PETITIONERS' APPENDIX

1

-ORDER-

United State Court of Appeals for The Third Circuit

BLD-089

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **24-2739**

SONNY L. THOMAS, Appellant

VS.

SUPERINTENDENT MAHANOY SCI, et al.

(E.D. Pa. Civ. No. 510-cv-01237)

Present: SHWARTZ, MATEY, and CHUNG, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied because jurists of reason would not debate the District Court's decision to deny his Fed. R. Civ. P. 60(b) motion. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). In particular, and for substantially the reasons stated by the District Court, jurists of reason would not debate the District Court's conclusion that Appellant's allegations of actual innocence were insufficient to overcome AEDPA's limitation period. See McQuiggin v. Perkins, 569 U.S. 383, 386 (2013); Reeves v. Fayette SCI, 897 F.3d 154, 160 (3d Cir. 2018). In addition, jurists of reason would not debate the District Court's conclusion that Appellant was not entitled to equitable tolling. See Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Wallace v. Mahanoy, 2 F.4th 133, 148 (3d Cir. 2021).

By the Court,

s/ Paul B. Matey
Circuit Judge

Dated: March 10, 2025
JK/cc: Sonny L. Thomas
All Counsel of Record

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

PETITIONERS' APPENDIX 2

-ORDER-

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SONNY L. THOMAS,	:	
Petitioner,	:	
	:	
v.	:	**Civ. No. 10-1237**
	:	
JOHN KERESTES, et al.,	:	
Defendants.	:	

ORDER

Pro se inmate Sonny Thomas submits his fifth Rule 60(b) Motion, challenging the denial of his Petition for Habeas Corpus as untimely. (Doc. No. 50.) I will deny the Motion and his related request for appointment of counsel.

I. BACKGROUND

On January 11, 2006, a state court jury convicted Thomas of first-degree murder and related offenses. The trial evidence showed that he stabbed a drug dealer to death with a samurai sword. See Thomas v. Kerestes, No. 10-1237, 2010 WL 2636071, at *1 (E.D. Pa. June 29, 2010). On the advice of counsel, Thomas waived his right to testify at trial. (See Doc. No. 50 at 19 (citing N.T. Vol. III at 2-4, 5, 11-12, 15-16).) After the defense rested, the trial court rejected defense counsel's request for voluntary manslaughter, heat of passion, and imperfect self-defense instructions, purportedly because Thomas had not testified to his motives and state of mind. (See id. at 20 (citing N.T. Vol. II at III at 33).) On February 13, 2006, Thomas was sentenced to life imprisonment without parole. Thomas, 2010 WL 2636071, at *1.

The Superior Court affirmed Thomas's judgment of sentence, and Thomas did not seek allocator. Commonwealth v. Thomas, 918 A.2d 792 (Pa. Super. 2006) (table). In March 2008, Thomas filed a PCRA petition, which was denied as untimely. The Superior Court affirmed; the Pennsylvania Supreme Court denied allocutor. Commonwealth v. Thomas, 981 A.2d 323 (Pa.

Super. Ct. 2009) (table); Commonwealth v. Thomas, 986 A.2d 150 (Pa. 2009) (table).

On March 12, 2010, Thomas filed a *pro se* Petition for Writ of Habeas Corpus, which Judge John P. Fullam (late of this Court) denied as untimely. (Doc. No. 13); see also 28 U.S.C. § 2244(d). Thomas has since filed four 60(b) Motions for Relief from Judgment, each of which I have denied. (Doc. Nos. 21, 23, 29, 30, 37, 38, 39, 40, 50.) His most recent 60(b) Motion alleged actual innocence based on the Commonwealth's purported failure "to establish elements or diminished capacity demonstrat[ing] a lack of *mens rea* for first degree murder." (Doc. No. 37.) Because Thomas did not allege facts demonstrating that he was actually innocent, I denied his Motion without a hearing on October 31, 2018. (Doc. No. 40.)

In his fifth *pro se* 60 (b) Motion, Thomas argues that his habeas petition was timely because of equitable tolling and alleges that his trial counsel "erroneously advised Thomas to waive his right to testify in his own defense, and by doing so wrongfully excluded the very exculpatory evidence that would demonstrate his actual innocence of the crime he was convicted." (Doc. No. 50.) Thomas also asks me to appoint counsel.

Respondents argue that Thomas's Motion was not brought within a reasonable time, the Motion is "a thinly-disguised attempt to relitigate [the] Rule 60b) motion" I denied on October 31, 2018, and Thomas has not shown his claims are meritorious. (Doc. No. 55.)

II. EQUITABLE TOLLING

Thomas urges that his mental illness and low IQ equitably tolled the limitations clock governing his habeas petition. (See Doc. No. 50 at 36 ("In Thomas' [sic] case his mental illness has prevented him from asserting his rights.").) He states that he has "never participated in the preparation and filing of any documents to the courts. He has always relied on others to advice [sic] him and do the work for him when he could find someone who would listen. Thomas

cannot protect his rights." (Id. at 35.)

"Equitable tolling applies when a petitioner has been prevented in some extraordinary way from timely filing and has exercised reasonable diligence in bringing the claims." Wallace v. Mahanoy, 2 F.4th 133, 143 (3d Cir. 2021) (quotations omitted). Although mental illness may qualify as an extraordinary circumstance, as the Third Circuit has held, "the fact of his serious illness, without more, is not dispositive of [the] tolling claim . . . particularly [when the petitioner] asks us to excuse an exceptionally long delay. In fact, were we to conclude that his illness is sufficient—without more—to excuse his belated habeas filing, then up to this very day, [the petitioner] would not be subject to a deadline. That simply cannot be." Id. at 145.

The Wallace Court reviewed the petitioner's medical records and focused on his history of pro se filings, which demonstrated his capacity to pursue legal remedies. Id. Although Thomas states that he cannot protect his rights and has not prepared his filings, he attaches no medical records, and he has regularly filed *pro se* Motions, each of which he has signed. He has thus failed "to establish that extraordinary circumstances prevented him from filing a habeas petition [or other Motion] for the entirety of the period for which he has sought tolling." Wallace, 2 F.4th at 148.

III. TIMELINESS OF 60(b)(6) MOTION

Respondents ask me to deny Thomas's Motion because it was not brought within a "reasonable time," as required by Rule 60. (Doc. No. 55 at 2); see Fed. R. Civ. P. 60(c)(1). "Generally, filing for relief under Rule 60(b)(6) more than a year after final judgment is untimely absent some extraordinary circumstance to excuse the movant." Waliyud-Din v. Att'y Gen. of Pennsylvania, No. 10-5851, 2020 WL 6262982, at *3 (E.D. Pa. Oct. 23, 2020). "Where relief is sought under Rule 60(b)(6) based on a change in law, the time period for reasonableness is

measured from the date of decision." Id.

Thomas bases his Rule 60 Motion on McQuiggin v. Perkins, 569 U.S. 383 (2013) and Satterfield v. District Attorney of Philadelphia, 872 F.3d 152 (3d Cir. 2017). Unfortunately, Thomas filed his Motion years after McQuiggin and six years after Satterfield. Moreover, this is not the first time Thomas has relied on these cases to overcome AEDPA's time bar. In denying his third Rule 60(b) Motion which was based on these cases, I stated that Thomas's delay was unexplained. Thomas v. Kerestes, No. 10-1237, 2018 WL 10467313, at *1 (E.D. Pa. June 13, 2018). Another five years have now passed. Accordingly, just as I stated then, "the equitable consideration of finality weighs against reopening the Petition." See id.

IV. ACTUAL INNOCENCE

Thomas argues that he should be excused from AEDPA and Rule 60's timeliness requirements because he is actually innocent of murder.

To obtain relief from a final judgment, Thomas must show, *inter alia*, "extraordinary circumstances." Fed. R. Civ. P. 60(b); Cox v. Horn, 757 F.3d 113, 120 (3d Cir. 2014). A "credible showing of actual innocence" can constitute such an extraordinary circumstance. See McQuiggin, 569 U.S. at 392–93, 394; Satterfield, 872 F.3d at 162–63. Actual innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Schlup v. Delo, 513 U.S. 298, 315 (1995).

"To satisfy the demanding actual innocence exception, a petitioner must (1) present new, reliable evidence of his innocence; and (2) show by a preponderance of the evidence that it is more likely than not that no reasonable juror would have convicted him (i.e., a reasonable juror would have reasonable doubt about his guilt) in light of the new evidence." Wallace, 2 F.4th at

151; McQuiggin, 569 U.S. at 394-95 (quoting Schlup, 513 U.S. at 329 (internal quotation marks omitted)) (Actual innocence—also referred to as the "fundamental miscarriage of justice exception"—"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].'").

Accordingly, Thomas must first produce "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. "A defendant's own late-proffered testimony is not 'new'" for actual innocence gateway purposes "because it was available at trial." Hubbard v. Pinchak, 378 F.3d 333, 340 (3d Cir. 2004); see also Langforddavis v. United States, No. 13-2921, 2016 WL 4544338, at *9 (D.N.J. Aug. 30, 2016) (petitioner's "own sworn affidavit . . . does not, by itself, suffice to meet the actual innocence standard"). The Third Circuit has since held, however, that where the underlying violation claimed is ineffective assistance of counsel premised on a failure to present evidence, "such evidence constitutes new evidence for purposes of the Schlup actual innocence gateway." Reeves v. Fayette SCI, 897 F.3d 154, 164 (3d Cir. 2018), as amended (July 25, 2018). But see Brightwell v. Coleman, No. 11-4042, 2021 WL 3783908, at *4 (E.D. Pa. Aug. 25, 2021) (evidence known to Petitioner for 17 years is not new, even if counsel was purportedly ineffective in failing to present it).

The Third Circuit has not addressed whether, under Reeves, testimony that Petitioner argues counsel ineffectively failed to present constitutes new evidence. I conclude, however, that it does not as applied here. Although counsel presents evidence and examines witnesses, it is ultimately the defendant who chooses not to testify. See Hubbard, 378 F.3d at 340 ("A defendant's own late-proffered testimony is not 'new' because it was available at trial. Hubbard merely chose not to present it to the jury. That choice does not open the gateway."). This Court

has so ruled since Reeves, explaining that where the petitioner "chose not to testify due to his counsel's accurate legal advice, he cannot now invoke the 'actual innocence gateway' by presenting his own withheld testimony as 'new evidence.'" Walker v. Marsh, No. 19-2832, 2022 WL 3598061, at *7 (E.D. Pa. Aug. 22, 2022), certificate of appealability denied sub nom. Walker v. Superintendent Benner Twp. SCI, No. 22-2693, 2023 WL 3836783 (3d Cir. Jan. 4, 2023), cert. denied sub nom. Walker v. Houser, 144 S. Ct. 148 (2023).

Thomas "acknowledged he was making the decision not to testify of his own free will and that he understood he has a right to testify in his own defense and that it was his desire to waive that right." (Doc. 50 at 19.) He also apparently acknowledged that he and his counsel discussed the pros and cons of testifying. (Id.) Although Thomas suggests that his counsel provided irrational advice, he does not identify the advice—the reasons counsel purportedly gave for Thomas not to testify. (See id. at 24.) I thus cannot find this case distinct from Walker such that Thomas's testimony should be treated as new evidence. To the contrary, Thomas acknowledges that his testimony was not legally required to obtain a self-defense instruction and argues that sufficient evidence existed such that an instruction should have been given absent his testimony. (Doc. No. 50 at 13, 19-22.); see Commonwealth v. Reaves, 255 A.3d 1283 (Pa. Super. Ct. 2021). Given that evidence and Thomas's admitted drug use and mental health issues, counsel's strategic decision to keep Thomas off the stand seems sound.

That Thomas raised self-defense at trial and described the underlying facts during his taped interrogation and in conversations with Police further confirms that his "new" evidence of self-defense is not new. (See Doc. No. 50 at 20-21; see also Doc. No. 40 at 3 (concluding that Thomas has not explained "why his intoxication or mental illness constitutes 'new' evidence [as of 2017] entitling him to relief").) Similarly, even though Thomas did not testify, the jury was

presented with evidence of Thomas's drug use and mental health. (See Doc. No. 40 at 3.) For example, Dr. Datillo testified that Thomas was a heavy drug user and was under the influence of cocaine at the time of the instant offense. (Doc. No. 50 at 13-14.) He also testified that cocaine may have exacerbated underlying mental illness and contributed to the deterioration of Thomas's functioning, affirmatively stating that Thomas had a psychotic delusion resulting in the murder. (Id.)

Moreover, Thomas has not shown that his testimony was reliable and that had he testified, no reasonable juror would have found him guilty. Given his drug use and mental illness as well as the self-serving nature of his testimony, it is by no means clear that this evidence would have been "reliable." For the same reasons, he has not demonstrated that his testimony alone would have "undermined" the State's case. To the contrary, that testimony would, at best, have repeated the trial evidence: Thomas's statements regarding self-defense or provocation made during his taped interrogation, and his statements to Police and the Detectives that the victim tried to beat him up and threatened his child. (See Doc. No. 50 at 20-22); Waliyud, 2020 WL 6262982, at *6 ("Any evaluation of the new evidence must be considered in light of what was presented to the jury."). Moreover, as I have discussed, the jury also heard Dr. Datillo's testimony that Thomas was psychotic at the time of the murder. (See Doc. No. 50 at 13-15.) Accordingly, Thomas's "proposed, self-serving testimony, without more, does not sufficiently undermine the evidence presented at trial such that no reasonable juror would have convicted him." Birckett v. McGinley, No. 18-1533, 2020 WL 2106413, at *14 (E.D. Pa. Jan. 13, 2020), report and recommendation adopted, No. 18-1533, 2020 WL 2098107 (E.D. Pa. May 1, 2020).

Because Thomas has not demonstrated actual innocence, I will not reach his ineffective

assistance of counsel claim and will deny his Motion without a hearing.

V. MOTION TO APPOINT COUNSEL

There is has no constitutional right to counsel in habeas proceedings or Rule 60 Motions for relief from a habeas judgment. See Barkley v. Ortiz, No. 01-4530, 2016 WL 4705450, at *3 (D.N.J. Sept. 8, 2016) ("Petitioner does not have a constitutional right to counsel in habeas proceedings, let alone a fifth motion for Rule 60 relief from a habeas judgment.").

I have discretion to appoint counsel, however, when "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). I "must first decide if petitioner has presented a nonfrivolous claim and if the appointment of counsel will benefit the petitioner and the court. I may consider the complexity of the factual and legal issues in the case, as well as the pro se petitioner's ability to investigate facts and present claims." Barkley, 2016 WL 4705450, at *3 (quoting Reese v. Fulcomer, 946 F.2d 247, 263-64 (3d Cir. 1991), superseded on other grounds by statute, 28 U.S.C. § 2254).

Appointment of counsel is not warranted here. The instant claim he seems to bring is obviously meritless. Although Thomas argues that he is unable to pursue claims himself, this is his fifth 60(b) Motion. Thomas provides no explanation for his delay in raising the instant actual innocence claim. I will thus deny Thomas's Motion.

VI. CONCLUSION

In sum, I will deny Thomas's 60(b) Motion and Motion to Appoint Counsel.

* * *

AND NOW, this 23rd day of August, 2024, upon consideration of Plaintiff's Motion for Relief from Judgment Pursuant to Rule 60(b) and Motion to Appoint Counsel (Doc. No. 50), it is hereby **ORDERED** that:

1. Thomas's Motion (Doc. No. 50) is **DENIED**.
2. Because Thomas has not demonstrated that "jurists of reason could disagree with [my] resolution of his constitutional claims," a Certificate of Appealability shall **NOT ISSUE**. Slack v. McDaniel, 529 U.S. 473, 484 (2000).
3. The **CLERK OF COURT** shall **CLOSE** this case.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

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