

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DAVID TODD BENNETT, SR.,

Petitioner,

Case No. 1:16-cv-908

v.

HON. JANET T. NEFF

S.L. BURT,

Respondent.

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**OPINION AND ORDER**

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R, Dkt 6) recommending that this Court deny the petition as time-barred by the one-year statute of limitations. The matter is presently before the Court on Petitioner's objections to the Report and Recommendation (Objs., Dkt 7). In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order. The Court will also issue a Judgment in this § 2254 proceeding. *See Gillis v. United States*, 729 F.3d 641, 643 (6th Cir. 2013) (requiring a separate judgment in habeas proceedings).

Petitioner essentially requests that the Court reconsider his argument that the statute under which he was convicted is unconstitutional. In so arguing, Petitioner asserts that he is actually innocent, so as to excuse him from the statute of limitations (Objs., Dkt 7 at PageID.64).

Petitioner's argument fails to demonstrate any factual or legal error in the Magistrate Judge's analysis or conclusion.

As the Magistrate Judge explained, "Petitioner . . . proffers [no] new evidence of his innocence, much less evidence that makes it more likely than not that no reasonable jury would have convicted him" (R&R, Dkt 6 at PageID.62). Petitioner's re-argument concerning the constitutionality of the statute under which he was convicted does not change the Magistrate Judge's conclusion. For the purposes of actual innocence, a petitioner must show "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Petitioner's unconstitutional-statute argument alleges legal insufficiency, not factual innocence, and furthermore, such an argument does not constitute "new evidence." *See Blunt v. Mackie*, No. 2:11-cv-277, 2011 WL 4074705, at \*1-2 (W.D. Mich. Sept. 13, 2011) (finding that an argument concerning the unconstitutionality of an amendment to a Michigan statute was not new evidence that suffices to establish actual innocence). Therefore, Petitioner's objection is without merit.

The Magistrate Judge properly denied Petitioner's habeas petition as time-barred. Petitioner has failed to show actual innocence.

Having determined Petitioner's objections lack merit, the Court must further determine pursuant to 28 U.S.C. § 2253(c) whether to grant a certificate of appealability as to the issues raised. *See* RULES GOVERNING § 2254 CASES, Rule 11 (requiring the district court to "issue or deny a certificate of appealability when it enters a final order"). The Court must review the issues individually. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001).

“When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a 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*, 529 U.S. at 484. 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.” *Id.* Upon review, this Court finds that reasonable jurists would not find the Court’s procedural ruling debatable as to each issue asserted. A certificate of appealability will therefore be denied.

Accordingly:

**THEREFORE, IT IS ORDERED** that the Objections (Dkt 7) are DENIED and the Report and Recommendation of the Magistrate Judge (Dkt 6) is APPROVED and ADOPTED as the Opinion of the Court.

**IT IS FURTHER ORDERED** that the petition for habeas corpus relief (Dkt 1) is DENIED for the reasons stated in the Report and Recommendation.

**IT IS FURTHER ORDERED** that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted.

Dated: December 12, 2016

/s/ Janet T. Neff  
JANET T. NEFF  
United States District Judge