

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ADAM MURRAY COSTELLO,
Petitioner,

v.

CASE NO. 2:25-cv-74-JLB-NPM

SECRETARY, Department of Corrections,
Respondent.

**LIMITED RESPONSE TO PETITION FOR WRIT OF HABEAS
CORPUS INCORPORATING MOTION TO DISMISS PETITION AS
TIME-BARRED**

COMES NOW, the Respondent, by and through the undersigned Florida Assistant Attorney General, and files this motion to dismiss the 28 U.S.C. §2254 petition as time-barred by 28 U.S.C. §2244(d).

Before this Court is a petition for writ of habeas corpus filed by a Florida prisoner, Adam Murray Costello, challenging his 2018 convictions and sentences in Florida case number 16-CF-371. [Doc.1].

Respondent denies Costello is being illegally restrained. Costello is not entitled to relief on any claim contained in the petition. In filing this motion to dismiss, Respondent is not waiving any other defenses nor is Respondent waiving an opportunity to file a response on the merits regarding Costello's

claims. No district court judge or magistrate assigned to this case participated in any of Costello's state court proceedings.

I. Procedural History

On March 12, 2018, Costello was charged via fourth amended information with count one leaving the scene of a crash with death in violation of Florida Statute 316.027(2)(c), (2)(f), a first-degree felony, and count two tampering with or fabricating physical evidence in violation of Florida Statute 918.13, a third-degree felony. [Ex.2]. On March 12, 2018, Costello entered a negotiated plea and received ten years and six months in Florida State prison on the first-degree fleeing charge and a concurrent sentence of five years in prison on the tampering charge. [Ex.3, and Ex.5].

On March 5, 2020, Costello filed his motion for postconviction relief. [Ex.6]. Litigation on the motion concluded in the trial court on April 19, 2021, when the motion was denied. [Ex.12]. Costello appealed, and the Florida Second District Court of Appeal reversed and remanded to the trial court for further proceedings on December 22, 2021. [Ex.17]. The mandate issued on January 18, 2022. [Ex.18]. On March 3, 2022, Costello filed his motion to withdraw plea based on ineffective assistance of counsel. [Ex.19]. The motion was denied after evidentiary hearing on March 16, 2023. [Ex.26]. Costello appealed, and the appellate court affirmed on September 17, 2024. [Ex.31]. The mandate issued on December 2, 2024. [Ex.34].

Costello filed his §2254 Petition on December 27, 2024.¹ [Doc.1].

II. Timeliness

Costello correctly admits that his petition is untimely. Costello's petition is governed by the one-year period of limitations established in §2244(d). Costello's judgment and sentence became final on March 19, 2018, when it was filed in State court. Costello had 30 days to appeal under Florida law. Because Costello failed to appeal, the AEDPA clock started on April 18, 2018, when his time to appeal lapsed. See 28 U.S.C. § 2244(d)(1)(A). The AEDPA clock ran unabated until it expired on April 18, 2019.

III. Costello's Arguments for Review of the Untimely Petition

A. Equitable Tolling

To the extent that Costello argues that he is entitled to equitable tolling, Respondent argues as follows. Section 2244(d) "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). 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" of his § 2254 petition. *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). "[T]he burden of

¹ All pro se filings will reflect the date Costello provided the documents to prison officials for mailing, per the mailbox rule. See *Haag v. State*, 591 So.2d 614, 617 (Fla. 1992), adopting the rule of *Houston v. Lack*, 487 U.S. 266 (1988).

proving circumstances that justify the application of the equitable tolling doctrine rests squarely on the petitioner,” and “[m]ere conclusory allegations are insufficient to raise the issue of equitable tolling.” *San Martin v. McNeil*, 633 F.3d 1257, 1268 (11th Cir. 2011).

Because this is a “difficult burden” to meet, the Eleventh Circuit “has rejected most claims for equitable tolling.” *Diaz v. Sec’y, Dep’t of Corr.*, 362 F.3d 698, 701 (11th Cir. 2004). The applicability of equitable tolling depends on a case’s facts and circumstances. *See Holland*, 560 U.S. at 649-50 (stating that equitable tolling decisions are made on a case-by-case basis).

Costello did not show that he has been pursuing his rights diligently. Notably, Costello does not offer any explanation for the almost 2-year gap between his conviction and the filing of any motion. Costello has also failed to allege any exceptional circumstances prevented him from timely seeking federal habeas relief. Costello’s state court attorney’s failure to bring the State postconviction action sooner is not an extraordinary circumstance. *See Chavez v. Sec’y, Fla. Dep’t of Corr.*, 647 F.3d 1057, 1071 (11th Cir. 2011) (stating that an attorney’s failure to act quickly enough to allow timely filing of a federal habeas petition is not in itself sufficient to warrant equitable tolling).

Because he does not show that extraordinary circumstances prevented him from timely seeking federal habeas relief despite the use of diligence, Costello has not shown that equitable tolling is warranted.

B. Actual Innocence

Costello argues that this Court can review his petition because he is actually innocent. As described by the Supreme Court, the “miscarriage of justice” exception permits a prisoner who makes a credible showing of actual innocence to pursue his constitutional claims on the merits, notwithstanding the expiration of AEDPA’s statute of limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (permitting review of an untimely § 2254 petition if petitioner proves his actual innocence).

As a gateway to untimely claims, a petitioner must establish that “in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *House v. Bell*, 547 U.S. 518, 537 (2006) (cleaned up, internal quotations omitted). “An actual-innocence claim must be supported ‘with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.’” *Milton v. Sec’y, Dep’t of Corr.*, 347 Fed. Appx. 528-530-31 (11th Cir. 2009) (quoting *Schlup*, 513 U.S. at 324). The category of cases satisfying this standard is “severely confined.” *Perkins*, 569 U.S. at 394-95.

Costello asserts that he is innocent for two reasons: first, he claims that he entered a plea to a defective information that did not actually charge a criminal offense, [Doc.1, p.7-12], second, he claims that the evidence, as it

existed at the time he entered the negotiated plea, did not support guilt. [Doc.1, p.12]. Costello's claims fail because he does not come forward with any new evidence, let alone new, reliable evidence of his actual innocence. Further, "[i]t is important to note [in attempting to make the requisite showing] that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). Costello has not shown that he is entitled to the review of his untimely § 2254 petition based on a showing of actual innocence.

C. *Martinez v. Ryan*, 566 U.S. 1 (2012)

To the extent that Costello argues that this Court should review his claims based on *Martinez v. Ryan*, 566 U.S. 1 (2012), Respondent argues that *Martinez* does not serve to toll time or excuse Costello's failure to bring his claims within the statutory one-year limitation. In *Martinez*, the United States Supreme Court recognized a "narrow exception" to the rule that attorney error cannot establish cause to excuse a procedural default unless it violates the Constitution. The *Martinez* court held that ineffective assistance of state postconviction counsel may constitute cause to excuse a procedurally defaulted claim of ineffective assistance of trial counsel. *Shinn v. Ramirez*, 596 U.S. 366, 387 (2022). However, the *Martinez* equitable rule "applies only to the issue of cause to excuse the procedural default of an ineffective assistance of trial counsel claim that occurred in a state collateral proceeding" and "has no

application to the operation or tolling of the § 2244(d) statute of limitations” for filing a § 2254 petition. *Chavez v. Sec’y, Fla. Dep’t of Corr.*, 742 F.3d 940, 943 (11th Cir. 2014) (citing *Arthur v. Thomas*, 739 F.3d 611, 629-31 (11th Cir. 2014); see also *Patrick v. Warden*, 828 F. App’x 518, 522 (11th Cir. 2020) (per curiam) (“*Martinez* has nothing to do with equitable tolling – that case is about procedural default, which addresses when state procedural rules bar federal courts from considering certain habeas claims.”) (citations omitted).

CONCLUSION

Costello has failed to show that he qualifies for any of the exceptions to the period of limitations established in §2244(d). Based on the foregoing arguments and citations of authority, Respondent respectfully asks this Honorable Court to dismiss the petition as time-barred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2025, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and a copy was prepared to be mailed via U.S. mail to Adam Murray Costello DOC# B16188 Charlotte Correctional Institution 33123 Oil Well Road Punta Gorda, FL 33955.

JAMES UTHMEIER
ATTORNEY GENERAL

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