

APPENDIX CERTIFICATION OF REQUIREMENTS

I hereby certify that this "PETITION FOR WRIT OF CERTIORARI APPENDIX" complies with Supreme Court Rule 14 Content of a Petition for Writ of Certiorari (i) An appendix containing in the order indicated see Rule 14.1(i),(vi)

- i. Opinions, orders, finding or facts, and conclusions of law, whether written or orally given and transcribed, enter in conjunction with the judgment sought to be reviewed,
- vi. any other material the petitioner believes essential to understand the petition.

I further certify that the contents of this appendix is compiled of copies, sworn by the petitioner to be true and correct copies of original court documents and of law authorities (e.g. state statute law, Wisconsin statute 948.02(i); and legislative law, Wisconsin Jury Instructions) all relevant to this petitioner case issues governing at the time of his conviction.

DATED this 26TH day of April 2023.



Lamonte Ealy
Petitioner

Pro'se litigant prisoner No. 463485
Green Bay Correctional Institution
P.O. Box 19033
Green Bay, Wisconsin 54307-9033

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 22, 2023

Decided March 24, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-2622

LAMONTE EALY,
Petitioner-Appellant,

Appeal from the United States District
Court for the Eastern District of
Wisconsin.

v.

No. 2:22-cv-00736-BHL

DYLON RADTKE,
Respondent-Appellee.

Brett H. Ludwig,
Judge.

ORDER

Lamonte Ealy seeks a certificate of appealability to challenge the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We 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, we DENY the request for a certificate of appealability, the request for leave to proceed in forma pauperis, and all other pending motions.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAMONTE A. EALY,

Petitioner,
v.

Case No. 22-cv-0736-bhl

DYLON RADTKE,

Respondent.

ORDER DISMISSING PETITION

On August 5, 2022, this Court screened Petitioner Lamonte A. Ealy's petition for writ of habeas corpus under 28 U.S.C. Section 2254 and concluded that the claims raised therein had been previously rejected on an adequate and independent state law ground. (ECF No. 6.) Because such procedural default generally bars federal habeas review, the Court offered Ealy a chance to file a brief explaining how he could satisfy the cause and prejudice or miscarriage of justice exceptions. (*Id.* at 3.) On August 23, 2022, Ealy timely responded. (ECF No. 7.) Because nothing in his brief excuses his procedural default, his petition will be dismissed.

Ealy's brief invokes the "fundamental miscarriage of justice" exception. Relief under this exception "is limited to situations where [a] constitutional violation has probably resulted in a conviction of one who is actually innocent." *Dellinger v. Bowen*, 301 F.3d 758, 767 (7th Cir. 2002) (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). "To show 'actual innocence,' [a petitioner] must present clear and convincing evidence that, but for the alleged error, no reasonable juror would have convicted him." *Dellinger*, 301 F.3d at 767.

Ealy argues that prosecutors violated the constitutional prohibition on double jeopardy when they charged him with two counts of first-degree sexual assault under Wis. Stat. Section 948.02(1)(e). (ECF No. 7 at 12.) Section 948.02(1)(e) provides: "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." The state twice invoked this statute—first, in Count 1, where it argued that Ealy had sexual contact with a child's breasts, buttocks, and/or vagina; and second, in Count 3, where it argued that Ealy placed the child's hand on his penis. (ECF No. 1-1 at 37.) The jury returned a

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guilty verdict on Count 1 and a not guilty verdict on Count 3. (*Id.*) According to Ealy, because these counts were multiplicitous, no rational jury could have convicted on Count 1 while acquitting on Count 3. (ECF No. 7 at 12-13.) Thus, he is in custody in violation of the Double Jeopardy Clause, and failure to consider his petition would result in a fundamental miscarriage of justice.

But “[t]he Double Jeopardy Clause is not implicated when multiple separate violations of the same provision are charged in multiple counts.” *U.S. v. Snyder*, 189 F.3d 640, 647 (7th Cir. 1999). And there is no logical inconsistency between a conviction on Count 1 and acquittal on Count 3; neither depended on the other because the predicate acts (both of which violated the statute) were different. Under Ealy’s interpretation of the Double Jeopardy Clause, prosecutors would never be allowed to charge defendants for multiple violations of the same statute, even if those violations occurred in separate cities on different days. That is not how double jeopardy works.

To successfully invoke the fundamental miscarriage of justice exception and excuse his procedural default, Ealy needed to show actual innocence. He has not done so.

Accordingly,

IT IS HEREBY ORDERED that Petitioner’s petition for writ of habeas corpus under 28 U.S.C. Section 2254, ECF No. 1, is **DISMISSED**. The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin on August 29, 2022.

s/ Brett H. Ludwig
BRETT H. LUDWIG
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAMONTE A. EALY,

Petitioner,

Case No. 22-cv-0736-bhl

v.

DYLON RADTKE,

Respondent.

ORDER DENYING MOTION TO APPEAL IN FORMA PAUPERIS

On June 24, 2022, Petitioner Lamonte A. Ealy filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. (ECF No. 1.) A little over two weeks later, he paid the \$5.00 filing fee. On August 5, 2022, the Court screened Ealy's petition, determined that his claims were procedurally defaulted, and ordered him to file a document showing cause why his petition should not be dismissed. (ECF No. 6.) Ealy responded on August 23, 2022, but because his response did not identify any excuse for his procedural default, the Court dismissed his petition less than a week later. (ECF No. 8.) On September 15, 2022, Ealy docketed his notice of appeal. (ECF No. 12.) He also filed a motion for leave to appeal without prepayment of the filing fee, accompanied (about a week later) by his prisoner trust fund account statement. (ECF Nos. 14 & 18.)

Although Ealy paid the \$5.00 filing fee to initiate his case before this Court, the appellate fee is substantially higher, and Ealy's prisoner trust fund account balance shows that he lacks sufficient funds to pay it. (ECF No. 18 at 1.) He, therefore, meets the indigency requirement to appeal *in forma pauperis*. That said, a petitioner cannot appeal *in forma pauperis* if the district court "certifies in writing that [the appeal] is not taken in good faith." 28 U.S.C. § 1915(a)(3). Thus, the question before the Court is whether Ealy's appeal is taken "in good faith."

While the Court did not issue Ealy a certificate of appealability, an appeal can meet the good faith standard without also clearing the higher bar necessary to obtain a certificate. *See Walker v. O'Brien*, 216 F.3d 626, 631-32 (7th Cir. 2000). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some

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merit." *Id.* at 632. Ealy does not meet even that more modest standard here. In dismissing his petition, the Court determined that Ealy had procedurally defaulted on his federal habeas claims and failed to excuse that default. (ECF No. 8.) His current motion does not identify any reason to suppose this ruling might be reversed on appeal. *See Thomas v. Zatecky*, 712 F.3d 1004, 1006 (7th Cir. 2013). In the absence of any such argument, the Court must conclude that his appeal is frivolous and therefore "not taken in good faith." The Court, therefore, denies the motion to appeal in *forma pauperis*.

Accordingly,

IT IS HEREBY ORDERED that Ealy's motion for leave to appeal *in forma pauperis*, ECF No. 14, is **DENIED**.

Dated at Milwaukee, Wisconsin on September 20, 2022.

s/ Brett H. Ludwig

BRETT H. LUDWIG
United States District Judge