

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-3710

Anthony Brian Williamson

Plaintiff - Appellant

v.

Dexter Payne, Director, ADC

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:20-cv-00922-KGB)

JUDGMENT

Before BENTON, ERICKSON, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The motion to proceed on appeal in forma pauperis is denied as moot.

January 19, 2022

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

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-3710

Anthony Brian Williamson

Appellant

v.

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Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:20-cv-00922-KGB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 22, 2022

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

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

ANTHONY BRIAN WILLIAMSON
ADC #109343

PETITIONER

v.

Case No. 4:20-cv-00922-KGB

DEXTER PAYNE

RESPONDENT

ORDER

Before the Court are petitioner Anthony Brian Williamson's petition for panel rehearing; application for a certificate of appealability; and application to proceed in *forma pauperis* (Dkt. Nos. 21-1, 23, 24). For the reasons set forth below, the Court denies the motions (*Id.*).

On August 18, 2021, Mr. Williamson filed a petition for panel rehearing with this Court pursuant to Rule 40(a)(2) of the Federal Rules of Appellate Procedure (Dkt. No. 21-1, at 1). In the petition, Mr. Williamson reiterates arguments made in his petition (Dkt. Nos. 2, 21-1). The Court denies for lack of jurisdiction the petition for panel rehearing under Rule 40(a)(2) of the Federal Rules of Appellate Procedure (Dkt. No. 21-1). To the extent this Court has jurisdiction over the petition for panel rehearing, which the Court construes as a motion to alter or amend the judgment, the Court denies the motion because Mr. Williamson has not established an error of law or fact but merely relitigates matters the Court ruled on in its prior Order (Dkt. No. 19). *See United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (quoting *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)) (Rule 59(e) motions "cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment."); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (The rule permitting a court to alter or amend a judgment may not be used to relitigate old matters, and the

rule may not be used to raise arguments or present evidence that could have been raised prior to the entry of judgment) (citing Fed. R. Civ. P. 59(e)).

On August 3, 2021, the Court denied Mr. Williamson's petition for writ of habeas corpus (Dkt. No. 19). In its Order, the Court found that Mr. Williamson had not made a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(1)-(2), and the Court denied a certificate of appealability (Dkt. No. 19, at 4). Accordingly, the Court denies Mr. Williamson's application for a certificate of appealability and application to proceed *in forma pauperis* on appeal (Dkt. Nos. 23, 24).

It is therefore ordered that:

1. The Court denies Mr. Williamson's petition for panel rehearing (Dkt. No. 21-1).
2. The Court denies Mr. Williamson's application for a certificate of appealability and application to proceed *in forma pauperis* on appeal (Dkt. Nos. 23, 24).
3. Within 30 days from the entry of this Order, Mr. Williamson must either:
 - (a) pay to this Court the \$505.00 appellate filing and docketing fees, making his remittance payable to "Clerk, United States District Court" and including: (i) his name; (ii) his prison identification number; (iii) the case number; and (iv) that the remittance is for the appeal of the instant action; or
 - (b) file, with the United States Court of Appeals for the Eighth Circuit, a motion with an attached affidavit that complies with each mandate of Federal Rule of Appellate Procedure 24(a)(1), (5).
4. Mr. Williamson is directed to file any future documents or pleadings related to his appeal with the United States Court of Appeals for the Eighth Circuit.

So ordered, this 23rd day of November, 2021.

Kristine G. Baker

Kristine G. Baker
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

ANTHONY BRIAN WILLIAMSON
ADC #109343

PETITIONER

v.

Case No. 4:20-cv-00922-KGB

DEXTER PAYNE

RESPONDENT

ORDER

Before the Court are the Findings and Recommendation submitted by United States Magistrate Judge Patricia S. Harris (Dkt. No. 13). Petitioner Anthony Brian Williamson has filed objections to the Findings and Recommendation (Dkt. Nos. 15, 16). After careful consideration of the Findings and Recommendation, Mr. Williamson's objections, and a *de novo* review of the record, the Court concludes that the Findings and Recommendation should be, and hereby are, approved and adopted as this Court's findings in all respects (Dkt. No. 13).

The Court writes to address respondent Dexter Payne's argument that the Court lacks jurisdiction because Mr. Williamson is not "in custody pursuant to the judgment of a State court" under 28 U.S.C. § 2254(a). Mr. Williamson, an inmate in the Arkansas Division of Corrections, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking release from custody. In his petition, Mr. Williamson challenges a conviction and sentence from November 2007, when Mr. Williamson pleaded guilty in the Circuit Court of Garland County, Arkansas, to failure to register as a sex offender (Dkt. Nos. 8-2, 8-3). Mr. Williamson and Mr. Payne agree that Mr. Williamson has served his sentence on that conviction in its entirety (Dkt. Nos. 8, at 4; 8-5; 16, at 2). He is currently incarcerated on sentences for aggravated robbery and kidnapping, which Mr. Williamson does not challenge in this petition (Dkt. No. 2). As Judge Harris noted in her Findings

and Recommendation, this ground alone is adequate to dismiss Mr. Williamson's petition because he is no longer "in custody" under the conviction he challenges in his petition (Dkt. No. 13, n. 1).

The United States Supreme Court recently addressed whether such a habeas petitioner is "in custody pursuant to the judgment of a State court" under 28 U.S.C. § 2254. *See Alaska v. Wright*, No. 20-940, 2021 WL 1602608, at *1 (U.S. Apr. 26, 2021) (per curiam). A jury convicted petitioner Sean Wright of 13 counts of sexual abuse of a minor. *Id.* (citing *State v. Wright*, 404 P.3d 166, 170 (Alaska 2017)). Mr. Wright finished serving his sentence on the 13 counts in Alaska in 2016 and moved to Tennessee. Once in Tennessee, Mr. Wright failed to register as a sex offender as required by federal law, and he later pleaded guilty to one count of failure to register and received a sentence of time served along with five years of supervised release. *Id.*

During the course of his federal criminal proceedings, Mr. Wright filed a petition for a writ of habeas corpus in the United States District Court for the District of Alaska pursuant to 28 U.S.C. §§ 2241 and 2254, claiming that the Alaska Supreme Court had unreasonably applied clearly established federal law when it denied his Sixth Amendment claims and affirmed his 2009 state conviction and sentence. The Alaska District Court denied Mr. Wright's petition on the grounds that he was not "in custody pursuant to the judgment of a State court." *Id.* (citing § 2254(a)). Noting that a proper motion under § 2254(a) requires more than merely being "in custody" somewhere, the court reasoned that "the proper procedure for Wright to challenge his current federal custody would be a motion filed in the Eastern District of Tennessee pursuant to 28 U.S.C. § 2255." *Id.*

The Ninth Circuit Court of Appeals reversed stating that, in its view, Mr. Wright's state conviction was "'a necessary predicate'" to his federal conviction, so Mr. Wright was in fact in custody pursuant to the judgment of a state court. *Id.* (citing *Wright v. Alaska*, 819 Fed. App'x.

544, 545 (9th Cir. 2020) (quoting *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001)). The panel declined to assess the United States District Court for the District of Alaska's view that § 2255, rather than § 2254, provided the proper route for Mr. Wright to challenge his current custody. *Id.* (citing *Wright*, 819 Fed. App'x. at 546, n. 1). One judge on the Ninth Circuit's panel concurred and asserted that § 2254 was the proper mechanism for Mr. Wright to challenge his conviction "because Wright is not attacking the constitutionality of his federal conviction for failing to register as a sex offender in Tennessee; he is collaterally attacking the constitutionality of his predicate Alaska conviction for sexual abuse of a minor." *Id.* (quoting *Wright*, 819 Fed. App'x at 546).

The United States Supreme Court reversed the Ninth Circuit Court of Appeals in a *per curiam* opinion. The United States Supreme Court stated:

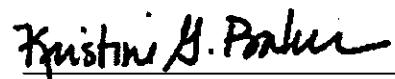
In *Maleng v. Cook*, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (*per curiam*), we held that a habeas petitioner does not remain "in custody" under a conviction "after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." *Id.*, at 492, 109 S.Ct. 1923; see also *id.*, at 490, 109 S.Ct. 1923 (noting the "in custody" requirement appears in both §§ 2241(c)(3) and 2254(a)). It made no difference, we said, that the possibility of a prior-conviction enhancement had materialized for the habeas petitioner in that case: "When the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore 'in custody.'" *Id.*, at 492–493, 109 S.Ct. 1923.

Alaska v. Wright, No. 20-940, 2021 WL 1602608, at *1 (U.S. Apr. 26, 2021). The United States Supreme Court concluded that the fact that Mr. Wright's "state conviction served as a predicate for his federal conviction thus did not render him 'in custody pursuant to the judgment of a State court' under § 2254(a)." *Id.* at 2. The same is true for Mr. Williamson, who is not "in custody" under § 2254(a) for failing to register as a sex offender.

For these reasons, the Court adopts the Findings and Recommendation in their entirety as this Court's findings in all respects (Dkt. No. 13). The Court dismisses Mr. Williamson's petition

for writ of habeas corpus (Dkt. No. 2). The relief requested is denied. Mr. Williamson's motion for default judgment pursuant to Federal Rule of Civil Procedure 55 and amended motion for discovery and to appoint counsel are denied as moot (Dkt. Nos. 7, 18). Mr. Williamson has not made a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(1)-(2), and the Court denies a certificate of appealability.

So ordered, this 3rd day of August, 2021.


Kristine G. Baker
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

ANTHONY BRIAN WILLIAMSON

PETITIONER

No. 4:20-cv-00922 KGB/PSH

**DEXTER PAYNE, Director,
Arkansas Department of Correction (“ADC”)**

RESPONDENT

FINDINGS AND RECOMMENDATION

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge Kristine G. Baker. You may file written objections to all or part of this Recommendation. If you do so, those objections must: (1) specifically explain the factual and/or legal basis for your objection; and (2) be received by the Clerk of this Court within fourteen (14) days of this Recommendation. By not objecting, you may waive the right to appeal questions of fact.

DISPOSITION

Petitioner Anthony Brian Williamson (“Williamson”) seeks *habeas corpus* relief pursuant to 28 U.S.C. § 2254. Williamson is currently in the custody of the Arkansas Department of Correction (ADC). The conviction he challenges is a 2007 conviction from Garland County, Arkansas, for failure to register as a sex offender.

Williamson pleaded guilty to the failure to register charge and was sentenced to sixty months imprisonment. Williamson and respondent Dexter Payne (“Payne”) agree that Williamson has served the entirety of this sentence.¹ His current custody in the ADC is the result of sentences for aggravated robbery and kidnapping convictions which are not the subject of this petition.

Because Williamson entered a guilty plea in 2007 to the failure to register charge, there was no direct appeal of the conviction. His sole post-conviction challenge to this conviction was a state court petition for writ of habeas corpus filed in June of 2020. Williamson alleged in state court that his conviction was invalid on its face, that the sentencing court was without jurisdiction, and the conviction and sentence were illegal. Docket entry no. 8-4. The state court dismissed the petition because Williamson was not currently incarcerated on the conviction which he challenged. Docket entry no. 8-5.

On August 10, 2020, Williamson filed his federal habeas corpus petition, alleging the following claims for relief:

1. Actual innocence;
2. His guilty plea was entered under duress and based on misinformation from

¹While this alone is reason for dismissal of the petition at bar, the Court will also address Payne’s statute of limitations argument in this Recommendation.

his attorney;

3. His guilty plea was entered as a result of conspiracy by state officials; and
4. He is subject to involuntary servitude.

Payne contends the petition should be dismissed for the following reasons: (1) Williamson is not in custody pursuant to the 2007 conviction he challenges; (2) Williamson failed to file this petition in a timely fashion; (3) Williamson's claims are procedurally barred due to his failure to adequately raise them in state court; and (4) Williamson's claim that he is subject to involuntary servitude is without merit. Docket entry no. 8. Williamson counters Payne's contentions in a response filed on September 21, 2020. Docket entry no. 9.

Williamson also moves for default judgment against Payne. Docket entry no. 7. This Recommendation will address both Payne's contentions that the habeas petition should be dismissed, and also Williamson's motion for default judgment. Williamson's petition should be dismissed, and Williamson's motion for default should be denied, for the reasons set forth below.

Statute of Limitations:

Section 101 of 28 U.S.C. 2244 (as amended) imposes a one year period of limitation on petitions for writ of habeas corpus:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a

State court. The limitation period shall run from the latest of--

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Payne contends that Williamson should have filed his federal habeas petition on or before January 12, 2009, in order to comply with the timeliness provisions of 28 U.S.C. § 2244. Payne is correct. Williamson's conviction became final on January 12, 2008, thirty days after the entry of the amended sentencing order, and the one year statute of limitations period expired on January 12, 2009. The petition at bar was filed in August 2020, more than 11 years after the conviction became final. *See Camacho v. Hobbs*, 774 F.3d 931 (8th Cir. 2015).

The Court notes that any time during which Williamson pursued a properly filed application for post-conviction relief should not be counted toward the limitations period. 28 U.S.C. § 2244(2). And while Williamson filed a state post-conviction habeas petition, that petition was not “properly filed” because Williamson was not incarcerated on the conviction he challenged at the time he sought state habeas relief. Thus, Williamson is not entitled to count the time during which he sought state habeas relief towards the limitations period. Additionally, even assuming the state habeas petition was “properly filed” as defined by 28 U.S.C. § 2244(2), “there was no federal limitations period remaining to toll.” *Painter v. Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001). The federal habeas statute of limitations had run on January 12, 2009, well before Williamson filed his state habeas petition in June of 2020.

The Court also notes that the failure to timely file a habeas petition may be excused by equitable tolling:

Equitable tolling is appropriate where extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time, or where a defendant’s conduct lulls the prisoner into inaction. *Id.* The doctrine applies “only when some fault on the part of the defendant has caused a plaintiff to be late in filing, or when other circumstances, external to the plaintiff and not attributable to his actions, are responsible for the delay.” *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir.2002). Equitable tolling is an “exceedingly narrow window of relief.” (*Citation omitted*).

Maghee v. Ault, 410 F.3d 473, 476 (8th Cir. 2005).

Williamson, in his reply to Payne's response, offers two reasons why the limitations period should be equitably tolled: (1) he was the victim of a conspiracy perpetuated by state officials and his trial attorney resulting in his conviction; and (2) he is actually innocent of the crime.

Neither of the reasons advanced by Williamson serve to equitably toll the limitations period. The mere assertion of a conspiracy against Williamson resulting in his conviction is insufficient to toll the limitations period. Williamson offers no evidence to support the existence of a conspiracy, nor does he explain how such a conspiracy prevented him from seeking habeas relief for the year after his conviction became final. He does not claim that any fault on the part of Payne caused him to be late in filing, nor does he claim that any circumstances not attributable to his actions (other than this alleged conspiracy) caused him to be late in filing.

Williamson's assertion of actual innocence also does not excuse his failure to seek habeas relief during the limitations period. Pursuant to *McQuiggin v. Perkins*, 569 U.S. 383 (2013), actual innocence, if proved, may serve as a gateway through which a petitioner may pass to overcome the expiration of the statute of limitations. The Supreme Court emphasized, however, that a tenable actual innocence gateway plea is rare.

The Supreme Court described evidence which may support a claim of actual innocence as follows:

To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Schlup v. Delo, 513 U.S. 298, 324 (1995). Such new evidence "must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U.S. at 327. This demanding standard is not met by Williamson's assertion of a conspiracy. Williamson fails to offer the "new reliable evidence" envisioned in *Schlup v. Delo, supra*. As a result, Williamson fails to establish actual innocence as a pathway to defeating the limitations period.

For the reasons stated herein, Williamson's August 2020 federal habeas petition was untimely filed and should be dismissed on that basis.²

Default Judgment:

Williamson contends Payne failed to respond to his petition in a timely manner and, as a result, he merits default judgment. The docket sheet reflects the following

²Because the Court finds that the statute of limitations bars Williamson's petition, the Court declines to address the other arguments made by Payne in his response to the habeas petition.

events:

- * Petition filed on August 10, 2020.
- * The Court Orders service of the petition by regular mail on August 18, and directs Payne to file an answer or other response within 21 days after service.
- * Payne responds on September 8.

The motion for default should be denied for three reasons. First, Williamson does not demonstrate Payne's response is untimely. Indeed, the calculations show the response was timely even if Payne was served on the very day the Court ordered service. Second, Williamson does not plead or prove he was prejudiced, even assuming an untimely response was filed. Finally, default judgments are extreme and disfavored in habeas corpus cases. *See, e.g., Hale v. Lockhart*, 903 F.2d 545 (8th Cir. 1990).

For the foregoing reasons, Williamson's motion for default judgment (docket entry no. 7) should be denied.

Conclusion:

The Court recommends that the petition for writ of habeas corpus be dismissed and the relief requested be denied because the petition is time-barred. The Court also

recommends that Williamson's motion for default judgment be denied.

Pursuant to 28 U.S.C. § 2253 and Rule 11 of the Rules Governing Section 2554 Cases in the United States District Court, the Court must determine whether to issue a certificate of appealability in the final order. In § 2254 cases, 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)(1)-(2). The Court finds no issue on which petitioner has made a substantial showing of a denial of a constitutional right. Thus, the certificate of appealability should be denied.

IT IS SO RECOMMENDED this 6th day of October, 2020.



UNITED STATES MAGISTRATE JUDGE