

No. _____

IN THE
SUPREME COURT FOR THE UNITED STATES

LAVELLE EUGENE MARKS,

Petitioner,

-VS-

RUSS RURKA, (Acting Warden),

Respondent.

PETITIONER'S APPENDIXES

Submitted by:

Lavelle Marks

Lavelle Eugene Marks, #499291
Petitioner In Propria Persona
Lakeland Correctional Facility
141 First Street
Coldwater, Michigan 49036

Dated: 4/15/26

APPENDIX CONTENT

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No. 25-1835

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 4, 2026
KELLY L. STEPHENS, Clerk

LAVELLE EUGENE MARKS,)
)
 Petitioner-Appellant,)
)
 v.)
)
 RUSSELL RURKA, Acting Warden,)
)
 Respondent-Appellee.)

ORDER

Clerk

Before: MURPHY, Circuit Judge.

Lavelle Eugene Marks, proceeding pro se, appeals the district court's dismissal of his petition under 28 U.S.C. § 2254. We construe Marks's notice of appeal as an application for a certificate of appealability. Marks also moves for the appointment of counsel. We deny the application and motion because Marks's application is untimely. *See* 28 U.S.C. § 2244(d)(1).

Marks pleaded guilty to second-degree murder, and the trial court sentenced him to thirty-five to seventy years in prison. *See Marks v. Davis*, 504 F. App'x 383, 384-85 (6th Cir. 2012). Michigan state courts rejected Marks's attempts to withdraw his plea. *Id.* at 385. Marks then turned to the federal courts, but the district court denied his habeas petition. *Id.* at 384-85. We affirmed. *Id.* at 387.

Years later, Marks acquired an affidavit from James McNeely, a recently released felon who had been incarcerated with Marks. The affidavit, dated January 14, 2020, claimed that Marks was innocent. So on September 23, 2020, Marks moved the state trial court for relief from its judgment based on that newly discovered evidence. The trial court denied relief. And the Michigan Court of Appeals and Michigan Supreme Court both denied Marks leave to appeal. *See People v. Marks*, 985 N.W.2d 830 (Mich. 2023) (mem.). Marks moved the Michigan Supreme

Court to reconsider, and it denied that motion on May 30, 2023. *People v. Marks*, 990 N.W.2d 352 (Mich. 2023) (mem.).

On July 27, 2023, Marks moved this court for authorization to file a second or successive habeas petition based on the McNeely affidavit. We granted the motion on December 11, 2023. And on March 10, 2024, Marks filed this second habeas petition in the district court. Marks raised as grounds for relief that the prosecutor suppressed McNeely's recorded interview, his counsel rendered ineffective assistance by not obtaining the interview, he is actually innocent, and he was improperly forced to pay full restitution. The district court dismissed the petition as untimely and declined to issue a certificate of appealability.

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a petition on procedural grounds, the petitioner must also show "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).

All reasonable jurists would find that Marks's habeas petition is untimely. The limitations period began running, at the latest, on January 15, 2020, the day after McNeely signed his affidavit. *See* 28 U.S.C. § 2244(d)(1)(D); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 460, 462 n.1 (6th Cir. 2012). Marks filed his petition for state post-conviction relief on September 23, 2020, eight months after he discovered the evidence. The court can assume that Marks's state post-conviction petition tolled the deadline. *See* 28 U.S.C. § 2244(d)(2); *In re Hanserd*, 123 F.3d 922, 934 (6th Cir. 1997). And although the district court held that Marks's motion for authorization to file a second-or-successive petition in our court did not toll the statute of limitations, his case does not require an answer to that question. The court thus can assume that the statute of limitations was tolled during this period too. But Marks's petition is still untimely absent further tolling or an equitable exception to the limitations period. Fifty-eight days elapsed between the Michigan Supreme Court's denial of reconsideration on May 30, 2023, and Marks's filing of his motion for authorization on July 27, 2023. And another ninety days elapsed between

our grant of the motion for authorization on December 11, 2023, and Marks signing his habeas petition on March 10, 2024. Combined with the initial 252-day delay, Marks filed his petition 400 days after he discovered McNeely's affidavit: thirty-five days too late.

No reasonable jurist would find that Marks is entitled to additional equitable tolling. Equitable tolling kicks in only when petitioners show that they have been pursuing their rights diligently and that an extraordinary circumstance prevented them from timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Marks argues for equitable tolling based on his ignorance of the limitations period, his lack of legal assistance, library closures, mail delays, his difficulty obtaining copying services, and the COVID-19 pandemic. But we have previously held a prisoner's pro se status, ignorance of the law, and lack of access to a law library are not the kind of extraordinary circumstances that call for equitable tolling. *See Keeling*, 673 F.3d at 464; *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 752 (6th Cir. 2011); *Sloan v. United States*, 2023 WL 6296602, at *2 (6th Cir. Mar. 31, 2023) (order). That is especially true here given that Marks discovered the new evidence four years before the limitations period expired.

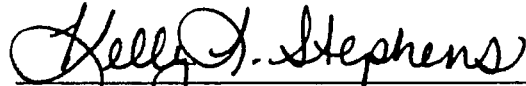
Nor would reasonable jurists debate the district court's conclusion that Marks is not entitled to a miscarriage-of-justice exception to the limitations period. To qualify for the exception, Marks needs to show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty. *McQuiggin v. Perkins*, 569 U.S. 383, 394-95 (2013); *House v. Bell*, 547 U.S. 518, 536-37 (2006). McNeely's affidavit states that, while he was at Marks's apartment with Marks, Glenn Turner, and the victim, Marks and the victim began arguing about drugs. Marks punched the victim several times before the men shook hands and apologized to each other. Turner then hit the victim in the head with a wooden statue and tried to hit the victim again, but Marks stopped him. Turner then told McNeely and Marks that he would kill them or their families if they snitched on him.

Reasonable jurors would doubt the veracity of McNeely's affidavit. *See House*, 547 U.S. at 538. The affidavit is unreliable because McNeely is a convicted felon, he was in prison with Marks, and he did not provide his statement to Marks for over 15 years after the murder (despite

allegedly telling his story to the prosecutor before Marks's trial). *See Davis v. Bradshaw*, 900 F.3d 315, 326 (6th Cir. 2018). McNeely's affidavit is also contrary to an affidavit that Marks filed with his first habeas petition. In that affidavit, Robert Johnson claimed that Turner admitted to attacking the victim with the wooden statue after Marks had left the apartment. Plus, McNeely's affidavit is inconsistent with the medical examiner's conclusion that the victim's cause of death was *multiple* blows to the head with an object with a sharp edge—not the single blow McNeely described. Considering “all the evidence,” Marks has not shown that “any reasonable juror would have reasonable doubt.” *House*, 547 U.S. at 538 (citation omitted).

Accordingly, Marks's application for a certificate of appealability and motion to appoint counsel are **DENIED**.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 12/29/2025.

Case Name: Lavelle Marks v. Russell Rurka

Case Number: 25-1835

Docket Text:

ORDER filed: Accordingly, Marks's application for a certificate of appealability and motion to appoint counsel [7430169-2] are DENIED. Eric E. Murphy, Circuit Judge.

The following document(s) are associated with this transaction:

Document Description: Order

Notice will be sent to:

Mr. Lavelle Eugene Marks
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

A copy of this notice will be issued to:

Ms. Andrea M. Christensen-Brown
Ms. Kinikia D. Essix
Mr. John S. Pallas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAVELLE EUGENE MARKS,

Petitioner,

Case No. 2:24-cv-10736

HONORABLE STEPHEN J. MURPHY, III

v.

ADAM DOUGLAS,

Respondent.

_____ /

OMNIBUS ORDER [10, 13]

Lavelle Eugene Marks petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 and challenged his 2005 plea-based conviction for second-degree murder. ECF No. 1. On December 11, 2023, the Sixth Circuit granted authorization to file a second habeas petition based on alleged newly discovered evidence. *Id.* at PageID.59. Petitioner then filed his petition on March 10, 2024. *Id.* at PageID.6. In lieu of an answer, Respondent filed a motion to dismiss the petition as time-barred under 28 U.S.C. § 2244(d)(1). For the reasons stated below, the Court will dismiss the petition with prejudice, deny the motion to amend and for an evidentiary hearing as moot, deny a certificate of appealability, but grant leave to appeal *in forma pauperis*.

BACKGROUND

Petitioner's convictions arose from the beating death of Mark Carter at Petitioner's home in Ypsilanti Township, Washtenaw County on October 6, 2004. *See Marks v. Davis*, No. 2:08-cv-13710, 2010 WL 11519612, at *1 (E.D. Mich. Aug. 5,

2010), *aff'd*, 504 F. App'x 383 (6th Cir. 2012).¹ Petitioner and his co-defendant, Glenn Turner, forcibly brought the victim to Petitioner's apartment, where he was beaten to death. Hours before the murder, Petitioner "broadcasted a \$60.00 reward through the drug community to find and detain the victim." *See Marks v. Davis*, Case No. 2:08-cv-13710, ECF No. 1-2, PageID.64 (E.D. Mich. Aug. 27, 2008) (Steeh, J.). Petitioner was later charged with homicide open murder, three counts of kidnapping, and extortion.

On the eve of trial, Petitioner was offered an agreement to plead guilty to second-degree murder in exchange for dismissal of the kidnapping and extortion charges, and an agreement to be sentenced under the non-habitual guidelines. On September 12, 2005, the day that Petitioner's trial was scheduled to begin, he accepted the offer and pleaded guilty. The trial court sentenced Petitioner to 35 to 70 years' imprisonment.

Later, Petitioner filed a post-conviction motion to withdraw his plea and vacate the sentence, or, in the alternative, for an evidentiary hearing. Petitioner claimed that he pleaded guilty because his attorney told him that his plea deal guaranteed him a sentence of 22 ½ to 37 ½ years. He argued that his plea was unknowing and involuntary. On October 3, 2006, the trial court dismissed Petitioner's motion and cancelled oral argument as the court determined that the motion was untimely filed.

¹ Unless otherwise noted, the Court takes the factual background from the above-mentioned district court and Sixth Circuit opinions.

Petitioner then filed a delayed application for leave to appeal with the Michigan Court of Appeals. The Michigan Court of Appeals denied Petitioner's application in a standard-form order "for lack of merits in the grounds presented." *People v. Marks*, No. 273595 (Mich. Ct. App. Dec. 6, 2006) (unpublished). Petitioner then filed an application for leave to appeal with the Michigan Supreme Court, which was denied because the court was "not persuaded that the question presented should be reviewed." *People v. Marks*, 478 Mich. 870 (2007) (Mem.).

On August 27, 2008, Petitioner filed his first federal habeas petition and raised the following claims:

- I. The trial court abused its discretion in dismissing [Petitioner's] motion to withdraw plea and vacate sentence, or in the alternative, for an evidentiary hearing, and misapplied the appropriate law as it pertains to the timeliness of the filing of [Petitioner's] post conviction motion, therefore, denying [Petitioner's] constitutional right to due process of law under the fifth and fourteenth amendments of the United States Constitution where [Petitioner] tried to preserve the involuntariness and coercive nature of his plea to the court.
 - A. The Plea was involuntary and unknowingly entered. [Petitioner] should be allowed to withdraw it.
 - B. The trial court abused its discretion in failing to grant defendant's presentence motion to withdraw his plea.
 - C. The trial court judge failed to apply the proper standard of review at the initial hearing on the motion to withdraw.
 - D. An evidentiary hearing was necessary.
 - E. Defendant's assertion of innocence and claim of self-defense are well founded and have been consistently made.

See Marks v. Davis, Case No. 2:08-cv-13710, ECF No. 8, (E.D. Mich. 2010).

The district court rejected Petitioner's claims and denied habeas relief, and the Sixth Circuit affirmed. *Marks v. Davis*, 504 F. App'x at 387. On April 15, 2013, the United States Supreme Court denied the petition for writ of certiorari. *Marks v. Warren*, 569 U.S. 935 (2013) (Mem.).

In 2016, Petitioner filed a motion for relief from judgment in state court that challenged defense counsel's effectiveness during the plea stage and argued that Petitioner's lawyer had a conflict of interest. Soon thereafter, the trial court denied the motion on the basis that Petitioner failed to show cause and actual prejudice for failing to raise the claims on direct appeal and for lack of merit.

On September 23, 2020,² Petitioner filed a second motion for relief from judgment in the state trial court, asserting that he was entitled to post-conviction relief based on a newly discovered affidavit from witness James McNeely. The affidavit, signed on January 14, 2020, averred the following key facts: (1) McNeely was present at Petitioner's apartment on October 6, 2004 with co-defendant Glenn Turner and the victim Mark Carter, (2) that he witnessed Petitioner punch the victim several times over a drug-related dispute, (3) that the victim apologized and shook hands with Petitioner, (4) moments later Turner took a wooden statue and hit the victim on the head, while Petitioner intervened to stop Turner, (5) the victim began bleeding from the head and Petitioner suggested he go to the hospital, (6) before McNeely left the apartment, Turner threatened to kill him or his family if he ever

² The date comes from the register of actions in Washtenaw County. ECF No. 11-2, PageID.182.

spoke of what happened, (7) Petitioner did not kill the victim, Turner did, (8) McNeely was interviewed by the prosecutor in 2004, but was never called to testify, and (9) McNeely was later incarcerated with Petitioner, but did not tell him about the interview for fear he would get hurt in prison, but upon his release told Petitioner's brother what happened. ECF No. 1, PageID.37.

Based on that affidavit, Petitioner argued that he was entitled to relief because (1) McNeely's affidavit established newly discovered evidence of his actual innocence, (2) the prosecution committed misconduct by suppressing evidence of McNeely's interview, (3) trial counsel was ineffective for failing to investigate the interview, (4) appellate counsel was ineffective for failing to raise these claims, and (5) restitution payments should be returned. ECF No. 11-16, PageID.420-424.

The state trial court rejected Petitioner's arguments, concluding that he failed to establish good cause and actual prejudice to overcome the procedural bar set forth under Mich. Ct. R. 6.508(D)(3). ECF No. 11-17, PageID.426. The trial court further stated that the "new evidence" argument was without merit. Petitioner filed an application for leave to appeal. *Id.* at 428. On May 26, 2022, the Michigan Court of Appeals denied Petitioner's delayed application for leave to appeal. ECF No. 11-18, PageID.431. On March 10, 2023, the Michigan Supreme Court denied Petitioner's application for leave because he "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Marks*, 985 N.W.2d 830 (Mich. 2023) (Mem.). On May 30, 2023, the Michigan Supreme Court denied reconsideration of its order. *People v. Marks*, 511 Mich. 970 (2023) (Mem.).

On July 27, 2023, Petitioner submitted a motion for authorization to file a second or successive petition in the Sixth Circuit. On December 11, 2023, the Sixth Circuit granted Petitioner authorization to file a second or successive petition based on his prima facie showing under 28 U.S.C. § 2244(b)(2), (3)(C) through the McNeely affidavit. ECF No. 1, PageID.59.

The habeas petition was filed in this Court on March 22, 2024, but signed and dated on March 10, 2024. ECF No. 1, PageID.6. The Court understands that the petition alleges that (1) the prosecutor suppressed a recorded witness interview of McNeely, (2) Petitioner's trial and appellate counsel rendered ineffective assistance by failing to obtain the interview, (3) Petitioner is actually innocent, and (4) Petitioner was improperly forced to pay the full restitution amount despite the trial court ordering his co-defendant to pay half. ECF No. 1, PageID.9–13.

Respondent filed a motion to dismiss on the basis that the petition is untimely, along with Rule 5 materials. ECF No. 10.

DISCUSSION

I. Timing

The Sixth Circuit's decision to grant Petitioner authorization to file a second or successive habeas petition under 28 U.S.C. § 2244(b), ECF No. 1, PageID.59, does not constitute a finding that his current petition is timely, nor does it preclude this Court from considering the timeliness of the petition under the one-year statute of limitations applicable to federal habeas actions. *See Davis v. Bradshaw*, 900 F.3d 315,

325 (6th Cir. 2018); *In re McDonald*, 514 F.3d at 543–44. So, the Court will consider the timeliness of the petition.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2241 et seq., established a one-year deadline for state prisoners to file a federal habeas corpus petition. *See Wall v. Kholi*, 562 U.S. 545, 550 (2011); *Sexton v. Wainwright*, 968 F.3d 607, 609–10 (6th Cir. 2020). The one-year limitation period ordinarily runs from the latest of the following four dates:

- (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.

28 U.S.C. § 2244(d)(1).

A habeas petition filed outside the allotted time period must be dismissed. *See Isham v. Randle*, 226 F.3d 691, 694–95 (6th Cir. 2000) (dismissing case filed thirteen days late); *Wilson v. Birkett*, 192 F. Supp. 2d 763, 765 (E.D. Mich. 2002).

Here, the timeliness of the habeas petition depends on when Petitioner discovered or could have discovered the factual predicate for his new claims through the exercise of due diligence. Under § 2244(d)(1)(D), the limitations period begins to

run when a petitioner knows, or through due diligence, could have discovered, the important facts for a habeas claim—not when the petitioner recognizes the legal significance of those facts. *Smith v. Meko*, 709 F. App'x 341, 344 (6th Cir. 2017); *Redmond v. Jackson*, 295 F. Supp. 2d 767, 771 (E.D. Mich. 2003). “The question under the provision is not when prisoners first learned of the new evidence; it is when they should have learned of the new evidence had they exercised reasonable care.” *Townsend v. Lafler*, 99 F. App'x 606, 608 (6th Cir. 2004); *see also Brooks v. McKee*, 307 F. Supp. 2d 902, 905–06 (E.D. Mich. 2004). The start of the limitations period “does not await the collection of evidence which supports the facts.” *Brooks*, 307 F. Supp. at 906. A habeas petitioner bears the burden of showing due diligence in discovering the factual predicate for his or her claims. *DiCenzi v. Rose*, 452 F.3d 465, 471 (6th Cir. 2006).

Crediting the Sixth Circuit’s discussion of Petitioner’s inability to previously discover McNeely’s statements through the exercise of due diligence, it appears the latest date Petitioner could have learned of McNeely’s statements was January 14, 2020, when McNeely signed the affidavit. *See* ECF No. 1, PageID.37. So, the one-year period would have started running the next day, January 15, 2020. When Petitioner initiated his post-conviction proceedings on September 23, 2020, 252 days had passed, and 113 days remained on the clock. The clock resumed when the Michigan Supreme Court entered its decision denying reconsideration on May 30, 2023.

Although Petitioner filed his motion for authorization to file a second or successive petition in the Sixth Circuit on July 27, 2023, statutory tolling does not

apply to the time period when the petitioner's motion to the Sixth Circuit Court of Appeals for authorization to file a second or successive petition was pending. The United States Supreme Court has held that the filing of an application for habeas corpus review does not fall within the language of Section 2244(d)(2) because it is not an "application for State post-conviction or other collateral review." *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001). If the filing of an actual habeas petition does not provide a basis for statutory tolling under Section 2244(d)(2), then the filing of a motion to file a second or successive habeas petition necessarily cannot provide a basis for statutory tolling under Section 2244(d)(2). Accordingly, Petitioner's habeas petition became due on September 20, 2023. He filed his petition on March 10, 2024,³ after the one-year limitations period expired. AEDPA's statute of limitations bars him from pursuing his habeas claims, unless Petitioner can show that equitable tolling applies.

AEDPA's statute of limitations is subject to equitable tolling "when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011) (quoting *Robertson v. Simpson*, 624 F.3d 781, 783 (6th Cir. 2010)). But equitable tolling is granted "sparingly." *Id.* (quoting *Robertson*, 624 F.3d at 784). A habeas petitioner is entitled to equitable tolling only if he establishes that (1) "he has

³ Under the prison mailbox rule, the filing date is assumed to be the day that the pro se prisoner plaintiff handed the filing to prison officials; that day, in turn, is assumed to be the date on the complaint absent evidence to the contrary. *See Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008). Petitioner's petition is signed and dated March 10, 2024. ECF No. 1, PageID.6.

been pursuing his rights diligently;” and (2) “some extraordinary circumstance stood in his way and prevented timely filing.” *Id.* (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

While the time in which a habeas case has been pending in federal court is not statutorily tolled, *see Duncan*, 533 U.S. at 181–82, such time is equitably tolled. *See Johnson v. Warren*, 344 F. Supp. 2d 1081, 1088–89 (E.D. Mich. 2004). So, the Court will equitably toll the time when Petitioner’s motion for authorization to file a second or successive petition was pending in the Sixth Circuit, allotting Petitioner 55 days remaining on the limitations clock as of December 11, 2023, when the Sixth Circuit granted authorization. Petitioner then had until February 4, 2024, to file his petition absent other justifications for equitable tolling. But he failed to do so.

Still, Petitioner argued that the time before he filed his motion for relief from judgment in state court should be tolled because the 2020 pandemic caused prison lockdowns preventing him from filing his motion any sooner. ECF No. 12, PageID.71. He also argued that the period after the Sixth Circuit’s order should be tolled because law library closures (and mailing delays) prevented him from filing his petition. *Id.* Such circumstances, however, do not justify equitable tolling.

Mailing delays, lockdowns, delays related to legal assistance, and limited law library access are normal aspects of prison life, not extraordinary ones. *See, e.g., Hall*, 662 F.3d at 750–52 (rejecting petitioner’s argument that he was entitled to equitable tolling due to lack of access to transcripts, pro se status, and limited law library access); *United States v. Cherry*, No. 04-90040, 2010 WL 3958679, *2 (E.D. Mich. Oct.

8, 2010) (citing cases holding that lack of access to legal materials during prison lockdowns, transfers, and administrative segregation are not extraordinary circumstances that warrant tolling); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) (“[A]n inmate’s lack of legal training, his poor education, or even his illiteracy does not give a court reason to toll the statute of limitations.”).

Further, while the pandemic itself was certainly unusual, the associated effects on prison life are not exceptional circumstances that warrant equitable tolling. This is especially true where, as here, the petitioner has not explained or presented evidence to show how his circumstances actually prevented him from filing his state post-conviction motion. *United States v. West*, 578 F. Supp. 3d 962, 967 (N.D. Ohio 2022) (concluding that petitioner was not entitled to equitable tolling where he only made general allegation about pandemic-related lockdown and lack of law library access and failed to show that he acted diligently during the one-year period); *Shoening v. Christianson*, No. 2:21-cv-11955, 2021 WL 4290242, at *3–4 (E.D. Mich. Sept. 21, 2021) (same). Accordingly, Petitioner is not entitled to additional tolling for any of these reasons.

II. Actual Innocence

Petitioner next argues that his actual innocence excuses the procedural bar of the statute of limitations. The Court disagrees.

A habeas petitioner who can show actual innocence under the rigorous standard of *Schlup v. Delo*, 513 U.S. 298 (1995) is excused from the procedural bar of the statute of limitations under the miscarriage-of-justice exception. *McQuiggin v.*

Perkins, 569 U.S. 383, 392 (2013). “[A]ctual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 624 (1998). To make a showing of actual innocence under *Schlup*, a petitioner must present new evidence showing that “it is more likely than not that no reasonable juror would have convicted the petitioner.” *McQuiggin*, 569 U.S. at 399 (citation modified). To do so, a court must survey “all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *House v. Bell*, 547 U.S. 518, 538 (2006) (citation modified). With “all the evidence” in mind, a court’s “function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.” *Id.*

Because actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in determining the credibility of the evidence of actual innocence. *McQuiggin*, 569 U.S. at 399–400. Critically, a showing of actual innocence must be based on “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; *see also Hubbard v. Rewerts*, 98 F.4th 736, 743 (6th Cir. 2024). And so, a petitioner who presents a credible claim of actual innocence is entitled to equitable tolling of AEDPA’s statute of limitations. *Souter v. Jones*, 395 F.3d 577, 601 (6th Cir. 2005).

When a petitioner has pleaded guilty, as here, the question of whether the actual innocence exception applies is more complex. Courts in this circuit have held that the actual-innocence exception does not apply when the petitioner pleaded guilty. *See Shofner v. Green*, No. 0:20-cv-23, 2020 WL 8475034, at *4–5 (E.D. Ky. Apr. 16, 2020) (collecting cases), *report and recommendation adopted*, 2021 WL 472911 (E.D. Ky. Feb. 9, 2021). After all, “a valid guilty plea relinquishes any claim that would contradict the ‘admissions necessarily made upon entry of a voluntary plea of guilty.’” *Class v. United States*, 583 U.S. 174, 183 (2018) (quoting *United States v. Broce*, 488 U.S. 563, 573–74 (1989)). “[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.” *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). And any “attack on the sufficiency of the evidence that might have been produced at trial [is] clearly waived by [a] defendant’s guilty plea.” *United States v. Manni*, 810 F.2d 80, 84 (6th Cir. 1987).

That said, the Sixth Circuit, in an unpublished opinion, has noted that “[a] petitioner may claim actual innocence for the purposes of equitable tolling, even if his conviction was the result of a plea.” *Connolly v. Howes*, 304 F. App’x 412, 417 (6th Cir. 2008). There are also some district-court cases in this Circuit that applied *Souter* after a guilty plea. *See, e.g., Eads v. Bottom*, No. 6:13-cv-29, 2014 WL 2742581, at *5 (E.D. Ky. June 12, 2014) (“[A] defendant [who] pled guilty still may assert a *Schlup* claim. . . . [but] the application of *Schlup* in the plea context creates a host of analytical difficulties.”); *Miles v. Ohio*, No. 1:09-cv-262, 2010 WL 5899288, at *4 (S.D.

Ohio Mar. 11, 2010) (applying *Souter* when the petitioner had pleaded guilty, but finding he did not “meet his burden of establishing actual innocence”), *report and recommendation adopted*, 2011 WL 799847 (S.D. Ohio Mar. 2, 2011).

But even if actual innocence applies in guilty-plea cases,⁴ the Court finds that Petitioner has not satisfied the “high bar” of *Schlup* to warrant tolling. While the McNeely affidavit may qualify as new evidence because it emerged after the guilty plea and sentencing, Petitioner has not shown that the affidavit is reliable evidence. The court in *Schlup* did not provide an exhaustive list of what could be considered reliable evidence, but it did provide examples which are instructive. *See Schlup*, 513 U.S. at 324 (listing exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence as examples of support for petitioner’s claim). The McNeely affidavit does not meet the *Schlup* criteria.

First, the affidavit is highly suspect. McNeely is a convicted felon and avers that he was incarcerated with Petitioner. ECF No. 1, PageID.37 (“While I was in prison with [Petitioner], I never told him about the statement I made to the Sheriff and Prosecutor because I would be hurt in prison for telling.”). Statements by fellow prisoners are viewed with suspicion. *Cf. Milton v. Secretary, Dep’t of Corr.*, 347 F. App’x 528, 531–532 (11th Cir. 2009) (concluding that an affidavit from the family member of a fellow inmates created after trial is not sufficiently reliable evidence to support a claim of actual innocence).

⁴ The Court acknowledges that Petitioner argued his innocence during sentencing. *See* ECF No. 11-12, PageID.390. (“I feel sorry for Mark and his family, but I didn't kill Mark.”).

Second, the affidavit is inconsistent with evidence from the state-court record and the other affidavits submitted in support of Petitioner's initial habeas petition. To begin, the affidavit conflicts with witness testimony from the preliminary investigation. Chris Whisenant testified that, hours before the crime, he drove Petitioner and Turner to the victim's apartment. ECF No. 11-4, PageID.250. Whisenant further testified that when Petitioner, Turner, and the victim were in his car, he drove them back to Petitioner's apartment, while Petitioner and the victim argued about money. *Id.* at PageID.253–254. When they arrived at Petitioner's apartment, no one else was present. *Id.* at PageID.256. Before Whisenant left the apartment, the argument between Petitioner and the victim continued. *Id.* at PageID.255. The testimony plainly contradicts McNeely's statement that, while he was at Petitioner's apartment, "an argument broke out between [Petitioner and the victim] over some crack." ECF No. 1, PageID.37. According to Whisenant, an argument between Petitioner and the victim had been ongoing and McNeely was not at the apartment.

The affidavit also conflicts with some of the sworn affidavits attached to Petitioner's earlier habeas petition. For instance, Jeffery Irby's affidavit states that, on October 6, 2004, he saw the victim near Petitioner's apartment, beaten and badly injured after getting jumped near his apartment complex. The victim then informed Irby that he was going to stay the night at Petitioner's. *See Marks v. Davis*, Case No. 2:08-cv-13710, ECF No. 1-2, PageID.48 (E.D. Mich. Aug. 27, 2008). Additionally, Robert Johnson's affidavit states that Glenn Turner told him that the victim arrived

at Petitioner's apartment *already* injured and that Petitioner tried to take the victim to the hospital, but he refused to go. Johnson further averred that, after Petitioner left to go to the store, a fight broke out between Turner and the victim over crack cocaine and Turner beat the victim with a wood statue. *Id.* at PageID.46.

But McNeely's affidavit tells a different tale. McNeely states that Petitioner and the victim fought over cocaine at the apartment and Petitioner hit the victim several times, but that Turner hit the victim on the head with a wood statue. When Turner tried to hit the victim a second time, McNeely claims Petitioner stopped him. ECF No. 1, PageID.37. Petitioner's filing of multiple habeas petitions with multiple conflicting affidavits calls the reliability of the McNeely affidavit into question.

Third, the Court finds that the affidavit does not establish factual innocence. As discussed, McNeely states that Petitioner "punched [the victim] several times." *Id.* During the preliminary examination, the coroner testified that the victim's cause of death was *multiple* blunt force injuries to the head. ECF No. 11-4, PageID.224–226. The affidavit is silent as to where Petitioner hit the victim but is clear that Turner hit the victim on the head only once with the statue. Therefore, a jury could find both Petitioner and Turner caused the victim's death. The affidavit does not exonerate Petitioner.

Finally, the Court finds the timing of the affidavit highly suspicious. It was signed approximately 16 years after the murder. New statements from witnesses years after a crime are inherently suspect and are viewed with "a fair degree of skepticism." *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring).

For these reasons, Petitioner fails to make a persuasive showing of actual innocence. The affidavit is suspect, contains inconsistencies with other evidence, and fails to establish factual innocence. Considering the available evidence, Petitioner fails to establish that it is more likely than not no reasonable juror would have convicted him based on the McNeely affidavit.

His petition is, therefore, untimely and will be dismissed. Petitioner's motion to amend and for an evidentiary hearing, ECF No. 13, will also be denied.

III. Certificate of Appealability

Before petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court denies a habeas claim on procedural grounds without addressing the claim's merits, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner 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. *See Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed. In such a case, no appeal is warranted. *Id.* "The district court must issue or

deny a certificate of appealability when it enters a final order adverse to the applicant.” Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254; *see also Strayhorn v. Booker*, 718 F. Supp. 2d 846, 875 (E.D. Mich. 2010).

Here, the Court will deny petitioner a Certificate of Appealability. Reasonable jurists would not find it debatable whether this Court was correct in determining that petitioner did not file his habeas petition within the one-year limitations period. *Grayson*, 185 F. Supp. 2d at 753.

Although jurists of reason would not debate this Court’s resolution of petitioner’s claims, the issues are not frivolous; therefore, an appeal could be taken in good faith and petitioner may proceed *in forma pauperis* on appeal. *See Foster v. Ludwick*, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002).

ORDER

WHEREFORE, it is hereby **ORDERED** that Respondent’s Motion to Dismiss [10] is **GRANTED**, and the Petition is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that the motion to amend and for an evidentiary hearing [13] is **DENIED**.

IT IS FURTHER ORDERED a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **GRANTED**.

This is a final order that closes the case.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: August 19, 2025

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAVELLE EUGENE MARKS,

Petitioner,

v.

ADAM DOUGLAS,

Respondent.

Case No. 2:24-cv-10736

HONORABLE STEPHEN J. MURPHY, III

JUDGMENT

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's order dated August 19, 2025, Petitioner's claims are dismissed with prejudice.

KINIKIA ESSIX
CLERK OF THE COURT

BY: s/ R. Loury

Dated: August 19, 2025

APPROVED:

s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
U.S. DISTRICT JUDGE

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