United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 25, 2023
Decided November 2, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 23-1649

BOBBY TATUM,
Petitioner-Appellant,

v.

DARREN GALLOWAY,
Respondent-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 22-CV-2159

Colin S. Bruce,
Judge.

ORDER

Bobby Tatum has filed a notice of appeal from the dismissal with prejudice of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Tatum's request for a certificate of appealability and his requests to proceed in forma pauperis and for counsel are denied.

E-FILED
Tuesday, 28 March, 2023 09:49:06 AM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

BOBBY TATUM,	)	
	)	
Petitioner,	)	
v.	)	**Case No. 22-CV-2159**
	)	
DARREN GALLOWAY, Warden, Shawnee Correctional Center,	)	
	)	
Respondent.	)	

ORDER

Petitioner, Bobby Tatum, filed a Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus By a Person in State Custody (#7) on July 15, 2022. Respondent[1] filed a Motion to Dismiss (#25) on January 24, 2023, to which Petitioner filed two Responses (#28), (#29), on January 30 and February 6, 2023.

For the following reasons, Petitioner's Petition (#7) is DISMISSED with prejudice as untimely. Petitioner's Motion Requesting Waiver of Full Exhaustion of State Remedies (#9), Motions for Production of Omitted Discovery Documents (#10), (#24), and Motion to Amend/Correct (#30) are DENIED.

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[1]Darren Galloway is the current Warden of Shawnee Correctional Center. Therefore, the clerk is directed to substitute Darren Galloway for Dawan Rightnower as the Respondent in this case.

BACKGROUND

The following background facts are taken from the decisions of the Illinois Appellate Court in *People v. Tatum*, No. 4-08-0078 (Ill. App. Ct. Aug. 20, 2009); *People v. Tatum*, 2100 IL App (4th) 100562-U (Ill. App. Ct. Oct. 28, 2011), *People v. Tatum*, 2015 IL App (4th) 130561-U (Ill. App. Ct. Feb. 19, 2015), *People v. Tatum*, 2019 IL App (4th) 170295-U (Ill. App. Ct. Apr. 25, 2019), *People v. Tatum*, 2021 IL App (4th) 200206-U (Ill. App. Ct. Sept. 14, 2021), and the documents filed by the parties. The factual determinations of the state court are presumed to be correct, unless a petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Petitioner's State Court Proceedings

In June 2007, the State charged Petitioner with two counts of aggravated battery of a child (720 Ill. Comp. Stat. 5/12-4.3(a) (West 2006)) for his actions between March 1, 2007, and April 21, 2007, against S.D., the son of his girlfriend. The State also charged S.D.'s maternal aunt, Latasha Seets, with two counts of aggravated battery of a child, but those charges were later dismissed. A grand jury indicted Petitioner on the same two charges.

The Champaign County Circuit Court appointed the public defender to represent Petitioner. On July 3, 2007, Assistant Public Defender Janie Miller-Jones appeared on Petitioner's behalf. Miller-Jones represented Petitioner during the pretrial proceedings and at Petitioner's August 2007 jury trial. At the beginning of Petitioner's jury trial, the circuit court dismissed one of the aggravated battery of a child counts.

The State presented the testimony of several witnesses, including S.D. and Seets. Seets admitted to hitting S.D. with a belt three times for taking a game memory card from her home but denied causing the injuries at issue. S.D. testified Petitioner "whupped" him after Seets left their home. S.D. testified it hurt and he screamed. Petitioner did not present any evidence. The jury found Petitioner guilty of aggravated battery of a child.

Miller-Jones filed a posttrial motion and a supplemental posttrial motion. In her supplemental posttrial motion, Miller-Jones argued she was ineffective for not properly impeaching Seets. Miller-Jones admitted she knew Seets had been found unfit to stand trial and Seets's case had been dismissed. Miller-Jones also admitted she neglected to get Seets's court file.

The circuit court appointed Petitioner new counsel on the posttrial motions. Petitioner filed several pro se posttrial motions. Petitioner's new counsel also filed a posttrial motion, asserting, inter alia, that Miller-Jones was ineffective for failing to investigate Seets's case and to file a motion in limine to exclude Seets's testimony. At the November 2007 hearing on the posttrial motions, the court took judicial notice of Seets's case and Miller-Jones testified. The court denied the posttrial motions.

After a December 2007 hearing, the circuit court sentenced Petitioner to 24 years in prison.

Petitioner appealed and argued that Miller-Jones was ineffective for failing to impeach Seets on her fitness to stand trial. The Illinois Appellate Court affirmed Petitioner's conviction and sentence. Petitioner appealed to the Illinois Supreme Court,

which denied his petition for leave to appeal ("PLA") on November 25, 2009. Petitioner did not file a petition for a writ of certiorari with the U.S. Supreme Court, and thus his conviction became final on February 23, 2010.

On April 7, 2010, Petitioner filed a pro se petition for relief under the Post-Conviction Hearing Act ("Postconviction Act") (725 Ill. Comp. Stat.. 5/122-1 et seq. (West 2010)), which set forth claims of ineffective assistance of trial and appellate counsel. In his petition, Petitioner noted Seets was charged with the same offense as him. In June 2010, the circuit court summarily dismissed Petitioner's postconviction petition, finding it frivolous and patently without merit. Petitioner appealed but only challenged the imposition of a fine. The Illinois Appellate Court affirmed the dismissal of Petitioner's postconviction petition on October 28, 2011. No PLA was filed to the Illinois Supreme Court.

Petitioner next filed a March 2013 pro se petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 Ill. Comp. Stat. 5/2-1401 (West 2012)). Petitioner argued his three-year term of mandatory supervised release must be vacated because it was never expressly imposed by the circuit court. The State filed a motion to dismiss Petitioner's petition. In June 2013, the circuit court dismissed the petition and ordered Petitioner to pay $40 for the filing fees and court costs. The court also directed the Illinois Department of Corrections ("IDOC") to withhold and collect the $40 from Petitioner's prisoner trust account. Petitioner appealed and asserted the $40 fee imposed by the circuit court should be vacated and the amount refunded to his account.

The Illinois Appellate Court affirmed the dismissal of Petitioner's section 2-1401 petition but agreed with Petitioner's argument regarding the $40 fee.

In February 2014, Petitioner filed his first motion for leave to file a successive postconviction petition under section 122-1(f) of the Postconviction Act (725 Ill. Comp. Stat. 5/122-1(f) (West 2014)). The circuit court denied Petitioner's motion in June 2014. Petitioner appealed, and the Office of the State Appellate Defender ("OSAD") moved to withdraw its representation of Petitioner on appeal, contending no colorable claim of actual innocence could be raised and Petitioner's petition failed to meet the cause-and-prejudice test. The appellate court agreed with OSAD and granted OSAD's motion to withdraw as counsel and affirmed the circuit court's judgment.

In June 2016, Petitioner filed a petition entitled, "Petition For Relief From Judgment Pursuant to 735 Ill. Comp. Stat. 5/2-1401 Section C-F and 725 Ill. Comp. Stat. 5/122-1 ect [sic] seq." Along with the petition, Petitioner filed (1) a 30-day notice to respond to Petitioner's petition for relief from judgment, (2) a motion to proceed in forma pauperis and for the appointment of counsel on his petition for "postjudgment relief," and (3) a letter to the Champaign County Circuit Clerk asking her to make sure the State was aware of the petition and notice of 30 days to respond.

In the petition, Petitioner asserted the two-year limitations period should be excused because the grounds and facts raised in the petition were fraudulently concealed from him. In paragraph eight of the petition, Petitioner stated relief under the Postconviction Act was unavailable to him at the present time due to his successive

postconviction petition being on appeal. Petitioner raised a claim of a per se conflict of interest with his public defender because the public defender simultaneously represented him as well as Seets, one of the State's witnesses. Petitioner included several attachments to the petition, including the docket sheets for Seets's case. The docket sheets show the circuit court appointed the public defender to represent Seets at a July 13, 2007, hearing and Miller-Jones appeared instanter. On July 19, 2007, the circuit court vacated the appointment of the public defender and appointed Walter Ding to represent Seets. Petitioner also attached his own affidavit and his May 2016 request for the transcript of the July 19, 2007, hearing in Seets's case.

In a July 14, 2016, letter, the circuit court informed Petitioner as follows:

> The Court has reviewed your "Petition For Relief From Judgment Pursuant to 735 ILCS 5/2-1401 Section C-F and 725 ILCS 5/122-1 ect [sic] seq." The Court does not recognize hybrid pleadings. You may only file under only one section for each individual petition and must specify the section you are seeking relief under. Further, because you filed for relief under 725 ILCS 5/122-1 previously, you must file a request for leave to file a subsequent petition.

On August 9, 2016, Petitioner filed a letter with the circuit clerk asking the clerk to withdraw his June 1, 2016, petition because the judge told him it was filed "wrong." In the letter, Petitioner noted he was filing a new petition for postjudgment relief. On that same day, Petitioner filed (1) a petition for postjudgment relief under section 2-1401, (2) a 30-day notice to respond to Petitioner's petition for relief from judgment, and (3) a motion to proceed in forma pauperis and for the appointment of counsel on his petition for "postjudgment relief."

Petitioner filed amended section 2-1401 petitions on August 29, 2016, and September 21, 2016. Both amended petitions set forth Petitioner's conflict of interest claim.

In October 2016, the State filed a motion to dismiss Petitioner's August 9, 2016, petition and the August 29, 2016, amendment. The State later filed a second motion to dismiss addressing Petitioner's September 2016 amended petition. Petitioner filed replies to both motions to dismiss. On March 28, 2017, the circuit court entered a written order granting the State's motion to dismiss Petitioner's August 2016 petition and the subsequent amended petitions. In granting the State's motion to dismiss, the court noted all the parties knew "Miller-Jones appeared with Seets one time in arraignment court at the first appearance, and then a private attorney was appointed to represent Seets." The court further stated Petitioner was aware of Seets's case and the records in her court file as demonstrated by his posttrial motion.

Petitioner appealed, asserting the circuit court erred by not treating his June 2016 petition as a request for leave to file a successive postconviction petition and the petition should be remanded for second-stage proceedings under the Postconviction Act. The appellate court disagreed and affirmed the dismissal of Petitioner's petition. Petitioner appealed to the Illinois Supreme Court, which denied his PLA on September 25, 2019.

In November 2019, Petitioner filed his second pro se motion for leave to file a successive postconviction petition, asserting that Miller-Jones had a per se conflict of interest due to her representation of Seets and that he did not learn of that representation until 2016. Petitioner again attached his own affidavit and the docket sheets from Seets's case. On March 30, 2020, the circuit court entered a written order denying Petitioner's second pro se motion for leave to file a successive postconviction petition. The court found Petitioner failed to set forth both cause and prejudice. As to cause, the court noted Petitioner was "fully aware" of Seets's case and the record in her court file 12 years ago when those matters were the subject of his posttrial motion and direct appeal. It specifically noted the existence and significance of Seets's court file was known to Petitioner no later than December 2007. Additionally, the court pointed out the public court file in Seets's case was not fraudulently concealed, and Petitioner failed to identify any objective factor that impeded his ability to raise his specific claim during his initial postconviction proceedings.

Petitioner argued that his pleadings must be taken as true, and that he did not learn of the facts showing Miller-Jones had a conflict of interest until 2016. The State, however, responded that because the information Petitioner relied upon had been reasonably available to him since 2007, he could not show cause because there was no objective factor that impeded his ability to bring the claim earlier.

The Illinois Appellate Court affirmed the circuit court's denial of Petitioner's second motion for leave to file a successive postconviction petition, finding that Petitioner could not satisfy the cause prong of the cause-and-prejudice test. The appellate court found that the factual basis for Petitioner's claim was reasonably available to him, as the record demonstrated that he was aware of Seets's case and that her court file had information relevant to his case during his posttrial proceedings. The appellate court noted that Petitioner did not identify any objective factor that prevented him from obtaining Seets's court file with its docket sheets before he filed his initial postconviction petition. The appellate court concluded that Petitioner did not make a prima facie showing of cause and found that denial of his second pro se motion for leave to file a successive postconviction petition was proper. The Illinois Supreme Court denied Petitioner's PLA on January 26, 2022.

The Instant Federal Habeas Petition

Petitioner filed the instant federal habeas Petition (#7) on July 15, 2022. In his Petition, Petitioner raises the following grounds: (1) "official interference" in violation of his Sixth and Fourteenth Amendment rights by the trial court for omitting various documents showing that Miller-Jones was operating under an actual and per se conflict of interest when she was allowed to represent Petitioner at trial, even though it had been brought to the trial court's attention in July 2007 that Miller-Jones had represented Seets; (2) trial counsel Miller-Jones was ineffective for operating under an actual and per se conflict of interest due to her prior representation of Seets; (3) the State violated his

Fifth, Sixth, and Fourteenth Amendment rights when it failed to correct perjured testimony from the victim, S.D., that had been planted by police and coached by Seets; (4) posttrial counsel was ineffective for failing to raise the issues Petitioner is raising in this Petition; (5) the State violated his rights under the Fifth, Sixth, and Fourteenth Amendments by using perjured, false testimony from Seets at trial; and (6) Petitioner's due process and equal protection rights were violated when various Illinois courts and authorities omitted and removed facts and evidence concerning the conflict of interest from the record in order to "clear other officials and keep unconstitutional conviction herein."

ANALYSIS

Timeliness

Respondent argues that Petitioner's Petition must be dismissed with prejudice because it is untimely.

There is a one-year statute of limitations period for the filing of habeas petitions under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254:

> (d) (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.

28 U.S.C. § 2244(d).

Here, Petitioner's conviction became final on February 23, 2010, 90 days after the Illinois Supreme Court denied his direct appeal PLA, when time for filing a petition for a writ of certiorari with the U.S. Supreme Court expired. 28 U.S.C. § 2244(d)(1)(A); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Hanson v. Haines*, 2014 WL 4792648, at *1 (E.D. Wis. Sept. 25, 2014). The limitations period ran for 43 days until it was tolled with the filing of Petitioner's initial postconviction petition on April 7, 2010. 28 U.S.C. § 2244(d)(2); *Martinez v. Jones*, 556 F.3d 637, 638 (7th Cir. 2009) ("A properly filed petition for postconviction relief in state court tolls the one-year statute of limitations for filing a § 2254 petition."). Thus, there were 322 days remaining for Petitioner to file his federal habeas claim when the filing of his state postconviction petition tolled the limitations period.

The tolling of the limitations period came to an end on October 28, 2011, when the Illinois Appellate Court affirmed the dismissal of Petitioner's initial postconviction petition and Petitioner did not file a PLA with the Illinois Supreme Court. *Tate v.*

Pierson, 177 F.Supp.2d 792, 797 n.10 (N.D. Ill. 2001). Thus, Petitioner had 322 days, until September 14, 2012, to timely file his federal habeas petition. Petitioner did not file his federal habeas petition until July 15, 2022, and therefore it is untimely.

The multiple collateral attacks filed by Petitioner from 2013 onward, such as the 2-1401 petitions and successive postconviction petitions, had no effect on the federal limitations period. Collateral attacks filed after the limitations period has expired are irrelevant, and do not retroactively "restart" the limitations clock. See *De Jesus v. Acevedo*, 567 F.3d 941, 943 (7th Cir. 2009) ("It follows that a state proceeding that does not begin until the federal year has expired is irrelevant."). Moreover, the motions for leave to file successive postconviction petitions did not toll the limitations period because they were unsuccessful and thus not properly filed and, in any event, the limitations period had already expired. See *Martinez*, 556 F.3d at 638-39 ("Instead the second petition tolls the limitations period only if the state court grants permission to file it."). Thus, because Petitioner's habeas Petition was filed almost a decade after the expiration of the one-year limitations period, his Petition is untimely unless equitable tolling applies.

Equitable Tolling

Equitable tolling of AEDPA's one-year limitations period is an extraordinary remedy that is "rarely granted." *Mayberry v. Dittman*, 904 F.3d 525, 529 (7th Cir. 2018). To satisfy the "high bar" for equitable tolling, a habeas petitioner must demonstrate (1) that he has been pursuing his rights diligently, and (2) that some extraordinary

circumstance stood in his way and prevented timely filing. *Mayberry*, 904 F.3d at 529. A petitioner bears the burden of establishing both elements, and failure to show either element will disqualify him from eligibility for tolling. *Mayberry*, 904 F.3d at 529-30.

Petitioner makes two main arguments in support of equitable tolling: (1) he is a layman who is not well-versed in the law and did not become aware of any federal basis for his claims until 2022; and (2) he suffers from a mental disability. Concerning Petitioner's lack of knowledge of the law, the U.S. Supreme Court has rejected arguments that "to *explain* an untimely filing by reference to the [petitioner's] limited knowledge or ability is to *excuse* it." *Davis v. Humphreys*, 747 F.3d 497, 499-500 (7th Cir. 2014), citing *United States v. Kubrick*, 444 U.S. 111 (1979) (emphases in original). The Seventh Circuit has held that "a prisoner's shortcomings of knowledge about AEDPA or the law of criminal procedure in general do not support tolling." *Davis*, 747 F.3d at 500.

With regard to Petitioner's claim of a mental impairment preventing his timely filing a federal habeas claim, the Seventh Circuit has recognized that "mental illness may toll a statute of limitations, but 'only if the illness *in fact* prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them.'" *Mayberry*, 904 F.3d at 530, quoting *Obriecht v. Foster*, 727 F.3d 744, 750-51 (7th Cir. 2013) (emphasis in original).

The problem with Petitioner's claim of mental impairment is that it is made in vague and conclusory terms, there is little to no evidence of it, and the evidence Petitioner does produce sheds no light on the relevant time period for tolling. See *Mayberry*, 904 F.3d at 530. Petitioner makes conclusory statements about his impairment, and claims to be on many medications, but the only evidence in support of these claims are two IDOC "call passes" from November 2021 and December 2022, respectively, to talk to mental health professionals. However, these "call passes" are from almost 14 years after the trial, nearly a decade after the expiration of the limitations period, and more than five years after Petitioner claims he first became aware of Miller-Jones's conflict of interest, and do nothing to demonstrate that any mental challenges he may have prevented him from understanding and acting on his legal rights between 2012, when the tolling period from his initial postconviction petition ended, and 2022, when he filed this § 2254 Petition. See *Mayberry*, 904 F.3d at 530.

Indeed, during that time Petitioner filed numerous motions and petitions in state court attacking his conviction. There is also no evidence in the record that Petitioner's mental abilities were an issue in any of the state court proceedings or were raised by Petitioner or his counsel at any point from 2007 to 2021. Petitioner has failed to explain how his limited education or mental health issues (purportedly evidenced by the 2021

and 2022 call passes and Petitioner's claim of being on medications) actually impaired his ability to understand or pursue his federal habeas claims to such an extent that he qualifies for the extraordinary remedy of equitable tolling. See *Mayberry*, 904 F.3d at 531.

Nor does this court believe an evidentiary hearing is necessary to resolve Petitioner's mental health status. Petitioner has not alleged specific facts about his mental impairment or how such an impairment prevented him from timely filing his habeas claims, but rather has advanced only vague and conclusory allegations, and that is not sufficient to justify the court holding an evidentiary hearing. See *Mayberry*, 904 F.3d at 532; *Boulb v. United States*, 818 F.3d 334, 340-41 (7th Cir. 2016).

Further, Petitioner cannot show due diligence because, even taking Petitioner at his word that he did not discover the main predicate for his claims (that Miller-Jones represented Seets for one week at the beginning of the case) until 2016, Petitioner still waited six years to file his habeas claims in federal court after going through multiple rounds of fruitless state court collateral review.

Next, even if he could show due diligence in pursuit of his claims, Petitioner cannot meet his burden to demonstrate that some extraordinary circumstance stood in his way and prevented timely filing. The circumstances that caused Petitioner's delay must be both extraordinary *and* beyond his control. See *Mayberry*, 904 F.3d at 530. The Illinois Appellate Court determined that the record showed that: (1) Petitioner "was aware of Seets's case and that her court file had information relevant to his case during

his posttrial proceedings" way back in 2007 or 2008; and (2) that Petitioner did "not identify any objective factor that prevented him from obtaining Seets's court file with its docket sheets before he filed his *initial* postconviction petition" in 2010. *Tatum*, 2021 IL App (4th) 200206-U, ¶ 23 (emphasis added). This court must presume the Illinois Appellate Court's factual determination in this regard to be correct, and Petitioner has not provided clear and convincing evidence rebutting the presumption. 28 U.S.C. § 2254(e)(1). Equitable tolling does not apply.

For the above reasons, the court also denies Petitioner's Motion Requesting Waiver of Full Exhaustion of State Remedies (#9).

Actual Innocence

Although Petitioner did not raise a specific, stand alone, detailed claim of actual innocence, he does state in his Response (#28) that he was innocent of the crime charged. Petitioner argues that a conspiracy between Miller-Jones, the State, and the trial judge to not inform him of Miller-Jones's conflict of interest and to remove various documents from the court record violated his constitutional rights, resulting in the conviction of an innocent man. Petitioner argues that if all the suppressed documents were produced, a trier of fact would have to find him not guilty.

A claim of actual innocence must be both credible and founded on new evidence. *Arnold v. Dittman*, 901 F.3d 830, 836 (7th Cir. 2018). To be credible, the claim must have the support of reliable evidence- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence- and that evidence must

also be new in the sense that it was not before the trier of fact. *Arnold*, 901 F.3d at 836-37. The petitioner's burden is to show that, in light of this new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Arnold*, 901 F.3d at 837. "In evaluating the claim, the court is to conduct a comprehensive assessment that takes into account any reliable evidence probative of petitioner's innocence or guilt, even evidence that was previously excluded; the court is not bound by the rules of evidence that would govern at trial." *Arnold*, 901 F.3d at 837.

Petitioner does not explicitly state what exactly his new evidence is, but the court presumes he is referring to some kind of documentation undermining the credibility of Seets and the victim, S.D. Petitioner does not identify what documents demonstrate a conspiracy between Miller-Jones, the State, and the trial judge to convict him of a crime he did not commit and/or illegally remove incriminating documents from the court record. Petitioner makes vague allusions to the existence of such damning documents, but it is not clear from the filings just what specific documents Petitioner is referring to. Petitioner also does not demonstrate how knowledge that Miller-Jones briefly, for one week at the start of the case as a public defender, represented Seets as well as himself, proves his actual innocence. Nor has Petitioner cited to exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not before the jury in 2007. See *Arnold*, 901 F.3d at 836-37.

The court is not going to reproduce, in this Order, the entire recounting of evidence by the Illinois Appellate Court from Petitioner's direct appeal. Suffice it to say, the State relied on witnesses other than Seets to convict Petitioner. It was other witnesses who provided the most compelling evidence that Petitioner beat S.D., leaving significant injuries (S.D. himself, his cousins, and CPD Detective Mark Huckstep and DCFS Investigator Jennifer Davidson, who both interviewed S.D. at the Children's Advocacy Center).

From his filings, it appears Petitioner believes evidence of Miller-Jones's conflict and the documents that were improperly suppressed and/or removed from the court record would greatly undermine the credibility of Seets, and possibly S.D., based on their prior inconsistent statements or other credibility and/or reliability issues. However, such evidence would be something that could, possibly, be used on cross-examination to undermine their credibility, but it would not *negate* the evidence produced at trial from the States' witnesses that implicated Petitioner. Confronted with that evidence, the court finds that a reasonable juror certainly could also find Petitioner *guilty* of the charged offenses, as well as not guilty.[2]

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[2]As stated, from what the court can tell, the vast majority of the "new evidence" Petitioner would produce would undermine the credibility of Seets and show that S.D. first identified Seets as his attacker. However, as the Illinois Appellate Court noted on direct appeal, such evidence would be cumulative to evidence about Seets that was already before the jury and, moreover, Seets's testimony was not determinative of Petitioner's guilt or innocence, as Seets offered no testimony that she saw Petitioner either beat or inflict the injuries on S.D. *Tatum*, No. 4-08-0078, at pp. 26-28.

The actual innocence gateway is narrow and "demanding." *McQuiggen*, 569 U.S. at 401. Petitioner cannot just make an argument, based on new evidence, that a reasonable juror could find him not guilty. Rather, the burden is on Petitioner to show that, in light of this new evidence, it is more likely than not that *no reasonable juror* would have found him guilty beyond a reasonable doubt. See *Arnold*, 901 F.3d at 837.

The court sees no evidence in the record of any sort of conspiracy between State authorities, the courts, or Petitioner's counsel to convict him of this offense and suppress exculpatory evidence. The evidence Petitioner alludes to does not rise to the level of "credible and new" necessary to meet the narrow and demanding standard of actual innocence. Based on the evidence in this case, Petitioner has not met that narrow, demanding burden. Therefore, the Petition (#7) is dismissed as untimely.

For the foregoing reasons, the court also denies Petitioner's Motions for Production of Omitted Discovery Documents (#10), (#24) and Motion to Amend/Correct (#30).

CERTIFICATE OF APPEALABILITY

In *Slack v. McDaniel*, the United States Supreme Court held that "when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability ("COA") should issue when the prisoner shows, at least, 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). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Slack*, 529 U.S. at 484. Further, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2), the Supreme Court set forth the methodology to be used in evaluating a request for a COA. A petitioner need not demonstrate that he should prevail on the merits, but rather must demonstrate that the issues are debatable among jurists of reason, that the court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Barefoot*, 463 U.S. at 893, n.4.

Here, it is clear that Petitioner's habeas petition is untimely. Further, the court finds Petitioner has not met the high and demanding bar of demonstrating actual innocence. The court believes that Petitioner has not demonstrated that the issues raised are debatable among jurists of reason. The court would not resolve the issues in a different manner nor does it believe the questions are adequate to deserve encouragement to proceed further. Petitioner has not made a substantial showing of the denial of a constitutional right. Therefore, a certificate of appealability is denied.

IT IS THEREFORE ORDERED THAT:

(1) Respondent's Motion to Dismiss (#25) is GRANTED. Petitioner's Petition for Writ of Habeas Corpus By a Person in State Custody Pursuant to 28 U.S.C. § 2254 (#7) is

DISMISSED with prejudice. Petitioner's Motion Requesting Waiver of Full Exhaustion of State Remedies (#9), Motions for Production of Omitted Discovery Documents (#10), (#24), and Motion to Amend/Correct (#30) are also DENIED.

(2) Petitioner's request for a Certificate of Appealability is DENIED.

(3) This case is terminated.

ENTERED this 28th day of March, 2023.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 27, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

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v.

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No. 22-CV-2159

Colin S. Bruce,
Judge.

ORDER

Petitioner-Appellant filed a petition for rehearing and rehearing en banc on November 20, 2023. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore **DENIED**.

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