered the start of the limitations period because at that time Petitioner possessed all the relevant facts supporting his claims. On that date, Judge Martusewicz found

that Petitioner received ineffective assistance of counsel because his attorney failed to inform him of the potential immigration consequences of his guilty plea (citing *Padilla*). (Dkt. No. 76, p. 27). Thus, Petitioner should have known on that date that his federal trial attorney could have investigated and challenged the state court conviction based on the *Padilla* issue. The fact that the state case was later dismissed and sealed did not provide Petitioner with any new information about the *substance* of his claims. Because Petitioner possessed the relevant facts for his claims on February 6, 2019, he had until February 6, 2020 to seek habeas relief.[1] Petitioner's motion was not filed until more than one year later on May 26, 2020. And Petitioner has not shown any basis for equitable tolling. There is no dispute that Petitioner received notice of the vacatur on February 6, 2019, and he has not evidenced any extraordinary circumstances that delayed or prevented him from filing his motion. In sum, Petitioner's motion is untimely.

B. Merits

Even assuming *arguendo* that Petitioner's motion was timely, it would still fail on the merits. To establish a claim for ineffective assistance of counsel, Petitioner must show: "(1) that counsel's performance fell below an 'objective standard of reasonableness,' and (2) that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995) (*per curiam*) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984)). There is a "strong presumption" that counsel's assistance was reasonable, and "every effort [should] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's

[1] The Court also finds that, regarding Petitioner's claims that his attorney failed to pursue an alibi defense and prevented him from testifying, Petitioner possessed all the relevant facts at the time of his conviction on January 19, 2017, and the later vacatur and dismissal of the state case would have added nothing.

challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Here, Petitioner cannot show that his federal trial counsel fell short by not doing more to investigate or challenge the underlying state conviction—when that conviction was based largely on confessions (written and videotaped) wherein Petitioner admitted to sexually abusing a child. Specifically, Petitioner stated that in the first week of March 2012, he took the child's hand and rubbed it on his erect penis. (Dkt. No. 90-1, p. 118). As the Government points out, "these confessions were the focal point of the case, and the state conviction and guilty plea colloquy, which were mentioned only briefly by the government in opening and at closing and did not receive the same focus or attention as the other confessions, were cumulative at best and ultimately insignificant in the context of all the other evidence of Singh's guilt." (Dkt. No. 90, p. 12). Critically, the charge against Petitioner for unlawful procurement of citizenship hinged on the fact that he did not disclose the *commission* of a crime, not that he was *convicted* of it. The Government presented overwhelming evidence at trial that Petitioner committed a crime and then failed to disclose it during the application process for naturalization. In other words, even if counsel had successfully challenged the state conviction, there was still compelling evidence for the jury to convict Petitioner. Therefore, Petitioner also cannot show prejudice.[2]

Petitioner's remaining arguments fail for the same reasons. In view of Petitioner's confessions to the sexual abuse of a minor, it is hard to see how the jury could have been swayed to acquit Petitioner based on his testimony or an alibi. Thus, Petitioner cannot show that any

[2] To the extent Petitioner argues that the confessions were coerced or marred by misunderstanding, the Court has reviewed the two-hour long video and finds no basis to support such claims. In addition, Petitioner's argument that the confessions would have been sealed and unavailable at trial is speculative, since "sealing would not have necessarily rendered this evidence inadmissible," *People v. Vega*, 983 N.Y.S.2d 30, 31 (N.Y. App. Div. 1st Dept. 2014), and moreover, federal law enforcement officials could have moved to *unseal* the records. *See* N.Y. Crim. Pro. Law § 160.50(d).

ineffective assistance regarding these issues was prejudicial. And to the extent Petitioner argues that the dismissal of the state case proves his innocence (that the answers he gave on the naturalization forms were true), he is mistaken. As discussed above, the state case was dismissed due to ineffective assistance of counsel on a narrow issue—the failure to advise Petitioner about the immigration consequences of his guilty plea. Judge Martusewicz's decision had nothing to do with *the merits* of the case against Petitioner. In other words, the overwhelming evidence still shows that Petitioner committed a crime by sexually abusing a minor and then lying about it during the naturalization application process.[3]

In sum, Petitioner has failed to make a plausible habeas claim, suggest actual innocence, or otherwise show that his conviction amounts to a "complete miscarriage of justice." *See Bokun*, 73 F.3d at 12 (quoting *Hill*, 368 U.S. at 428). Finally, the Court need not hold a hearing on Petitioner's motion because the record conclusively shows that he is not entitled to relief. *See Chang v. United States*, 250 F.3d 79, 85–86 (2d Cir. 2001).

V. CONCLUSION

For these reasons, it is

ORDERED that Petitioner's motion to vacate his conviction under 28 U.S.C. § 2255 (Dkt. No. 76) is **DENIED**; and it is further

ORDERED that a certificate of appealability shall not be issued because Petitioner has not made a substantial showing of the denial of a constitutional right; and it is further

[3] Petitioner's claim that he received ineffective assistance on appeal is refuted by the record, which shows that he signed a written declaration stating that his attorney "explained to me the effect of voluntarily withdrawing my appeal," and "that by withdrawing my appeal, I will forego and give up my right to challenge the conviction and sentence on direct appeal in this Court." (Dkt. No. 90-2, p. 7). Petitioner further stated that after speaking with his attorney, "I understand that by withdrawing my appeal, I will give up my right to challenge the conviction and sentence on direct appeal in this Court." (*Id.*).

ORDERED that the Clerk of the Court is directed to close this case and provide a copy of this Memorandum-Decision and Order to the parties in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

Date: May 17, 2021
Syracuse, New York

Norman A. Mordue
Senior U.S. District Judge