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United States District Court,
N.D. New York.

David Rhodes, Petitioner,
v.
M. Sheahan, Respondent.

9:13-CV-00057 (FJS/TWD)
|
Signed 01/12/2016

Attorneys and Law Firms

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ORDER and REPORT–RECOMMENDATION

THÉRÈSE WILEY DANCKS, United States Magistrate Judge

I. INTRODUCTION

***1** Petitioner David Rhodes' pro se Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 has been referred to this Court for Report and Recommendation, pursuant to 28 U.S.C. § 636(b) and Northern District Local Rule 72.3(c), by the Hon. Frederick J. Scullin, Senior United States District Judge. As a threshold matter, Respondent seeks to have the Petition denied and dismissed on statute of limitation grounds. (Dkt. No. 21.) For reasons explained herein, the Court recommends that the petition be denied and dismissed as time-barred.

II. BACKGROUND

A. State Court Conviction and Sentencing

Petitioner was convicted of rape in the first degree (Penal Law § 130.35(1)) and rape in the third degree (Penal Law § 130.25(3)) on April 20, 2007, following a jury trial in Ulster County Court, the Hon. J. Michael Bruhn, County Court Judge, presiding. (Dkt. No. 11 at 765[1].) On June 26, 2007, Petitioner was sentenced to a term of incarceration of twenty-five years followed by five years post-release supervision on the charge of rape in the first degree, and an indeterminate term of incarceration with a minimum of two years and maximum of four years on the charge of rape in the third degree. *Id.* at 810.

B. Petitioner's Direct Appeal

On April 21, 2011, on Petitioner's counseled direct appeal, the Appellate Division Third Department ("Appellate Division") unanimously affirmed the June 26, 2007, judgment of conviction against Petitioner on the rape in the first degree and rape in the third degree charges. *See People v. Rhodes,* 921 N.Y.S.2d 405, 406 (3d Dep't 2011). The Appellate Division, Malone, Jr., J., denied Petitioner's counseled motion pursuant to N.Y. Criminal Procedure Law ("CPL") § 460.20 for permission to appeal to the Court of Appeals on July 21, 2011.[2] (Dkt. No. 12–7 at 3.) Petitioner did not file a petition for a writ of certiorari in the United States Supreme Court. (Dkt. No. 1 at 3.) Petitioner's conviction became final upon the expiration of the ninety day period allowed to seek certiorari.

C. Petitioner's Motion to Vacate his Conviction Pursuant to CPL § 440.10

Petitioner filed a pro se motion to vacate his conviction under CPL § 440.10 on August 19, 2010, before his direct appeal was decided by the Appellate Division. (Dkt. No. 12–8 at 910.) Petitioner's § 440.10 motion was denied by the Hon. Anthony McGinty, Acting Ulster County Court Judge, on May 11, 2011, on the grounds that the issues raised in the motion could have and should have been raised on direct appeal as there were sufficient facts in the record. (Dkt. No. 21–1 at 12.) Judge McGinty's Order was entered on May 11, 2011. *Id.* at 3. A copy of the Decision and Order with Notice of Entry was served by mail on Petitioner on June 20, 2011. *Id.* at 1–2.

***2** Respondent has asserted in his Supplemental Memorandum of Law that Petitioner did not seek leave to appeal the denial of his § 440.10 motion to the Appellate Division. (Dkt. No. 21 at 3.) In his opposition to Respondent's claim that his habeas petition is time-barred, Petitioner claimed that he was going through his papers trying to find his application to appeal his § 440.10 motion

because "he did, in fact, seek leave of denial of his CPL § 440.10 motion." (Dkt. No. 31 at 15.)

Petitioner's Traverse includes a July 23, 2011, Notice of Appeal from Judge McGinty's May 11, 2011, Order, under CPL § 460.15. (Dkt. No. 31–3 at 2.) The Notice of Appeal indicates that copies were sent to the Ulster County District Attorney and the Ulster County Court Clerk. Id. There is no affidavit or certificate of service on the District Attorney. Petitioner's Traverse also includes a September 18, 2011, letter to the Court of Appeals regarding his application for leave to appeal to the Court of Appeals from the Appellate Division affirmance on his direct appeal. (Dkt. No. 31–3 at 2–3.) In the letter, Petitioner referenced the denial of his § 440.10 motion and indicated that the § 440.10 had not been answered by the Appellate Division. Id. at 3. Petitioner claims in his Traverse that on November 10, 2011, after he had written to the Court of Appeals, he received a reply from the Appellate Division. (Dkt. No. 31 at 15.) Because Petitioner has provided no information regarding the content of the Appellate Division reply, it is unclear whether the Appellate Division wrote with regard to Petitioner's motion to appeal to the Court of Appeals on his direct appeal or his § 440.10 motion or both. Id.

In his Petition, Petitioner responded in the affirmative to the question of whether he appealed from the denial of his § 440.10 motion. (Dkt. No. 1 at 8.) However, he answered in the negative to the question whether he raised the issues in the § 440.10 on the appeal. *Id.* His explanation for not raising the issues on appeal was that it was due to medical issues including but not limited to "lower and upper back pain, that causes (sic) migraines, muscle spasps (sic), and having neck surgery and going on medical trips to the pain clinic and prescribed medication for the pain and now having carpal tunnel syndrome in both hands along with having hip and groin problems, makes it difficult for petitioner to sit and lay down for long periods at a time, so petitioner was unable to properly exhaust all state remedies." *Id.*

D. Habeas Proceeding

Plaintiff filed his habeas Petition on January 15, 2013. (Dkt. No. 1.) On July 2, 2013, after answering the Petition and filing his Memorandum of Law in Opposition, Respondent's counsel submitted a letter motion requesting permission to amend to assert that the Petition is time-barred. (Dkt. No. 13 at 1–3.) The request was based upon information that had been received from the District Attorney on July 1, 2013. *Id.*

In his initial Memorandum of Law, counsel for Respondent represented that the District Attorney's Office had not served Petitioner with a copy of the County Court Order denying his § 440.10 motion. *Id.* at 1. As a result, counsel had concluded that the § 440.10 proceeding was still pending because Petitioner's time within which to seek leave to appeal would not commence running until service of the Order with Notice of Entry. *Id.* Counsel further represented that pendency of the proceeding tolled the habeas statute of limitations. *Id.* The representations had been based upon a statement by the District Attorney's Office that its file did not contain a notice of entry which would have documented service, leading the Office to believe service of the Order had not been made. *Id.*

***3** On July 1, 2013, counsel was informed by the District Attorney's Office that the Notice of Entry, which had apparently been misfiled, had been located. *Id.* at 2. The District Attorney's Office provided counsel with copies of June 20, 2011, correspondence to Petitioner from the Chief Assistant District Attorney enclosing Judge McGinty's Order on the § 440.10 motion and the Notice of Entry of the Order, along with an affidavit of service executed on June 20, 2011. (Dkt. No. 13–1 at 1–12.)

The Court granted Respondent's request on September 13, 2013, after having allowed Petitioner until September 3, 2013, to file papers in opposition. [3] (Dkt. Nos. 16 and 20.) Respondent filed his Supplemental Memorandum of Law raising statute of limitations as a ground for dismissal of Petitioner's Petition on September 25, 2013. (Dkt. No. 21.) On September 26, 2013, Petitioner was given thirty days to file a reply to Respondent's submissions. (Dkt. No. 22.) Thereafter, Petitioner made and was granted four requests for extensions of time to submit his reply. (*See* Dkt. Nos. 23–30.) On Petitioner's fourth request for an extension, the Court extended his time to file opposition to February 18, 2014, and advised Petitioner that no further extensions would be granted. (Dkt. No. 30.)

Petitioner filed a Traverse, which included, *inter alia,* his opposition to Respondent's statute of limitations defense, on February 28, 2014. (Dkt. No. 30.) Petitioner thereafter requested additional time to respond to arguments made by Respondent in his initial opposition, and was granted

leave to serve a supplemental reply by June 9, 2014. (Dkt. Nos. 32–33.) Petitioner's supplemental reply was filed on June 16, 2014. (Dkt. No. 34.) The parties were advised by the Court that briefing was closed on June 18, 2014. (Dkt. No. 35.)

III. STATUTE OF LIMITATIONS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ("AEDPA")

A. Legal Standard

1. *Statute of limitations under the AEDPA*

Under the AEDPA, a petitioner must file an application for a writ of habeas corpus within one year of his conviction becoming final. 28 U.S.C. § 2244(d)(1). A conviction becomes final for AEDPA purposes "when [the] time to seek direct review in the United States Supreme Court by writ of certiorari expire[s]," that is ninety days after the final determination by the state court. *Williams v. Artuz,* 237 F.3d 147, 150 (2d Cir.2001) (citation and internal quotation marks omitted). The statute of limitations may be tolled when a "properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *see also Fernandez v. Artuz,* 402 F.3d 111, 116 (2d Cir.2005). However, a post-conviction challenge does "not reset the date from which the one-year statute of limitations begins to run." *Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000) ("If the one-year period began anew when the state court denied collateral relief, then state prisoners could extend or manipulate the deadline for federal habeas review by filing additional petitions in state court.") The statute of limitations begins to run again from the date on which the state court issues a final order and no further appellate review is available. *See, e.g., Saunders v. Senkowski,* 587 F.3d 543, 549 (2d Cir.2009). "A state-court collateral attack on a conviction cannot toll an already expired limitations period." *Bell v. Herbert,* 476 F.Supp.2d 235, 244 (W.D.N.Y.2007) (citing *Smith,* 208 F.3d at 13, 17.)

2. *Equitable Tolling*

***4** The AEDPA statute of limitations is not jurisdictional and is subject to equitable tolling in appropriate cases. *Holland v. Florida,* 560 U.S. 631, 645 (2010); *Smith,* 208 F.3d at 17. The Supreme Court has made it clear that "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland,* 560 U.S. at 649 (citation and internal quotation marks omitted); *see also Smith,* 208 F.3d at 17 (the one year AEDPA statute of limitations may be equitably tolled in "extraordinary or exceptional circumstances" where the party seeking equitable tolling has "acted with reasonable diligence during the period he seeks to toll"). A petitioner seeking to toll the statute of limitations must not only show that extraordinary circumstances prevented him from filing his petition, and that he acted with due diligence throughout the period he seeks to toll, he must "demonstrate a causal connection relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of the filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances." *Valverde v. Stinson,* 224 F.3d 129, 134 (2d Cir.2000). Where extraordinary circumstances prevented the petitioner from filing his petition "for some length of time," the federal habeas court must still determine whether they "prevented him from filing his petition *on time*." *Id.* (emphasis in original; citation and internal quotation marks omitted).

"[W]hether equitable tolling is warranted in a given situation is a highly case-specific inquiry." *Bolarinwa v. Williams,* 593 F.3d 226, 232 (2d Cir.2010) (citation and internal quotation marks omitted). "To establish extraordinary circumstances, a petitioner must support his allegations with evidence; he cannot rely solely on personal conclusions or assessments." Further, a petitioner must show that he was unable to pursue his legal rights during the entire time he seeks to toll. *Collins v. Artus,* 496 F.Supp.2d 305, 313 (S.D.N.Y.2007).

3. *Equitable Exception*

In *McQuiggin v. Perkins,* ___ U.S. ___, 133 S.Ct. 1924, 1931–36 (2013), the Supreme Court held that a credible showing of "actual innocence" under the standard announced in *Schlup v. Delo,* 513 U.S. 298, 329 (1995) could serve as a gateway for gaining review of an otherwise time-barred habeas petition. A year earlier, in

Rivas v. Fischer, 687 F.3d 514, 530–43 (2d Cir.2012), the Second Circuit had concluded that a petitioner who can demonstrate "actual innocence" may be excused from the AEDPA one-year statute of limitations period. [4]

In *Rivas,* the Second Circuit distinguished a plea to override the AEDPA limitations period based upon actual innocence from a request for equitable tolling, finding the actual innocence issue to be more accurately described as whether an "equitable exception" to § 2244(d)(1) exists in such cases. 687 F.3d at 547, n.42. The Supreme Court, citing *Rivas,* adopted the term "equitable exception" in *McQuiggin*. 133 S.Ct. at 1931.

"To invoke the miscarriage of justice exception to AEDPA's statute of limitations, ... a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of new evidence.' " *McQuiggin,* 133 S.Ct. at 1935 (quoting *Schlup,* 513 U.S. at 327). The claim of innocence must be both "credible" and "compelling." *Rivas,* 687 F.3d at 541 (citing *House v. Bell,* 547 U.S. 518, 521, 538 (2006)). In order for a claim to be found credible, it must be supported by "new reliable evidence whether it is exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." *Schlup,* 513 U.S. at 324; *accord Rivas,* 687 F.3d at 541, 543 ("new evidence" is evidence not presented at trial). A claim of innocence is compelling if the petitioner proves that it is more likely than not that "any reasonable juror would have a reasonable doubt." *House,* 547 U.S. at 538; *accord Rivas,* 687 F.3d at 541. When a Petitioner presents new evidence, "the habeas court must determine whether the new evidence is trustworthy by considering it both on its own merits and, where appropriate, in light of the pre-existing evidence in the record." *Doe v. Menefee*, 391 F.3d 147, 161 (2d Cir.2004) (quoting Schlup, 513 U.S. at 327–28).

B. Application

1. *Timeliness of the Petition*

***5** The Appellate Division denied Plaintiff's motion to appeal to the Court of Appeals, brought pursuant to CPL § 460.20, on July 21, 2011. (Dkt. No. 12–7 at 3.) Petitioner did not file a petition for a writ of certiorari in the Supreme Court. (Dkt. No. 1 at 3.) Therefore, Petitioner's conviction became final on October 19, 2011, ninety days after the denial of his motion to appeal to the Court of Appeals, and the one-year limitation period under the AEDPA began to run. *See Williams,* 237 F.3d 147, 151 (2d Cir.2001). Absent a tolling of the statute of limitations, Petitioner's last day to file a timely habeas petition within the statute of limitation was October 19, 2012. Petitioner's habeas petition, dated January 3, 2013, was not filed until January 15, 2013. (Dkt. No. 1.)

As noted above, Petitioner filed a motion to vacate his conviction under CPL § 440.40 on August 19, 2010, well before the statute of limitations began to run. (Dkt. No. 12–8 at 9–10.) The motion was denied in Judge McGinty's Decision and Order, dated May 11, 2011, and entered on the same date. (Dkt. No. 21–1 at 3, 12.) The Decision and Order, with notice of entry was served by mail on Petitioner by the District Attorney's Office on June 20, 2011. *Id.* at 1–2.

The question of when the denial of Petitioner's § 440.10 motion became final must be determined because if the denial was not final prior to the time the one-year limitations period began to run, it would present a tolling issue. Under New York law, an order denying a § 440.10 motion to vacate a judgment of conviction is an intermediate order from which an appeal to the Appellate Division may properly be limited. *See People v. Thomas,* 583 N.Y.S.2d 424, 425 (1st Dep't 1992). Under CPL § 450.15(1), an order denying a § 440.10 motion may be appealed only when the Appellate Division issues a certificate granting leave to appeal pursuant to CPL § 460.15. The defendant must make application for a certificate granting leave to appeal under § 460.15 within thirty days after service of a copy of the order sought to be appealed. [5] *See* CPL § 460.10(4)(a). CPL § 460.15 provides that:

> 1. A certificate granting leave to appeal to an intermediate appellate court is an order of one judge or justice of the intermediate appellate court to which the appeal is sought to be taken granting such permission and certifying that the case involves questions of law or fact which ought to be reviewed by the intermediate appellate court.
>
> 2. An application for such certificate must be made in a manner determined by the rules of the appellate division of the department in which such intermediate appellate

court is located. Not more than one application may be made for such a certificate.

Section 800.3 of the Appellate Division Third Department Rules of Practice, in effect in 2011, provides in relevant part that:

> An application to a justice of the Appellate Division for leave to appeal in a ... criminal action or proceeding (CPL 460.15; 460.20), may, but need not be, addressed to a named justice, and, unless otherwise directed by order to show cause, shall be made returnable at the court's address in Albany, in the manner provided in section 800.2(a) of this Part. [6]

N.Y. Comp.Codes R. Regs. tit. 22, § 800.3.

***6** The Notice of Appeal from the denial of his § 440.10 motion submitted by Petitioner provides that "David Rhodes, hereby appeals pursuant to § 460.15 of the New York Criminal Procedure Law, certifying that this case involves a question of law or fact which ought to be reviewed by the Appellate Division, Third Department." (Dkt. No. 31–3 at 2.) The Notice of Appeal clearly failed to comply with the requirements of CPL §§ 460.10(4)(a) and 460.15 and the Third Department Rules governing applications made under § 460.15. Moreover, there is nothing in the record indicating that the Notice of Appeal was submitted to, or acted upon by, the Appellate Division, only that a copy went to the Ulster County Court Clerk. Although the Notice of Appeal indicates that the Ulster County District Attorney was provided with a copy, there is no certificate or affidavit of service showing that to be the case, in contrast to Petitioner's pro se § 440.10 motion for which he did an affidavit of service showing service on the District Attorney. (Dkt. No. 12–8 at 2.)

Petitioner claims that he received a letter from the Appellate Division on November 10, 2011, in response to his September 18, 2011, letter to the Court of Appeals inquiring as to the status of his application to the Appellate Division for leave to appeal to the Court of Appeals and noting that the denial of his § 440.10 motion had not been answered by the Appellate Division. (Dkt. Nos. 31 at 15; 31–3 at 2–3.) However, Petitioner has provided no information regarding the contents of the letter, including whether the Appellate Division addressed the denial of the § 440.10 motion in any fashion. Furthermore, Petitioner has conceded that he never raised the issues in the § 440.10 motion in the Appellate Division, blaming the failure on health problems. (Dkt. No. 1 at 8.)

Based upon both what is and what is not in the state court record and Petitioner's papers, the Court must conclude that Petitioner failed to file an application for a certificate granting leave to appeal to the denial of his § 440.10 motion with the Appellate Division in accordance with New York State law, and Judge McGinty's intermediate order denying the motion became final when the time within which Petitioner was required to file an application for leave to appeal expired months before the commencement of the running of the statute of limitations. Therefore, the Court finds that the one-year statute of limitations that commenced running on October 19, 2011, was not tolled by Petitioner's § 440.10 motion, and that Petitioner's Petition, which was signed by him on January 3, 2013, and filed on January 15, 2013, is time-barred.

2. *Equitable Tolling*

Petitioner has asserted two grounds for equitable tolling of the statute of limitations in this case. [7] They are: (1) that he was prevented from filing a timely habeas petition because his legal papers were damaged by corrections officers; and (2) his health problems prevented him from filing a timely petition. (Dkt. No. 31 at 8–10.) The Court finds that neither of those grounds constitutes a valid basis for an equitable tolling of the statute of limitations in this case.

a. *Damage to Petitioner's Legal Papers*

***7** Petitioner cites the Second Circuit decision in *Valverde,* 224 F.3d 129, in support of his claim that damage to his legal papers provides a valid basis for an equitable tolling of the statute of limitations in this case. In *Valverde,* the Second Circuit held that "the confiscation of a prisoner's legal papers by a corrections officer *shortly before* the filing deadline may justify equitable tolling and permit the filing of a petition after the statute of limitations ordinarily would have run." *Id.* at 133 (emphasis added).

In *Valverde,* the district court dismissed a habeas petition on statute of limitations grounds because it had not been filed within a "reasonable time" after the effective date of the AEDPA. *Id.* at 132–33. The petitioner's conviction had become final on March 6, 1996, and his petition was not filed until fourteen months later on May 6, 1997. *Id.* at 132. The petitioner in *Valverde* had submitted a sworn affirmation to the district court in which he stated that he had first learned of the AEDPA in April of 1997 and sought help from the law library. *Id.* at 135. Petitioner was given a habeas petition form pursuant to 28 U.S.C. § 2254, which he completed and sent to the law library to be typed. However, a corrections officer in the Special Housing Unit confiscated his legal papers from another inmate, preventing the petitioner from completing another form until the beginning of May of 1997. *Id.* The Second Circuit vacated the dismissal of the petition by the district court, which had not considered the petitioner's confiscation grounds for equitable tolling, and remanded for development of the facts relevant to the petitioner's claim. *Id.* at 136–37.

Petitioner claims that he is entitled to equitable tolling of the limitations period under Valverde because on or about February 11, 2011, corrections officers McKay and House searched his cell, damaging and destroying legal documents by throwing legal papers in the shower and running water on them, squeezing toothpaste on them, smearing peanut butter on them, dousing them with Muslim oil, throwing them under the bed where there was juice, and tearing them up. (Dkt. Nos. 31 at 5–6 31–1 at 13–14.) Petitioner has not identified the specific legal papers or categories of papers destroyed.

The statute of limitations did not begin running until October 19, 2011, and Petitioner had until October 19, 2012, to file his petition. Therefore, unlike *Valverde,* in which the Second Circuit found extraordinary circumstances where a petitioner's legal papers were confiscated shortly before the filing deadline, Petitioner had approximately a year and a half to attempt to obtain copies of the legal papers that were necessary for him to draft his habeas petition and were too damaged to use. The record is devoid of evidence that Petitioner exercised due diligence to obtain legal documents needed by him to prepare his petition prior to the running of the limitations period, and it is equally devoid of evidence demonstrating a causal relationship between the damage to Petitioner's legal documents and the lateness of the filing of his petition. *See Valverde,* 224 F.3d at 134. Even if the damage to his legal papers arguably prevented Petitioner from filing his petition "for some length of time," there is no basis in the record for concluding that the damage "prevented him from filing his petition *on time*." *Id.* (emphasis in original) Therefore, the Court finds that the alleged damage to Petitioner's legal papers by corrections officers does not provide grounds for an equitable tolling of the statute of limitations.

b. *Petitioner's Health Issues*

***8** Petitioner, who had been diagnosed with cervical stenosis, had C3–6 anterior cervical decompression and fusion with a C-arm surgery on October 28, 2009, and was ordered to rest for at least six months following the surgery. (Dkt. Nos. 31 at 8; 31–2 at 9, 14–15.) According to Petitioner, the surgery necessitated several requests for extensions of time to file a pro se brief in his direct appeal to the Appellate Division. (Dkt. No. 31 at 8.) Petitioner claims that he was granted extensions because during the years 2010 through 2012 he had ongoing medical treatment for migraines, eyes, upper and lower back, testicles, and right hip problems due to degenerative disc disease with a bulging herniated disc that was so painful he could only sit in a wheelchair for short periods of time.[8] *Id.* One of the reasons for seeking extensions on his direct appeal was that he was required to take a lot of medical trips during the times he had special access to the law library. *Id.* The medical trips were to the Pain Treatment Clinic at Upstate University Hospital, where Petitioner had facet blocks on his right L4/L5 spinal area.[9] (Dkt. No. 31 at 9.) The treatments caused muscle weakness in Petitioner's right leg, with a tingling, warm sensation. *Id.* at 9–10.

Petitioner also claims to have been suffering from an emotionally depressed state in 2011 and 2012 after losing his mother in February of 2011. *Id.* at 10. According to Petitioner, after talking to him, one of the clerks in the facility law library told him to file his habeas petition because he was running out of time, and Petitioner worked on it from scratch while working on another matter related to his being in a wheelchair. *Id.*

The Second Circuit has "recognized that medical conditions, whether physical or psychiatric, can manifest

extraordinary circumstances, depending on the facts presented." *Harper v. Ecole,* 648 F.3d 132, 137 (2d Cir.2011). *See Brown v. Parkchester South Condominiums,* 287 F.3d 58, 60 (2d Cir.2002) (equitable tolling may be appropriate where failure to comply is attributable to medical condition); *Bolarinwa,* 593 F.3d at 231 (holding that under the appropriate circumstances mental illness can justify equitable tolling). "[A] petitioner must allege more than the mere existence of physical or mental ailments to justify equitable tolling. A petitioner has the burden to show that these health problems rendered him unable to pursue his legal rights during the one-year time period." *Rhodes v. Senkowski,* 82 F.Supp.2d 160, 173 (S.D.N.Y.2000) (collecting cases); *see also Swanton v. Graham,* No. 07–CV–4113(JFB), 2009 WL 1406969, at * 5, 2009 U.S. Dist. LEXIS 45806, at * 13–14 (E.D.N.Y. May 19, 2009) [10] (petitioner not entitled to equitable tolling because of mental illness and related medical treatment where he "failed to provide the Court with any objective evidence substantiating his claims of disability, detailing how long such a disability lasted, or describing how the disability was related to his failure to timely file the instant petition."); *Barbosa v. United States of America* No. 01 Civ.7522(JFK), 2002 WL 869553, at * 2, 2002 U.S. Dist. LEXIS 8030, at * 5 (S.D.N.Y. May 3, 2002) ("A petitioner's allegations of illness must be supported by evidence and not merely based on the petitioner's own conclusions."); *Torres v. Miller,* No 99 Civ. 0580 MBM, 1999 WL 714349, at 8, 1999 U.S. Dist. LEXIS 13987, at * 31 (S.D.N.Y. Aug. 27, 1999) (conclusory allegations of physical and mental illness insufficient to justify equitable tolling).

The medical records that Petitioner has submitted in his opposition papers reveal that his spinal surgery took place nearly two years before the statute of limitations on his habeas petition began to run. (Dkt. No. 31–2 at 9, 14–15.) There are no medical records, nor has Petitioner presented any evidence showing that the surgery or the condition for which the surgery was performed, prevented him from filing his habeas petition prior to the expiration of the statute of limitations nearly three years after the surgery. Plaintiff has submitted the results of a September 12, 2012, MRI revealing degenerative disc disease and of three facet blocks (Dkt. No. 31–2 at 34, 9), but no evidence showing that the degenerative disc disease prevented him from filing his petition in a timely manner. There is no evidence whatsoever supporting the other physical ailments for which Petitioner claims to have received treatment during the years 2010 through 2012.

***9** Petitioner claims to have been depressed in the period during which the statute of limitations was running. However, he has presented no medical evidence other than his own conclusions as to his condition and even his own assessment of his condition fails to satisfy Petitioner's burden of showing with specificity how "his condition adversely affected [his] capacity to function generally or in relationship to the pursuit [of] his rights." *See Boos v. Runyon,* 201 F.3d 178, 185 (2d Cir.2000).

Based upon the foregoing, the Court concludes that Plaintiff has failed to establish that he is entitled to an equitable tolling of the statute of limitations as a result of his physical ailments or mental condition. *See Swanton,* 2009 WL 1406969, at * 5; *Barbosa,* 2002 WL 869553, at * 2.

3. *Equitable Exception for Actual Innocence*

Petitioner also claims that he is entitled to an equitable exception from the AEDPA statute of limitations based upon a claim that reliable new evidence supports his claim of actual innocence. (Dkt. No. 31 at 11–15.) The new evidence identified by Petitioner includes: (1) a statement witness Christopher Coon ("Coon") made to an investigator for the defense which should have been admitted into evidence by his counsel; (2) information that the father of the rape victim's child is a registered sex-offender meaning that the victim gave false testimony regarding the age of her child; (3) information that the victim, who stated she did not know where she was while at the house where the rape allegedly occurred, lived only five minutes away and could have gotten out of the car in the driveway and walked home; (4) information that there was a lamp post at the end of the driveway at the house where the rape allegedly occurred, and the light radiating into the house which had no window treatment rendered the size of the windows, about which there was no testimony, relevant to the victim's claim that it was dark in the house; (5) the victim's testimony that she was pulled up the stairs by the wrist by Petitioner was not mentioned in her statement to detectives or to the nurse who examined her, there were no marks, bruises, or lacerations made by the Petitioner noted by the nurse, and the victim could not remember which wrist Petitioner allegedly held onto;

and (6) there was no discussion of the size of the room where the alleged rape took place, although the size was relevant to the victim's claims that she was pushed from the doorway onto a wooden frame bed and hit the bed frame with her knees, because she had no marks on her knees. (Dkt. Nos. 31 at 13–14; 31–3 at 4–6, 9, 18–23.)

a. *Coon Statement to Investigator*

Petitioner has submitted an unsigned handwritten document dated September 20, 2006, which he has identified as a statement given to a defense investigator by Coon while he was at the Ulster County jail. (Dkt. No. 31–3 at 4–6.) The document appears to consist of the investigator's notes rather than a written statement by Coon. *Id.* The categories of reliable new evidence identified in *Schlup* include "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *See Schlup*. 513 U.S. at 324. However, "[e]vidence supporting an actual innocence claim need not fit within one of the categories explicitly listed in *Schlup* so long as the court determines it to be 'new reliable evidence.' " *Lopez v. Miller,* 915 F.Supp.2d 373, 399 n.14 (E.D.N.Y.2013). Certain evidence, however, is "simply not the *type* of evidence that meet[s] the *Schlup* requirement[s]" of credibility and reliability. *Diaz v. Bellnier,* 974 F.Supp.2d 136, 144 (E.D.N.Y.2013) (emphasis in original). As noted by the court in *Barrientos v. Lee,* No. 14CV3207–LTS–JCF, 2015 WL 3767238, at * 12, 2015 U.S. Dist. LEXIS 79345, at * 28 (S.D.N.Y. June 17, 2015), "[e]vidence that courts have considered to be 'new and reliable' includes: signed, notarized, and sworn statements of alibi witnesses; written recantation of the prosecutor's only witness; unchallenged testimony of expert forensic pathologist; and DNA testing." (citations omitted).

***10** The Court finds that the unsigned notes made by an unidentified investigator for the defense during an interview with a witness is not the type of evidence that meets the *Schlup* requirements of credibility and reliability. Furthermore, based upon the testimony at trial, including Coon's own testimony, the Court concludes that the unsigned investigator's notes are neither credible nor compelling and, even if they were admissible, would not leave any reasonable juror with a reasonable doubt as to Petitioner's guilt.

Coon, who worked for Petitioner at the time of the rape, was at the non-present third party's residence in Ellenville, New York in which the rape of E.A. [11] took place on June 20, 2006, and he saw E.A. after the attack. (Dkt. Nos. 11 at 99–100, 149, 207–08, 216; 12–8 at 7577.) The notes indicate that Coon told the investigator that while E.A., Petitioner, Coon, and a young woman were at a swimming hole earlier on the day of the rape, E.A. wrapped her legs around Petitioner, and Petitioner told her to get off and she said no. (Dkt. No. 31–3 at 4.) At the trial, however, when asked if he heard E.A. say anything to Petitioner at the swimming hole, Coon testified that he heard her tell him to leave her butt alone. (Dkt. No. 11 at 145.)

The investigator's notes indicate that Coon told him that E.A. gave him her cell phone to call his daughter before she and Petitioner went upstairs at a third party's residence to which Petitioner had driven them. (Dkt. No. 31–3 at 5.) At trial, Coon testified that Petitioner took E.A.'s phone away from her while she was talking to someone and gave it to Coon before Petitioner and E.A. went upstairs. (Dkt. No. 11 at 151–52.) According to the investigator's notes, E.A. asked Petitioner to go upstairs so that they could talk, and Petitioner had said later that she was all over him, and they had sex. (Dkt. No. 31–3 at 6.) Coon's trial testimony included nothing about why Petitioner and E.A. had gone upstairs. (Dkt. No. 11 at 152–53.)

Coon, who remained on the first floor while Petitioner went upstairs with E.A., told the defense investigator that E.A. came downstairs before Petitioner and was acting normally, that she went outside to have a cigarette, and she "was not upset not crying no comment." (Dkt. No., 31–3 at 6). At trial, Coon testified that E.A. was crying when she came back downstairs and went outside on the grass. *Id.* at 153–54, 220–221. Coon also testified that he noticed that Petitioner was all sweaty when he came back downstairs. *Id.* at 156.

The investigator's notes indicate that Coon told him that when Petitioner dropped E.A. off at home, she told him she would call him the next day and acted very happy. (Dkt. No. 31–3 at 6.) Coon testified at trial that the three of them got into the car and left the residence, and that during the ride to E.A.'s house, E.A. was "pissed off," and there was no conversation between Petitioner and E.A. *Id.* at 157. Coon also testified that he did not recall whether E.A. and Petitioner said anything to one another when she got out of the car. *Id.* at 158. According to E.A., when she

got out of the car, she was still crying, and when Petitioner asked her if she was okay, she did not answer. *Id.* at 224. When Petitioner told her that he was going to call her later, she told him to forget about her, not to remember her face, and to forget she existed. *Id.*

The testimony at trial calls into doubt Coon's claim that E.A. was fine when she came downstairs and on the way home. Petitioner testified that when she arrived home she collapsed in the living room crying, and she was on the floor crying when her former boyfriend, Terrance, who was residing with her as a friend, returned home. *Id.* at 84, 225. Terrance saw Petitioner and Coon in a vehicle pulling out of E.A.'s driveway. *Id.* at 85. According to Terrance, E.A., still crying, went into the bathroom and lay in the tub with the water running on her with her bra and boxers still on. *Id.* at 86. She told Terrance she had been raped by Petitioner. *Id.*

***11** In addition, E.A. called her long-time friend, Ingrid, in Manhattan at around 12:30 or 1:00am in the early morning of June 21, 2006. *Id.* at 58–59. They spoke for at least forty-five minutes. *Id.* at 62. According to Ingrid, E.A. was very upset and crying. *Id.* E.A. was hysterical, stuttering, crying and sniffling and having difficulty catching her breath. *Id.* at 59–60. E.A. told Ingrid that she had been raped by Petitioner. *Id.* at 60–61. Ingrid told E.A. to call the police, and E.A., although reluctant to do so, called the State Police. *Id.* at 61.

Because the interview notes are unsigned and the author is not identified, the trial testimony reveals the statements in the interview notes to more likely than not be largely untrue, and the so called new evidence, when considered with the evidence at trial, would not leave any reasonable juror with a reasonable doubt as to Petitioner's guilt, the Court recommends that the investigator's unsigned notes be rejected as new evidence adequate to support a claim of actual innocence by Petitioner.

b. *Remaining "New Evidence"*

Petitioner has failed to demonstrate that if evidence of the close proximity of the residence at which E.A. was raped to her home and the light provided by the lamp post at the end of the driveway were presented to the jury, "no reasonable juror would find him guilty beyond a reasonable doubt." *House,* 547 U.S. at 538. Furthermore, the evidence regarding distance is not new as it was the subject of testimony at trial. (Dkt. No. 11 at 223.) The claimed new evidence regarding the age of E.A.'s son is described by Petitioner as a challenge to E.A.'s credibility. (Dkt. No. 31 at 13–14.) The trial transcript reveals that the question as to her son's age, asked on direct examination, merely provided background information and had no direct relevance to Petitioner's innocence or guilt of the rape charges. *Id.* at 181.

Petitioner has not offered new evidence with regard to E.A.'s claim that he pulled her up the stairs by the wrist. (Dkt. No. 31 at 14.) E.A. was questioned regarding her claim that Petitioner pulled her upstairs by the wrist on cross-examination at trial, and she acknowledged that there were no marks on her wrist and testified that she did not mention her wrist to the police because it did not hurt at that time. (Dkt. No. 11 at 266–68.) Petitioner has done nothing more than question E.A.'s credibility in light of the absence of evidence of marks, bruises, or lacerations, and E.A.'s inability to recall which wrist was being held by Petitioner. (Dkt. No. 31 at 14.)

Petitioner's claim that there was no discussion of the size of the room where the alleged rape took place is not new evidence. *Id.* Petitioner has not offered new evidence as to the size of the room or evidence showing that the size was relevant to E.A.'s assertion that she hit the bed frame with her knees but had no marks on her knees.

In sum, none of the "new evidence" identified by Petitioner constitutes new evidence, and it provides no basis for an equitable exception to the bar imposed by the statute of limitations in this case.

WHEREFORE, based upon the foregoing, it is hereby

RECOMMENDED, that the Petition for a writ of habeas corpus (Dkt. No. 1) be DENIED and DISMISSED in all respects on the grounds that it is time-barred; and it is further

RECOMMENDED that a certificate of appealability not issue with respect to any of the claims set forth in the Petition; and it is hereby

ORDERED, that the Clerk's Office provide Petitioner with copies of all unpublished decisions cited herein in

accordance with *Lebron v. Sanders,* 557 F.3d 76 (2d Cir.2009) (*per curiam*).

***12** Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW. *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993) (citing *Small v. Sec'y of Health & Human Servs.,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72.

All Citations

Not Reported in F.Supp.3d, 2016 WL 890081

Footnotes

1 Page references to documents identified by docket number are to the numbers assigned by the CM/ECF docketing system maintained by the Clerk's Office.

2 CPL § 460.20(2)(a), which deals with certificates granting leave to appeal to the Court of Appeals in criminal matters, provides that "[w]here the appeal sought is from an order of the appellate division, the certificate may be issued by (i) a judge of the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed." If the application is denied by a justice of the Appellate Division or a judge of the Court of Appeals, no other application is permitted to either. *See People v. Nelson,* 447 N.Y.S.2d 155 (1981) (Mem).

3 Petitioner filed no opposition papers despite being granted an extension to do so. (Dkt. No. 16.)

4 Actual innocence serves only as a gateway to federal habeas review by allowing an otherwise untimely petition to be reviewed on the merits. *McQuiggin,* 133 S.Ct. at 1928. It does not, standing alone, warrant relief. *Id*.

5 The Court has given Petitioner the benefit of the additional five days for mailing under CPLR 2103(b)(2) in determining the timeliness of his July 23, 2011, Notice of Appeal. (Dkt. No. 31–3 at 3.)

6 N.Y. Comp.Codes R. Regs. tit. 22, 880.2(a), referred in § 800.3, requires that a motion be made upon notice as prescribed in CPLR Rule 2214, which sets forth the requirements for service of a notice of motion and supporting papers and requires the parties to furnish the court with copies of all papers served by the party.

7 Petitioner has not argued that he believed that an appeal from the denial of his § 440.10 motion was still pending before the Appellate Division awaiting determination during the one-year period after his conviction became final, thereby tolling the statute of limitations. Any such argument would in any event be futile since ignorance of the law in this case the proper procedure for seeking leave to appeal the denial to the Appellate Division does not constitute grounds for equitable tolling. *See Adkins v. Warden,* 585 F.Supp.2d 286, 297 (D.Conn.2008) ("Most courts also recognize that lack of knowledge and education about the law and one's legal rights is not an extraordinary circumstance because tolling for this common obstacle that most petitioners face would undermine the legislative decision to impose a one-year limitations period."); *Ruiz v. Poole,* 566 F.Supp.2d 336, 341 (S.D.N.Y.2008) ("[I]gnorance of law does not constitute a rare and extraordinary circumstance that would merit equitable tolling."); *see also Ormiston v. Nelson,* 117 F.3d 69, 72 n.5 (2d Cir.1997) ("Mere ignorance of the law is, of course, insufficient to delay the accrual of the statute of limitations.").

8 An MRI done on September 12, 2012, revealed multilevel degenerative disc disease, endplate changes with spondylitic ridge flattening the thecal sac, and no central or foraminal stenosis. (Dkt. No. 31–2 at 3–4.)

9 Petitioner has included three sets of Pain Treatment Discharge Instructions for the Facet Blocks in his opposition. (Dkt. No. 31–2 at 5–7.) The dates of the treatments is not legible. *Id*.

10 Copies of unreported cases cited herein will be provided to Petitioner. *See Lebron v. Sanders,* 557 F.3d 76 (2d Cir.2009) (per curiam).

11 The victim's initials are used herein to protect her privacy.