UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6540

ANTWON WHITTEN,

Petitioner - Appellant,

v.

HAROLD W. CLARKE, Director, Virginia Department of Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Lawrence Richard Leonard, Magistrate Judge. (2:20-cv-00570-LRL)

Submitted: December 20, 2022 Decided: December 22, 2022

Before NIEMEYER and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Antwon Whitten, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Antwon Whitten seeks to appeal the magistrate judge's order dismissing as untimely his 28 U.S.C. § 2254 petition.* *See Gonzalez v. Thaler*, 565 U.S. 134, 148 & n.9 (2012) (explaining that § 2254 petitions are subject to one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2244(d)(1)). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez*, 565 U.S. at 140-41 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Whitten has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

* The parties consented to proceed before a magistrate judge pursuant to 28 U.S.C. § 636(c).

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ANTWON GAIRRIO WHITTEN,

Petitioner,

v. **Civil Action No. 2:20-cv-570**

HAROLD W. CLARKE, Director,
Virginia Department of Corrections,

Respondent.

OPINION AND ORDER

This matter is before the Court on *pro se* Petitioner Antwon Gairrio Whitten's ("Petitioner") Amended Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 ("the Petition"), ECF No. 8, and Respondent Harold W. Clarke's ("Respondent") Motion to Dismiss, ECF No. 22. Petitioner consented to magistrate judge jurisdiction on May 11, 2021, ECF No. 20, and Respondent Harold W. Clarke ("Respondent") consented on May 21, 2021, ECF No. 26. Accordingly, this case was referred to the undersigned United States Magistrate Judge ("the undersigned") pursuant to an Order of the United States District Judge, ECF No. 27, and the case was reassigned. For the following reasons, Respondent's Motion to Dismiss, ECF No. 22, is **GRANTED**, and the Petition, ECF No. 8, is **DENIED** and **DISMISSED WITH PREJUDICE**.

I. PROCEDURAL BACKGROUND

On June 2, 2005, the Circuit Court for Stafford County ("the Trial Court") convicted Petitioner, following a jury trial, of one count of capital murder and one count of robbery, and sentenced Petitioner to two life sentences for these charges. ECF No. 24, attach. 1 at 1; ECF No. 8 at 5.

The evidence showed that on July 14, 2003, while Crystal Jacobs ("the victim") was closing the post office inside the Earl's True Value Hardware store where she worked, Petitioner stabbed her 16 times and stole cash amounting to $1,845.97 and a package containing a watch owned by Susan Ware. ECF No. 24, attach. 2, at 1–2. During the victim's autopsy, the medical examiner found genetic material under the victim's fingernails that matched Petitioner's DNA. *Id.* at 2. Police executed a search warrant at Petitioner's apartment and found the stolen watch and a shoe with a bloodstain on the sole. *Id.* DNA from that bloodstain matched the victim's DNA. *Id.*

Petitioner appealed his conviction to the Court of Appeals of Virginia. ECF No. 24, attach. 2. The Court of Appeals dismissed his appeal on July 26, 2006 on the grounds that the evidence was sufficient to prove Petitioner guilty beyond a reasonable doubt of capital murder and robbery. *Id.* at 1, 4. Petitioner appealed that decision, and the Supreme Court of Virginia refused the petition on January 4, 2007. ECF No. 24, attach. 3.

Twelve years later Petitioner filed a Petition for a Writ of Habeas Corpus in the Circuit Court of Stafford County ("the Habeas Court") on January 22, 2019. ECF No. 24, attach. 4 at 2. As explained by the Habeas Court, Petitioner alleged the following claims:

> (1) This Court was without subject matter jurisdiction to enter his conviction and sentencing orders, rendering them void.
>
> > (A) The Stafford County Circuit Court failed to prove that the July 14, 2003 crimes related to this claim took place in the Commonwealth of Virginia. No street address, town, city was used in the indictment, information, or presentments.
> >
> > (B) The mere fact that Stafford County Sherriff's Office initiated the investigation of the crime does not give a persuasive argument that the crime took place in Stafford County or Virginia.
> >
> > (C) This Court did not take judicial notice of the crime scene's location as being in Virginia.

(D) The probable cause affidavits supporting Whitten's arrest warrants are not on file with the court, negat[ing] subject matter jurisdiction as this Court seized [Whitten] without probable cause or due process of law.

(2) Whitten's conviction and sentence were procured by fraud on this Court, committed by judges of this Court, prosecutors, law enforcement, and his defense team. Specifically, Whitten claims that this conspiracy defrauded him by concealing the address of the site of his crimes, which he alleges are in Fredericksburg as opposed to Stafford County.

(3) Whitten's attorneys, Paul Maslakowski and Allen Bareford, provided ineffective assistance of counsel by:

(A) [C]onceal[ing] the true jurisdiction of the crime scene and failing to demonstrate that it was outside the jurisdiction of this Court;

(B) Failing to call the defense DNA expert to testify; and

(C) Failing to challenge the indictments as insufficient.

ECF No. 24, attach. 4 at 2–3 (internal citations and quotations omitted). On April 25, 2019, the Habeas Court issued a final order denying and dismissing the habeas petition as untimely. *Id.* at 6–12. The Habeas Court found that Petitioner's claims were without merit, and therefore his eleven-year delay in bringing his habeas petition was not excusable. *Id.* at 10.

Petitioner appealed the Habeas Court's order to the Supreme Court of Virginia on November 14, 2019. ECF No. 24, attach. 6. Though Petitioner's claims are difficult to interpret, the Court interprets Petitioner's claims as follows:

1. The habeas court erred in finding that the trial court had subject matter jurisdiction to enter convictions and sentencing orders, thus voiding the judgment.
2. The Trial Court failed to prove that the crimes took place in the Commonwealth of Virginia.
3. The Trial Court did not take judicial notice of the crime scene being in Virginia.
4. Affidavits for Whitten's arrest were never filed with the Trial Court; thus, he was seized without probable cause.
5. The habeas court erred in not addressing the issue of the probable cause affidavits for his arrest.

6. The habeas court erred in finding that the petition was time-barred.

7. The Court of Appeals order denying Petitioner's petition for appeal from July 26, 2006 was in error, as was the Supreme Court's refusal of the petition for appeal on January 4, 2007.

8. The habeas court erred in finding that there was no fraud upon the court and no injury to Petitioner

9. Assistant Commonwealth's Attorneys participated in committing fraud upon the court by eliciting false testimony from witnesses.

10. Detectives submitted misleading information about the address of the crime scene to the magistrate judge.

11. Trial counsel for Petitioner failed to stop the fraud upon the court, despite having the knowledge and information to do so.

12. The Trial Court participated in the conspiracy to defraud the court.

13. The habeas court erred in denying Petitioner's habeas petition.

14. The habeas court erred in finding there was no ineffective assistance of counsel.

15. Petitioner's trial counsel was ineffective for failing to call the DNA expert to testify.

16. The habeas court's ruling is plain error.

17. The rulings of the appellate courts below are all void for lack of subject matter jurisdiction.

Id. On March 20, 2020, the Supreme Court of Virginia dismissed in part, and refused in part the petition for appeal. ECF No. 24, attach 7. The Supreme Court of Virginia dismissed Petitioner's third assignment of error, and refused Petitioner's remaining assignments of error. *Id.*

Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, which was denied on October 5, 2020. *Whitten v. Clarke*, 141 S. Ct. 396 (2020).

Petitioner filed a petition for habeas corpus pursuant to Section 2254 in this Court on October 23, 2020,[1] ECF No. 1, and an Amended Petition, ECF No. 8, on November 26, 2020. In the Amended Petition, he alleges the following:

1. The trial court did not have subject matter jurisdiction over the case, and as such the conviction and sentencing orders are void. ECF No. 8 at 24. Relatedly, Petitioner alleges that:

    a. The trial court failed to take judicial notice of the location of the crime scene. ECF No. 8 at 24, 26.

    b. The location of the crimes was never stated at pretrial or trial. ECF No. 8 at 26.

    c. Petitioner was seized without probable cause, and no probable cause hearing was held, so the trial court did not have jurisdiction over the case. ECF No. 8 at 21, 32, 60.

2. Officers of the court, including the judge, prosecutors, law enforcement, and Petitioner's defense team, conspired to commit fraud upon the trial court by intentionally concealing the "true" jurisdiction of the crimes in order to "take unlawful jurisdiction." ECF No. 8 at 35, 37.

3. Petitioner's trial attorneys provided ineffective assistance of counsel by:

    a. Participating in fraud upon the court by helping to conceal the true location of the crimes. ECF No. 8 at 53.

    b. Failing to call the defense DNA expert to testify. ECF No. 8 at 54.

    c. Failing to address the issue before trial of whether there was probable cause for Petitioner's arrest, or the search and seizure of evidence in his apartment. ECF No. 8 at 60.

    d. Failing to challenge the indictments as insufficient. ECF No. 8 at 63.

4. The habeas court should have ordered an evidentiary hearing. ECF No. 8 at 29, 59.

5. The habeas court failed to rule on the merits of all the claims. ECF No. 8 at 54–55.

[1] Petitioner certified that his Petition was placed in the prison mailing system on October 23, 2020. ECF No. 1 at 5. The Petition was stamped as "received" in the Eastern District of Virginia, Alexandria Division on October 27, 2020, *Id.* at 6. The undersigned affords Petitioner the benefit of the "prison mailbox rule," which deems prisoner court filings to be "filed" as of the date that the documents are given to prison authorities for mailing—here, October 27, 2020. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) and Rule 3(d) of the Rules Governing Section 2254 Cases in the United States District Courts.

6. The Supreme Court of Virginia should have ordered an evidentiary hearing. ECF No. 8 at 32, 59.

7. The Supreme Court of Virginia failed to rule on the merits all of Petitioner's claims. ECF No. 8 at 25, 27.

8. Petitioner did not receive a fair hearing on his state habeas petition because he was not appointed counsel. ECF No. 8 at 52–53.

The Respondent filed a Motion to Dismiss, a Rule 5 Answer, a Brief in Support of Motion to Dismiss and Rule 5 Answer, and a *Roseboro* Notice. ECF Nos. 22–25. Petitioner filed a Response to the Motion to Dismiss. ECF No. 29. Therefore, the Petition and Motion to Dismiss are now ripe for disposition.

II. ANALYSIS

Before considering the merits of a federal habeas petition, the preliminary inquiry must be whether Petitioner's federal habeas petition was timely or may be excused for untimely filing under the Anti-terrorism and Effective Death Penalty Act ("AEDPA"). If a petition is time barred by the AEDPA, the Court need not consider its merits. *See Carey v. Saffold*, 536 U.S. 214, 225–26.

A. Timeliness

"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). Compliance with the statute of limitations must account for both statutory and equitable tolling. *See id.*; *Holland v. Florida*, 560 U.S. 631, 649 (2010).

Statutory tolling determines that the one-year statute of limitations runs from the latest of the following:

> (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 law 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 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.

28 U.S.C. § 2244(d)(1). Additionally, "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." 28 U.S.C. § 2244(d)(2). Therefore, Section 2254 petitions such as the instant Petition are subject to a one-year statute of limitations under the AEDPA and must be dismissed if they are filed later than one year after the expiration of the time to seek direct review of the highest state court's decision by the Supreme Court of the United States. *See* 28 U.S.C. § 2244(d)(1)(A).

In the instant matter, given the aforementioned procedural background of this case, the relevant date of finality is April 5, 2008. Petitioner's petition for direct appeal was denied by the Supreme Court of Virginia on January 4, 2007. ECF No. 24, attach. 3. Petitioner had ninety days to seek a writ of certiorari to the Supreme Court of the United States, but did not do so. Sup. Ct. R. 13. Accordingly, his conviction became final on April 4, 2007. *See* 28 U.S.C. § 2244(d)(1)(A). Given the date of finality, the one-year statute of limitations to file a federal habeas petition expired on April 5, 2008. Petitioner did not file the instant Petition until October 23, 2020, ECF No. 1 at 5, which is twelve years, six months, and eighteen days after the statute of limitations expired. Therefore, unless Petitioner is entitled to tolling based on the relevant provisions of 28 U.S.C. § 2244 permitting statutory and equitable tolling, his current Petition is barred by the federal habeas corpus statute of limitations.

1. Statutory Tolling

Section 2244(d)(2) of the AEDPA provides for tolling of the federal one-year statute of limitations during the pendency of a "properly filed" state habeas petition. *See* 28 U.S.C. § 2244(d)(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."). Petitioner filed a state habeas petition on January 22, 2019, ECF No. 24, attach. 4, well over a year after his conviction had become final. Notably, Petitioner does not allege any state-created impediment that prevented timely filing, nor does he allege additional facts that would warrant additional statutory tolling. Therefore, the Court **FINDS** that the benefits of statutory tolling are unavailable to Petitioner.

2. Equitable Tolling

A petitioner is entitled to equitable tolling of the federal habeas statute of limitations where he demonstrates "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 554 U.S. 408, 418 (2005)). Equitable tolling is only available in "those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Spencer v. Sutton*, 239 F.3d 626, 630 (4th Cir. 2001) (quoting *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). The petitioner "bears the burden of demonstrating that he is entitled to equitable tolling." *Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003). "In addition, the petitioner must 'demonstrate a causal relationship between the extraordinary circumstance 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 circumstances.'" *Rashid v. Clarke*, No. 1:18CV262, 2018 WL 1937349, at *3 (E.D. Va. Apr. 24, 2018) (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)).

Petitioner states that the reason for his untimely filing is because of the "intentional concealment" of the address where the crimes took place by the officers of the court. ECF No. 8 at 38–39. Petitioner explains that this conspiracy kept him from pursuing this claim previously because he was unaware of any "defects" in the jurisdiction of the Trial Court. *Id.* at 37, 39. The Trial Court found, however, that the address where the crimes took place was elicited at trial and was located in Stafford County, contrary to Petitioner's claims of conspiracy and concealment. ECF No. 24, attach. 4 at 6.

Petitioner has failed to demonstrate any extraordinary circumstances which prevented the timely filing of the instant petition. "Even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources," ignorance of the law is not a basis for equitable tolling. *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004). Further, a petitioner's ignorance of the law is "neither extraordinary nor a circumstance external to his control." *Id.* Thus, even if the undersigned were to find that Petitioner has pursued his rights diligently—the twelve-year delay in filing this Petition suggests that he has not—Petitioner has not demonstrated that some external extraordinary circumstance stood in his way and prevented timely filing. *See Holland*, 560 U.S. at 649. Thus, the Court **FINDS** that Petitioner is not entitled to equitable tolling.

3. *Evidence of Actual Innocence*

A petitioner may still overcome a time-bar if the petitioner makes "a convincing showing of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). To make a successful actual innocence claim, the petitioner must present new, reliable evidence, which is sufficient to convince the court that no reasonable juror could have found the petitioner guilty beyond a

reasonable doubt. *Id.* (citing *Schulp v. Delo*, 513 U.S. 298, 329 (1995)). Evidence which merely impeaches a government witness or adds support to a theory already presented at trial is insufficient to meet the actual innocence standard. *See Calderon v. Thompson*, 523 U.S. 538, 562–63 (1998). In the instant Petition, Petitioner does not put forward any claim of actual innocence or any new reliable evidence to support a claim of actual innocence. Without presenting "new reliable evidence," Petitioner cannot establish that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. Therefore, Petitioner has provided insufficient evidence of actual innocence and has not overcome the time-bar on his Petition.

Therefore, as Petitioner is not entitled to statutory or equitable tolling, the instant Petition is time barred by the federal habeas corpus statute of limitations, Section 2244(d)(1) of the AEDPA.

III. CONCLUSION

For these reasons, the Court **FINDS** that Petitioner did not timely file the instant Petition. Therefore, Respondent's Motion to Dismiss, ECF No. 22, is **GRANTED**, and Petitioner's Amended Petition, ECF No. 8, is **DENIED** and **DISMISSED WITH PREJUDICE**. It is **ORDERED** that judgment be entered in favor of the Respondent.

The Petitioner is hereby notified that he may appeal from the judgment entered pursuant to this Final Order by filing a *written* notice of appeal with the Clerk of the Court at the Walter E. Hoffman United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date judgment is entered. Because the Petitioner has failed to demonstrate a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c) and

Federal Rule of Appellate Procedure 22(b)(1), the Court declines to issue a certificate of appealability. *See Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003).

The Clerk is **DIRECTED** to forward a copy of this Order to Petitioner and to counsel for Respondent.

It is so **ORDERED.**

/s/
Lawrence R. Leonard
United States Magistrate Judge

Lawrence R. Leonard
United States Magistrate Judge

Norfolk, Virginia
March 24, 2022

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