

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

No: 17-1292

Richard A. Sales

Petitioner - Appellant

v.

Jay Cassady, Warden

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:16-cv-00968-DW)

JUDGMENT

Before RILEY, BOWMAN and SHEPHERD, 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 in forma pauperis is denied as moot.

June 23, 2017

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

/s/ Michael E. Gans

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

RICHARD A SALES,

Petitioner,

vs.

JAY CASSADY,

Respondent.

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Case No. 16-0968-CV-W-DW-P

ORDER DISMISSING CASE AND DENYING A CERTIFICATE OF APPEALABILITY

Petitioner, a convicted state prisoner currently confined at the Jefferson City Correctional Center in Jefferson City, Missouri, has filed *pro se* a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1992 conviction and 1995 sentence for sodomy, which was entered in the Circuit Court of Jackson County, Missouri. Respondent contends that Petitioner's petition should be dismissed as untimely. Doc. 10.¹ Petitioner has filed a reply thereto. Doc. 16. Because this Court finds that Petitioner's petition is barred by the statute of limitations set forth in 28 U.S.C. § 2244(d), this case will be dismissed.

Standard

"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 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). "If the petition alleges newly discovered evidence, however, the filing deadline is one year from 'the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due

¹ Initially, Respondent also argued that Petitioner is not "in custody" for purposes of federal habeas. Doc. 10. However, Respondent filed a supplemental response indicating that, upon further review, Petitioner fulfills the "in custody requirement. Doc. 12.

diligence.’ *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1929 (2013) (quoting 28 U.S.C. § 2244(d)(1)(D)).

Discussion

I. Petitioner’s petition is untimely.

Petitioner concedes that he has filed the instant petition more than one year after the date on which his conviction became final but claims that he is entitled to have his petition heard on the merits because he is “actually innocent.” Doc. 1, p. 12; Doc. 16. Petitioner contends that the victims “denied the allegations” during police interviews and/or during depositions. Doc. 1, p. 5; Do. 1-1, p. 6; Doc. 16, pp. 3-4. Petitioner claims that his counsel knew of this information but failed to share it with Petitioner in order to convince Petitioner to plead guilty. Doc. 16, p. 3. Respondent contends that the actual innocence exception is not available to a petitioner who pleaded guilty and that Petitioner has not presented “newly discovered” evidence that entitles him to toll the statute of limitations. Doc. 10.

“[A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief.” *McQuiggin*, 133 S. Ct. at 1931 (alterations added). Also called the “fundamental miscarriage of justice exception,” this rule “applies to a severely confined category: cases in which new evidence shows ‘it is more likely than not that no reasonable juror would have convicted [the petitioner].’” *Id.* at 1933 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)) (alteration in original.). “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.” *Schlup*, 513 U.S. at 324. “Section 2244(d)(1)(D) is both modestly more stringent (because it requires diligence) and dramatically less stringent (because it requires no showing of innocence).” *McQuiggin*, 133 S. Ct. at 1933.

Petitioner is not entitled to either toll the statute of limitations pursuant to § 2244(d)(1)(D) or to otherwise obtain review of the merits of his petition based on a gateway claim of actual innocence.

Initially, Petitioner pleaded guilty to the underlying offense and admitted specifically at his guilty plea hearing that he was at the victim's mother's home and touched the victim's vagina. Doc. 1-1, p. 5. "Because a guilty plea waives the defendant's right to prove his actual innocence at trial, a strong argument can be made that a guilty plea should absolutely foreclose a post-conviction claim of actual innocence" *Weeks v. Bowersox*, 119 F.3d 1342, 1355 (8th Cir. 1997) (en banc) (Loken, J. concurring) (internal citation omitted). Even if the actual innocence exception is available to a petitioner who has pleaded guilty, Petitioner fails to establish that the evidence at issue is "newly discovered" or that such evidence establishes that it is more likely than not that no reasonable juror would have convicted him. Petitioner admits that the evidence at issue was in his attorney's possession before the guilty plea. Doc. 1, p. 8. Although Petitioner claims that counsel never shared this information with him, Petitioner fails sufficiently to establish when he was otherwise made aware of this evidence or that the evidence could have been discovered earlier through the exercise of due diligence for purposes of § 2244(d)(1)(D). Instead, Petitioner claims merely that he did not know that his claims existed "until [he] received the records recently." Doc. 1, p. 5.²

Furthermore, a review of Plaintiff's pleadings and supporting exhibits fail to establish that the evidence set forth therein rises to the high bar of establishing that it is more likely than not that no reasonable juror would have convicted him. Although Petitioner's exhibits establish conflicting statements on behalf of the victims, the exhibits also present statements on which a reasonable juror could have found Petitioner guilty. For instance, a victim stated that Petitioner "touched [her] on [her] panties" but added "He was only looking at my dress and that's all." Doc. 1-1, p. 40. Another victim reported to her mother that Petitioner "put his hand into her pants" but later would not speak to police officers. *Id.* at 43-44. The inculpatory statements set forth in the investigation reports and depositions, along with Petitioner's inculpatory statements at his guilty plea hearing, prevent a

² A review of Missouri's CaseNet electronic docketing system reveals that Petitioner filed a state habeas corpus petition raising his claim of actual innocence with the Circuit Court of Cole County, Missouri, on July 17, 2013, in Case No. 13-AC-CC00428. That petition was denied on February 10, 2014. Doc. 1-1, p. 7.

finding that Petitioner is entitled to have the present petition decided on the merits under the actual innocence exception.

Petitioner does establish that he is entitled to any other provision regarding statutory or equitable tolling. *See Wollman v. Gross*, 637 F.2d 544, 549 (8th Cir. 1980) (“The party who is claiming the benefit of an exception to the operation of a statute of limitations bears the burden of showing that he is entitled to it.”). As a result, Petitioner’s petition is untimely and must be denied.

II. A certificate of appealability is denied.

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only “where a petitioner has made a substantial showing of the denial of a constitutional right.” To satisfy this standard, a petitioner must show that a “reasonable jurist” would find the district court ruling on the constitutional claim(s) “debatable or wrong.” *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because petitioner has not met this standard, a certificate of appealability will be denied.

Accordingly, it is **ORDERED** that:

(1) this case is dismissed as barred by the statute of limitations set forth in 28 U.S.C. § 2244(d); and

(2) a certificate of appealability is denied.

/s/ Dean Whipple
DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,

Dated: December 16, 2016.

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Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:16-cv-00968-DW)

ORDER

The petition for rehearing by the panel is denied.

September 05, 2017

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

/s/ Michael E. Gans