

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

James Dale

v.

Case No. 16-cv-292-SM

Northern NH Correctional Facility, Warden

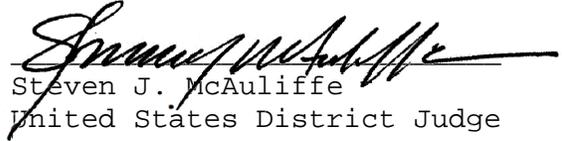
O R D E R

After due consideration of the objection filed, I herewith approve the Report and Recommendation of Magistrate Judge Andrea K. Johnstone dated February 5, 2018. The petition is time barred. Petitioner has failed to state a credible claim of actual innocence sufficient to excuse his failure to file a timely petition. That a witness may have been called that may have reiterated earlier testimony in a different proceeding to the effect that she saw a different person commit the rape and murder at issue in this case, does not amount to a credible claim of petitioner's actual innocence, particularly where the jury was made aware of the alternate perpetrator theory, as well as evidence of DNA testing excluding the other person as the perpetrator, but not excluding petitioner. What is required is not evidence upon which a jury might have found reasonable doubt, but evidence credibly supporting a claim of actual innocence of the crimes charged.

Respondent's Motion for Summary Judgment (document no. 19) is hereby granted.

Additionally, finding that the petitioner has failed to make substantial showing of the denial of a constitutional right, the court declines to issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2); Rule 11, Rules Governing Habeas Corpus Cases Under Section 2254; First Cir. LR 22.0.

The Clerk of Court shall enter judgment in accordance with this order and close the case.

  
Steven J. McAuliffe  
United States District Judge

Date: March 9, 2018

cc: James Dale, pro se  
Elizabeth C. Woodcock, Esq.