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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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<p>RONALD HULSEY,</p> <p style="text-align: center;">v.</p> <p>QUENTIN BYRNE,</p>	<p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">Respondent.</p>	<p>Case No. 3:16-cv-00069-RCJ-WGC</p> <p style="text-align: center;">ORDER</p>
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Petitioner Ronald Hulsey's counseled petition for a writ of habeas corpus under 28 U.S.C. § 2254 is before the court on respondents' motion to dismiss (ECF No. 13). Hulsey opposed (ECF No. 23), and respondents replied (ECF No. 24).

I. Procedural History and Background

On September 13, 2011, a jury convicted both Ronald Hulsey and his co-defendant Jeremy Turner of count I - second-degree murder and count II - battery with substantial bodily harm (exhibits 60, 61).¹ The convictions were based on events at a barbecue at Hulsey's home; Hulsey's wife and children, his brother-in-law Jeremy Turner and his children, mutual friend John Clymer, Clymer's girlfriend Carolyn Faircloth and Faircloth's son Carl Roberts were among the attendees. An alcohol-fueled argument started, and ultimately Hulsey and Turner severely beat Roberts and beat fifty-seven-year-old Faircloth, killing her. Exh. 55A, pp. 5-163. The state district court sentenced Hulsey to a term of life with the possibility of parole after ten years on count I and a consecutive

¹ Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 13, and are found at ECF Nos. 14-20.

1 term of 24 to 60 months on count II. Exh. 73. Judgment of conviction was entered on
2 November 17, 2011. Exh. 74.

3 The Nevada Supreme Court affirmed Hulsey's convictions on October 8, 2012, and
4 remittitur issued on November 4, 2012. Exhs. 94, 94A. On November 15, 2013, Hulsey
5 filed a state postconviction petition for writ of habeas corpus. Exh. 95. On November
6 13, 2014, the Nevada Supreme Court affirmed the dismissal of the petition as untimely,
7 and remittitur issued on December 10, 2014. Exhs. 109, 110.

8 Hulsey filed his counseled federal habeas petition on February 11, 2016 (ECF No.
9 1). Respondents now move to dismiss the petition (ECF No. 13).

10 **II. Instant Petition is Time-barred**

11 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year statute
12 of limitations on the filing of federal habeas corpus petitions. 28 U.S.C. § 2244(d). The
13 one-year time limitation can run from the date on which a petitioner's judgment became
14 final by conclusion of direct review, or the expiration of the time for seeking direct
15 review. 28 U.S.C. § 2244(d)(1)(A). Further, a properly filed petition for state
16 postconviction relief can toll the period of limitations. 28 U.S.C. § 2244(d)(2).

17 Here, the Nevada Supreme Court affirmed Hulsey's conviction in an order issued on
18 October 8, 2012, and remittitur issued on November 4, 2012. Exhs. 94, 94A. Hulsey
19 did not seek a petition for writ of certiorari with the United States Supreme Court, and
20 therefore, for the purposes of the AEDPA, Hulsey's conviction was considered final
21 ninety days after the final decision on appeal. *Jimenez v. Quarterman*, 555 U.S. 113,
22 119 (2009). Thus, Hulsey's conviction was final on January 7, 2013, and the AEDPA
23 limitation period began to run.

24 NRS 34.726(1) provides that a state postconviction habeas corpus petition must be
25 filed within one year after the Nevada Supreme Court issues its remittitur on direct
26 appeal. Remittitur on direct appeal issued on November 4, 2012. Exh. 94A. Hulsey
27 filed a state postconviction petition on November 15, 2013. Exh. 95. The Nevada
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1 courts dismissed the petition as untimely. Exhs. 96, 109, 110. An untimely state
2 petition is not considered "properly filed" for the purposes of the AEDPA, and therefore,
3 Hulsey was not entitled to any tolling of the federal statute of limitations while the state
4 petition was pending. *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). Thus, the federal
5 statute of limitations period expired on January 7, 2014. 28 U.S.C. § 2244(d)(1)(A).
6 Accordingly, Hulsey's February 11, 2016 federal habeas petition is untimely.

7 Hulsey first argues that the AEDPA limitations period should be calculated from the
8 date he discovered new evidence. 28 U.S.C. § 2244(d)(1)(D) provides that the AEDPA
9 limitation period shall run from "the date on which the factual predicate of the claim or
10 claims presented could have been discovered through the exercise of due diligence."
11 Hulsey claims that he first received a transcript of his co-defendant Jeremy Turner's
12 state postconviction evidentiary hearing on October 18, 2015, and that Hulsey's federal
13 claims are based upon his wife's and Turner's testimony at that hearing.

14 In his federal petition, Hulsey cites to his wife's and Turner's testimony at Turner's
15 state postconviction proceedings. Hulsey fails to explain how his wife's and Turner's
16 testimony about what happened is newly discovered evidence that could not have been
17 discovered prior to October 2015 when he claims he received the transcript. In fact,
18 Hulsey attached an affidavit by his wife to his state postconviction petition, filed on
19 November 15, 2013. Exh. 95, pp. 12-16. Nor does he identify any portion of Turner's
20 state postconviction testimony that constituted any fact not previously known to Hulsey.

21 The court first observes that the argument that this "newly discovered evidence" was
22 not previously discoverable through the exercise of due diligence strains credulity.
23 Second, Hulsey claims in his federal petition that his trial counsel was ineffective for
24 failing to interview and investigate his wife and his co-defendant in order to ascertain
25 how they would testify at trial. In other words, Hulsey attempts to argue both that his
26 wife's and Turner's eyewitness accounts are newly discovered evidence not
27 discoverable earlier through due diligence and that his trial counsel was ineffective for
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1 failing to discover this evidence prior to trial. The positions are inherently contradictory,
2 and the arguments in support of this federal petition border on frivolous.

3 Petitioner also argues that his claim of actual innocence allows him to overcome the
4 time-bar (ECF No. 23). He contends that he did not fight with Roberts and instead was
5 trying to break up the fight between Roberts and Turner and that he only used force
6 against Faircloth to stop Faircloth who was battering his wife (ECF Nos. 1, 23). A
7 convincing showing of actual innocence may enable habeas petitioners to overcome a
8 procedural bar to consideration of the merits of their constitutional claims. *Schlup v.*
9 *Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 518 (2006). In *McQuiggin v.*
10 *Perkins*, the United States Supreme Court held that “actual innocence, if proved, serves
11 as a gateway through which a petitioner may pass whether the impediment is a
12 procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the
13 statute of limitations.” 133 S.Ct. 1924, 1928 (2013). The Court emphasized that
14 “tenable actual-innocence gateway pleas are rare: ‘[A] petitioner does not meet the
15 threshold requirement unless he persuades the district court that, in light of the new
16 evidence, no juror, acting reasonably, would have voted to find him guilty beyond a
17 reasonable doubt.’” *Id.*; quoting *Schlup*, 513 U.S., at 329; see *House*, 547 U.S. at 538
18 (emphasizing that the *Schlup* standard is “demanding” and seldom met). In assessing a
19 *Schlup* gateway claim, “the timing of the [petition]” is a factor bearing on the “reliability of
20 th[e] evidence” purporting to show actual innocence. *Schlup*, 513 U.S. at 332;
21 *McQuiggin*, 133 S.Ct. at 1936 (“[f]ocusing on the merits of a petitioner’s actual-
22 innocence claim and taking account of delay in that context, rather than treating
23 timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of
24 justice exception—i.e., ensuring that federal constitutional errors do not result in the
25 incarceration of innocent persons” (internal quotations and citations omitted)).

26 John Clymer was the main eyewitness to testify at trial. Exh. 55A, pp. 5-163.
27 Clymer testified that at the time of the incident he was close friends with Hulsey.
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1 Clymer testified that his girlfriend Carolyn Faircloth was angry that Turner hit her son
2 Carl Roberts, which led to Faircloth and Hulseys wife fighting each other, including
3 exchanging punches. He testified that Turner grabbed Faircloth off of Hulseys wife and
4 punched her in the face, knocking her to the ground. Clymer stated that subsequently
5 Hulseys wife kicked Faircloth in the face while she lay on the ground, describing the kick as
6 like a football kicker punting the ball. *Id.* at 96-97. Clymer testified that both Turner and
7 Hulseys wife severely beat Roberts. *Id.*

8 At co-defendant Turners evidentiary hearing on his state postconviction petition,
9 Hulseys wife testified that Hulseys attorney told her to invoke spousal privilege at trial
10 (ECF No 5, p. 74). Twice during the evidentiary hearing she testified that, while she did
11 not see it, she thought that Hulseys wife kicked Faircloth in the face. *Id.* at 94, 97. She also
12 testified that she never saw co-defendant Turner anywhere near Faircloth. *Id.* at 98.

13 Co-defendant Turner testified in support of his state postconviction petition that his
14 trial counsel did not tell him before trial started that counsel was going to concede that
15 Turner battered Faircloth and that Turner would not have agreed to that. *Id.* at 104. He
16 testified that he "absolutely" did not punch Faircloth or ever kick her but that he did hit
17 Carl Roberts. *Id.* at 110, 113. He testified that Hulseys wife stepped between he and Roberts
18 to try to stop them from fighting. *Id.* at 109-110. He testified that he saw Hulseys wife kick
19 Faircloth and saw Hulseys wife punch Faircloth. *Id.* at 114-115. Turners counsel
20 mainly appeared to attempt to elicit testimony at the evidentiary hearing that it was
21 Hulseys wife who caused Faircloth's death.

22 This court has reviewed the trial transcripts and the transcript petitioner filed of
23 Turners state postconviction evidentiary hearing. At best, if Hulseys wife and co-
24 defendant had testified at trial, the jury would have had to evaluate their credibility in
25 comparison to Clymers and the other witnesses. The court concludes that petitioner
26 has failed to meet the demanding *Schlup* threshold requirement of demonstrating that,
27 "in light of the new evidence, no juror, acting reasonably, would have voted to find him
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1 guilty beyond a reasonable doubt." *McQuiggin*, 133 S.Ct. at 1928. Thus, the petition is
2 untimely, and petitioner has presented no meritorious basis to excuse such
3 untimeliness.²

4 III. Certificate of Appealability

5 As the petition is dismissed in its entirety, this is a final order adverse to the
6 petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this
7 court to issue or deny a certificate of appealability (COA). Accordingly, the court has
8 *sua sponte* evaluated the claims within the petition for suitability for the issuance of a
9 COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir.
10 2002).

11 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has
12 made a substantial showing of the denial of a constitutional right." With respect to
13 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
14 would find the district court's assessment of the constitutional claims debatable or
15 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
16 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
17 jurists could debate (1) whether the petition states a valid claim of the denial of a
18 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

19 Having reviewed its determinations with respect to Hulse's petition, the court finds
20 that none meets the *Slack* standard. The court therefore declines to issue a certificate
21 of appealability.

22 IV. Conclusion

23 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 13)
24 is **GRANTED**. The petition is **DISMISSED** as time-barred.

25 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

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28 ² The court notes that respondents point out that Hulse's federal petition also is wholly unexhausted. 28 U.S.C. § 2254(b)(1).

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IT IS FURTHER ORDERED that petitioner's motion for issuance of ruling (ECF No. 26) is **DENIED** as moot.

IT IS FURTHER ORDERED that the Clerk shall enter judgment accordingly and close this case.

DATED: ^{10th July} 27 June 2017.



ROBERT C. JONES
UNITED STATES DISTRICT JUDGE