

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LEWIS J. WHITE
ADC # 129569

PETITIONER

v.

No. 5:10-cv-357-DPM

RAY HOBBS, Director, Arkansas
Department of Correction

RESPONDENT

ORDER

After further thought, the Court has decided that it will consider White's motion to reconsider. The referral to Magistrate Judge Ray is therefore withdrawn. The Court sees no need for an evidentiary hearing. The motion to reconsider, *Document No. 39*, is denied.

The motion stands on a statement dated 12 March 2012 from Tara Lee White, Petitioner's daughter, recanting her trial testimony in September 2003 that Petitioner raped her. The statement is unsworn. Ms. White says she wrote it freely, without being coerced or standing to gain anything. The statement is witnessed.

Giving the statement all the evidentiary weight it will bear, White's petition still fails. Because White was not convicted of a capital offense, the governing precedent provides that he has no freestanding actual-innocence

claim at this point. *Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002); *see also Herrera v. Collins*, 506 U.S. 390, 400 (1993). Instead, the issue is whether the new statement makes a case for cause or equitable tolling. Under *Schlup*, the dispositive question is whether, taking all of the evidence at trial and the new statement into account, no reasonable juror could have found White guilty of rape. *Schlup v. Delo*, 513 U.S. 298, 329 (1995); *Cornell v. Nix*, 119 F.3d 1329, 1334 (8th Cir. 1997).

White cannot make it up this high hill. He gave a tape-recorded confession that he raped his daughter with his fingers. She testified at trial that he raped her in this way. Now, almost nine years later, she says her mother made her lie about a rape that never happened to get back at White. A reasonable juror could find White guilty beyond a reasonable doubt after considering all this evidence; and that conclusion would have adequate evidentiary support.

Motion to reconsider, *Document No. 39*, denied.

So Ordered.

D.P. Marshall Jr.

D.P. Marshall Jr.
United States District Judge

16 July 2012