

APPENDIX A1 – A4

Order of the United States Court of Appeals

for the Sixth Circuit

(Dec. 27, 2022 ; # 22-1618)

No. 22-1618

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Dec 27, 2022

DEBORAH S. HUNT, Clerk

KWAME BURRELL,

)

Petitioner-Appellant,

)

v.

)

GEORGE STEPHENSON, Warden,

)

Respondent-Appellee.

)

O R D E R

Before: NALBANDIAN, Circuit Judge.

Kwame Burrell, a pro se Michigan prisoner, appeals the district court's judgment dismissing as time-barred his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. This court construes his notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). Because no reasonable jurist could debate the district court's decision, Burrell's COA application will be denied.

In 2009, Burrell pleaded guilty to second-degree murder, and the trial court sentenced him to 26 years and 3 months to 50 years of imprisonment. Appellate counsel moved to withdraw because he could find no non-frivolous issues for appeal, and the trial court granted the motion. Burrell moved for appointment of substitute counsel, but the trial court denied the motion on October 25, 2011. Thus, no direct appeal of the conviction took place. In 2017, Burrell filed a motion for relief from judgment raising the substitute-counsel issue. The trial court denied the motion, and the Michigan Court of Appeals and Supreme Court both denied leave to appeal. *See People v. Burrell*, 935 N.W.2d 340 (Mich. 2019).

In January 2020, Burrell filed a § 2254 petition asserting that the trial court failed to protect his due-process rights by not appointing him substitute counsel on direct appeal and that the trial court failed to adequately inquire into his mental competence to stand trial or plead guilty. The

State moved to dismiss for untimeliness. The district court granted the motion and denied Burrell a COA. *Burrell v. Jackson*, No. 20-10161, 2022 WL 2192925 (E.D. Mich. June 17, 2022).

To obtain a COA, an applicant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied a § 2254 petition on procedural grounds, a petitioner must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A one-year statute of limitations applies to § 2254 petitions. *See* 28 U.S.C. § 2244(d)(1). Ordinarily, the limitations period begins to run on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). Burrell’s conviction became final on December 2, 2010, one year after his sentencing, when the time to file a direct appeal expired. *See* Mich. Ct. R. 7.205(F)(3) (2009). Even if the limitations period were tolled while Burrell sought the appointment of new counsel, *see* 28 U.S.C. § 2244(d)(2), it would not make his petition timely, as more than six years passed between the trial court’s denial of that motion and his filing of a motion for relief from judgment. Burrell argued that he could file his § 2254 petition at any time because the judgment was void. But even if the state-court judgment were invalid, he is still “in custody pursuant to the judgment of a State court,” 28 U.S.C. § 2254(a), and so the statute of limitations still applies. *See Frazier v. Moore*, 252 F. App’x 1, 6 (6th Cir. 2007); *see also Accord v. Anderson Cnty.*, No. 22-5206, at *2-3 (6th Cir. Nov. 8, 2022) (finding petitioner’s allegation that his prosecution was void insufficient to overcome the statute of limitations requirement).

The statute of limitations may be equitably tolled if a petitioner “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) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Burrell stated in his habeas petition that he discovered that his right to substitute counsel had been violated only after another prisoner showed him *People v. Atwood*, 875 N.W.2d 200 (Mich. 2016). *Atwood* relied on longstanding Supreme Court precedent, however, so he has not shown that he pursued his rights diligently; and ignorance of the law and pro se status are not extraordinary circumstances excusing late filing. See *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012). The district court noted that Burrell's claim that he was mentally incompetent to stand trial or plead guilty could be construed as an argument for equitable tolling, but he provided no details of his mental condition and did not show a causal link between his mental condition and his ability to file a timely habeas petition. See *Watkins v. Deangelo-Kipp*, 854 F.3d 846, 851-52 (6th Cir. 2017). Burrell thus has not made a substantial showing that he is entitled to equitable tolling.

The statute of limitations may also be overcome by a showing of actual innocence, see *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013), but Burrell presented no new evidence that he did not commit the underlying crime.

For these reasons, the application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KWAME BURRELL,

Petitioner,

v.

SHANE JACKSON,

Respondent.

Case No. 20-10161
Honorable Laurie J. Michelson

**OPINION AND ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS [1]**

In 2009, Kwame Burrell was charged with strangling Kiesha French to death. He eventually pled guilty to second-degree murder and is serving a sentence of up to 50 years in prison. In 2020, Burrell filed this pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254. The Warden argues that the petition should be dismissed because it was filed eight years after the state-court judgment became final, meaning that Burrell failed to comply with the one-year statute of limitations set out in 28 U.S.C. § 2244(d)(1). The Court agrees and DENIES the petition as untimely.

I.

On October 21, 2009, Burrell pled guilty to second-degree murder. (See ECF No. 6-4, PageID.152–153.) On December 2, 2009, Burrell was sentenced to 26 years, 3 months to 50 years in prison. (See ECF No. 6-5, PageID.175.)

Shortly thereafter, Burrell requested counsel to represent him on

appeal. (ECF No. 6-1, PageID.64.) His appointed counsel believed that only frivolous issues could be identified for appeal and asked the trial court to withdraw the order appointing him. (ECF No. 6-7.) The trial court granted the motion on May 19, 2010, in a one-page order and did not appoint another lawyer. (ECF No. 6-8.) Over a year later, Burrell filed a motion requesting appointment of substitute appellate counsel. (See ECF No. 6-9.) The trial court denied the motion on October 25, 2011. (See ECF No. 6-10.)

Six years later, on October 27, 2017, Burrell filed a motion for relief from judgment in the trial court claiming that the trial court's failure to appoint substitute appellate counsel violated his right to due process. (See ECF No. 6-11.) The trial court denied the motion. (See ECF No. 6-12.) The Michigan Court of Appeals denied Burrell's application for leave to appeal, *People v. Burrell*, No. 347776 (Mich. Ct. App. July 2, 2019) (unpublished order available at ECF No. 6-14), and, on November 26, 2019, the Michigan Supreme Court also denied leave to appeal, *People v. Burrell*, 935 N.W.2d 340 (Mich. 2019).

Burrell filed this habeas corpus petition on January 16, 2020. (See ECF No. 1.) The Warden seeks to dismiss the petition as untimely. (See ECF No. 5.) Burrell filed a reply arguing that he was not competent to plead guilty in 2009 and that the judgment is therefore void, making the statute of limitations inapplicable. (See ECF No. 7.)

II.

Outside of a few contexts that are not relevant here, the Antiterrorism

and Effective Death Penalty Act provides that a federal habeas petitioner must file his petition within one year from “the date on which the [state] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]” *See* 28 U.S.C. § 2244(d)(1)(A). And if that limitations period runs out, AEDPA “effectively bars relief absent a showing that the petition’s untimeliness should be excused based on equitable tolling” or based on new evidence of the petitioner’s actual innocence. *Akrawi v. Booker*, 572 F.3d 252, 260 (6th Cir. 2009); *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

The Court must first determine when Burrell’s judgment became final. Burrell was sentenced on December 2, 2009. He did not directly appeal his conviction to either the Michigan Court of Appeals or the Michigan Supreme Court. So Burrell’s conviction became final when the time for pursuing a direct appeal expired. *See* 28 U.S.C. § 2244(d)(1)(A). Under then-existing Michigan law, Burrell had one year—until December 2010—to seek leave to appeal to the state appellate courts. *See* Mich. Ct. R. 7.205(F)(3) (2009) (later amended to provide only six months to seek leave to appeal, *see* Mich. Ct. R. 7.205(A)(2)(a)). He did not do so, and his conviction became final in December 2010. So the one-year limitations period expired in December 2011. *See* 28 U.S.C. § 2244(d); *DiCenzi v. Rose*, 452 F.3d 465, 469 (6th Cir. 2006).

Burrell signed and dated his petition on January 16, 2020, and it is considered filed on that date. (ECF No. 1, PageID.7); *United States v. Smotherman*, 838 F.3d 736, 737 (6th Cir. 2016). So the petition was filed over

eight years after the limitations period expired and is untimely.¹

The conclusion that the petition is untimely would seemingly end the matter. But Burrell argues that the statute of limitations does not bar review of his petition because he “suffers from a void judgment which can be raised at any time and has no bar when it comes to AEDPA.” (ECF No. 7, PageID.307.) And the judgment is void, says Burrell, because the trial court violated state law when it declined to appoint replacement appellate counsel and failed to make a competency determination. (*Id.*)

The Sixth Circuit has squarely rejected the argument that an attack on the validity of an underlying state-court judgment can overcome a time-bar. AEDPA’s statute of limitations reads as follows: “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.” 28 U.S.C. § 2244(d)(1). In *Frazier v. Moore*, that court explained that this language “requires only custody ‘pursuant to the judgment of a state court.’ Nothing in the text requires that the judgment be valid under state or federal law.” 252 F. App’x 1, 6 (6th Cir. 2007). Similarly, in *Witherell v. Warren*, the court said “[e]ven if a state court conviction is void, the federal habeas statute of limitations still applies where the petitioner is in custody pursuant to that state court judgment.” No. 18-1409, 2018 WL 4897064,

¹ Burrell filed a motion for relief from judgment on October 27, 2017, but that motion had no effect on the already-expired statute of limitations. See *Error! Main Document Only. Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) (the filing of an application for state post-conviction relief does not “restart the clock at zero” or toll a limitations period that has fully run).

at *3 (6th Cir. June 21, 2018). So because Burrell is in custody pursuant to a state-court judgment, the statute of limitations applies to him whether or not the judgment is valid.

Thus, absent a showing of equitable tolling or actual innocence, the petition is time-barred. The doctrine of equitable tolling allows courts to toll a statute of limitations when “a litigant’s failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant’s control.”

Robertson v. Simpson, 624 F.3d 781, 783 (6th Cir. 2010) (internal quotation omitted). The party seeking equitable tolling bears the burden of proving he is entitled to it, and such relief is granted only “sparingly” by federal courts. *Id.* 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.” *Jefferson v. United States*, 730 F.3d 537, 549 (6th Cir. 2013) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Burrell is not entitled to equitable tolling. Though he does not cast his argument in terms of equitable tolling, the closest he comes to explaining his delay in filing this habeas petition is that he was not aware of his right to appellate counsel until another prisoner showed him *People v. Atwood*, 875 N.W.2d 200 (Mich. 2016). But, as the Warden argued, *Atwood* did not establish any new law and merely relied on longstanding Supreme Court precedent. (ECF No. 5, PageID.49); see *Atwood*, 875 N.W.2d 200 (citing *Anders v. California*, 386

U.S. 738 (1967) and *Halbert v. Michigan*, 545 U.S. 605 (2005)). Stated differently, Burrell could have made a similar claim before he was aware of *Atwood* specifically. So Burrell has not shown that he was diligently pursuing his rights. And, in any case, a petitioner’s “*pro se* status and lack of knowledge of the law are not sufficient to constitute an extraordinary circumstance and to excuse his late filing.” *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012).

Burrell also says that he is mentally ill, which is arguably an attempt to use the “extraordinary circumstances” route to tolling. But a “blanket assertion of mental incompetence is insufficient to toll the statute of limitations. Rather, a causal link between the mental condition and untimely filing is required.” *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011). Burrell never suggested that his mental illness prevented him from timely filing a habeas petition, and he was clearly able to file motions in the state court over the last decade. (See ECF Nos. 1, 6-1, 7.) So this argument cannot excuse the time-bar either.²

Finally, Burrell cannot overcome the time-bar by making a showing of actual innocence. *See McQuiggin v. Perkins*, 569 U.S. 383, 399–400 (2013). A

² The Court is aware that the Sixth Circuit recently found a Michigan trial court’s failure to appoint replacement appellate counsel unconstitutional under somewhat similar circumstances. *See Pirkel v. Burton*, 970 F.3d 684, 697 (6th Cir. 2020) (finding that the trial court violated a habeas petitioner’s constitutional right to appellate counsel when the trial (rather than appellate) court determined there were no appealable issues, when appellate counsel filed a defective brief, and when the court failed to conduct an independent review of the merits of an appeal). But because the petition is time-barred and the untimeliness cannot be excused, the Court cannot reach the merits.

credible actual innocence claim requires a habeas petitioner to support allegations of constitutional error “with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Burrell presents no new, reliable evidence to establish that he was actually innocent of French’s murder. (See ECF Nos. 1, 7.)

In sum, Burrell’s complaint is time-barred and is not excused by equitable tolling or evidence of actual innocence.

III.

For the foregoing reasons, the Court DENIES Burrell’s petition for a writ of habeas corpus. (ECF No. 1.) A separate order on Burrell’s certificate of appealability and a separate judgment will follow.

SO ORDERED.

Dated: June 17, 2022

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KWAME BURRELL,

Petitioner,

v.

SHANE JACKSON,

Respondent.

Case No. 20-10161
Honorable Laurie J. Michelson

JUDGMENT

It is ORDERED and ADJUDGED that pursuant to this Court's opinion and order dated June 16, Kwame Burrell's petition for a writ of habeas corpus is DENIED and DISMISSED WITH PREJUDICE. A certificate of appealability is DENIED, but Burrell is GRANTED leave to appeal in forma pauperis.

Dated this 16th day of June 2022 in Detroit, Michigan.

KINIKIA ESSIX
CLERK OF THE COURT

By: s/Erica Parkin
DEPUTY COURT CLERK

APPROVED:

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

Dated: June 17, 2022

APPENDIX C1

Order of the Michigan Supreme Court

(November 26, 2019, #160069)

People v. Burrell

Supreme Court of Michigan
November 26, 2019, Decided
SC: 160039

Reporter

935 N.W.2d 340 *; 2019 Mich. LEXIS 2163 **; 505 Mich. 871

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-
Appellee, v KWAME BURRELL, Defendant-Appellant.

Prior History: **[**1]** COA: 347776. Washtenaw CC: 09-
000210-FC.

People v. Burrell, 2019 Mich. App. LEXIS 3548 (Mich.
Ct. App., July 2, 2019)

Core Terms

order of the court

Judges: Bridget M. McCormack, Chief Justice. David F. Viviano, Chief Justice Pro Tem. Stephen J. Markman, Brian K. Zahra, Richard H. Bernstein, Elizabeth T. Clement, Megan K. Cavanagh, Justices.

Opinion

[*340] Order

On order of the Court, the application for leave to appeal the July 2, 2019 order **[*341]** of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

End of Document

APPENDIX D1

Opinion of the Michigan Court of Appeals

(July 2, 2019, #347776)

 Neutral
As of: February 6, 2023 2:25 PM Z

People v. Burrell

Court of Appeals of Michigan

July 2, 2019, Decided

Docket No. 347776

Reporter

2019 Mich. App. LEXIS 3548 *

People of MI v Kwame Burrell

Subsequent History: Leave to appeal denied by
People v. Burrell, 505 Mich. 871, 935 N.W.2d 340, 2019
Mich. LEXIS 2163 (Nov. 26, 2019)

Certificate of appealability denied, Judgment entered by,
Writ of habeas corpus denied, Dismissed by *Burrell v.*
Jackson, 2022 U.S. Dist. LEXIS 108736 (E.D. Mich.,
June 17, 2022)

Prior History: [*1] LC No. 09-000210-FC.

Core Terms

orders

Counsel: For PEOPLE OF MI, Plaintiff-Appellee: FAWN
ARMSTRONG.

Judges: Thomas C. Cameron, Presiding Judge. Kirsten
Frank Kelly, Michael J. Riordan, Judges.

Opinion

ORDER

The Court orders that the motion to waive fees is
GRANTED for this case only.

The Court further orders that the delayed application for
leave to appeal is DENIED because defendant has
failed to establish that the trial court erred in denying the
motion for relief from judgment.

No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE: **KWAME BURRELL**,
Petitioner,

V

WILLIS CHAPMAN, Warden
Respondent.

NOTARIZED STATEMENT OF DEPOSITING

Kwame Burrell, first duly sworn, states he is an inmate confined at the Macomb Correctional Facility, at 34625 26 Mile Road, Lenox Township, Michigan 48048, and on this 16 day of February 2023, he turned over to the Michigan Department of Corrections Officials to deposit an Original; **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS w/AFFIDAVIT IN SUPPORT; PETITION FOR WRIT OF CERTIORARI w/APPENDIX; PROOF OF SERVICE**, to file with the Clerk of Court, United States Supreme Court, **Notarized Statement Of Depositing**; in the Macomb Correctional Facility Internal Mail System with first class postage fully prepaid.

Subscribed and sworn to before me

This 16 day of February 2023

Kelly B. Edwards

Notary Public

Kelly B. Edwards
My Commission expires
09-09-2029

Kwame Burrell
Kwame Burrell, #280050
Pro Se

Notary Public, State of Michigan
County of Sanilac
Acting in the county of Macomb