No. 19-3227

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RONNIE L. FAMOUS,

Petitioner-Appellant,

v.

LARRY FUCHS, Warden,

Respondent-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Wisconsin
Case No. 10-C-707, Hon. William C. Griesbach

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March 12, 2021

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INTRODUCTION

Petitioner Ronnie Famous maintains that he is imprisoned in violation of the Sixth Amendment. Famous claims that after he attempted to remove his defense attorney at trial, the attorney retaliated against him by refusing to call key alibi witnesses, thus intentionally undermining Famous's defense. Two different Wisconsin state courts have recognized that, if proved, this claim would amount to constitutionally ineffective assistance of counsel.

No court has heard Famous's ineffective-assistance-of-trial-counsel claim on the merits. The district court dismissed Famous's habeas petition as untimely, and the Wisconsin Court of Appeals held that Famous procedurally defaulted his claim by failing to press it on direct appeal. But Famous presents facts to show that statutory and equitable tolling render his petition timely, and that his procedural default should be excused because his appellate attorney was constitutionally ineffective in failing to raise his ineffective-assistance-of-trial-counsel claim. Accordingly, Famous is entitled to an evidentiary hearing to determine whether his petition is timely, whether ineffective assistance by his appellate counsel excuses the failure to press his underlying claim on appeal, and whether his trial counsel was constitutionally ineffective in refusing to call several alibi witnesses. For these reasons, this Court should reverse and remand so that the district court can conduct that hearing.

JURISDICTIONAL STATEMENT

Famous filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254(a) in the Eastern District of Wisconsin. *See* Pet. for Habeas Corpus (D. Ct. ECF No. 1). The

district court had jurisdiction under 28 U.S.C. § 2241(a) and 28 U.S.C. § 1331. The district court granted respondent's motion to dismiss on October 10, 2019, entering final judgment as to all claims and all parties. D. Ct. Op. 9.

Famous then filed a notice of appeal (D. Ct. ECF No. 67) and requested a certificate of appealability (D. Ct. ECF No. 69) on November 7, 2019. On September 28, 2020, this Court granted Famous's request for a certificate of appealability on timeliness and on whether Famous's trial and appellate counsel were ineffective (7th Cir. ECF No. 9). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

I. The district court dismissed Famous's habeas petition as untimely. But the statute of limitations is subject to statutory tolling if the petitioner faced a state-created impediment to filing and to equitable tolling if extraordinary circumstances stood in the petitioner's way. *See* 28 U.S.C. § 2244(d)(1)(B); *Socha v. Boughton*, 763 F.3d 674, 683 (7th Cir. 2014).

The first issue is whether Famous is entitled to an evidentiary hearing to demonstrate that statutory and equitable tolling render his petition timely.

II. The Wisconsin Court of Appeals denied Famous's ineffective-assistance-of-appellate-counsel claim. State-court decisions are not entitled to deference from a federal habeas court under 28 U.S.C. § 2254(d)(1) if they are so inadequately supported by the record as to be an unreasonable application of clearly established law. *See Badelle v. Correll*, 452 F.3d 648, 655 (7th Cir. 2006). In these situations, 28 U.S.C. § 2254(e) permits an evidentiary hearing where the record has not been developed so as to include

the factual predicate for the petitioner's claim and the petitioner was diligent in trying to develop that predicate.

The second issue is whether Famous is entitled to an evidentiary hearing on his ineffective-assistance-of-appellate-counsel claim.

III. No court has heard Famous's claim of ineffective assistance of trial counsel on its merits. 28 U.S.C. § 2254(e) permits an evidentiary hearing when the state-court record is insufficient to adjudicate the petitioner's claims and the petitioner exercised due diligence in attempting to develop the record.

The third issue is whether Famous is entitled to an evidentiary hearing on his ineffective-assistance-of-trial-counsel claim.

STATEMENT OF THE CASE

I. Legal background

A. Timeliness of federal-court habeas petitions

Statutory tolling. The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year limitations period on habeas petitioners in custody pursuant to a state-court judgment. 28 U.S.C. § 2244(d)(1). That period "run[s] from the latest of" several possible dates, including as relevant here when the judgment becomes final on direct review and when a state-created impediment to filing is removed. *Id.*

Denial of access to an adequate prison library is a state-created impediment under Section 2244(d)(1)(B) warranting tolling. *See Estremera v. United States*, 724 F.3d 773, 776 (7th Cir. 2013). An evidentiary hearing on the applicability of tolling is appropriate when

the petitioner alleges facts that call into question his access to an adequate library. *See id.* at 777.

Equitable tolling. Beyond the express statutory tolling just discussed, AEDPA's limitations period is equitably tolled when a petitioner "shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Socha v. Boughton*, 763 F.3d 674, 683 (7th Cir. 2014) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Extraordinary circumstances that warrant equitable tolling include attorney misconduct, the petitioner's mental incompetence, and the petitioner's lack of access to vital documents. *See Holland*, 560 U.S. at 652; *Davis v. Humphreys*, 747 F.3d 497, 499 (7th Cir. 2014); *Socha*, 763 F.3d at 686. A petitioner is entitled to a hearing on equitable tolling when he "alleges facts, which if proven, would entitle him to relief." *See Mayberry v. Dittmann*, 904 F.3d 525, 532 (7th Cir. 2018).

B. Deference to state-court decisions

When a petitioner's habeas claim was previously "adjudicated on the merits in State court proceedings," a federal court may grant habeas relief only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). When determining whether a state-court decision is "contrary to, or involved an unreasonable application of" Supreme Court precedent under Section 2254(d)(1), a federal court "is limited to the record that was

before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A state-court decision is "contrary to" Supreme Court precedent "'if the state court arrives at a conclusion opposite to that reached by th[e] Court on a question of law' or 'if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to'" it. *Anderson v. Cowan*, 227 F.3d 893, 896 (7th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)).

A state court's decision unreasonably applies Supreme Court precedent "if the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case." *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1044 (7th Cir. 2001) (quoting *Anderson*, 227 F.3d at 896). As this Court has recognized, "even a general standard may be applied in an unreasonable manner." *Kubsch v. Neal*, 838 F.3d 845, 860 (7th Cir. 2016) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). There need not be "some nearly identical factual pattern" between the case from which the standard derives and the case to which it is being applied. *Id.* at 859-60 (quoting *Panetti*, 551 U.S. at 953). A state-court decision is also an unreasonable application of Supreme Court precedent when it is "'so inadequately supported by the record, or so arbitrary' as to be unreasonable." *Badelle v. Correll*, 452 F.3d 648, 655 (7th Cir. 2006) (quoting *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997)).

C. Procedurally defaulted claims

Generally speaking, "[w]hen a state court denies a prisoner relief on a question of federal law and bases its decision on a state procedural ground that is independent of the federal question, the federal question is procedurally defaulted." *Lee v. Davis*, 328 F.3d 896, 899-900 (7th Cir. 2003). But a federal habeas court may reach a procedurally defaulted claim if the petitioner shows "both 'cause' for failing to abide by the state procedural rules, and a resulting 'prejudice' from that failure." *Wrinkles v. Buss*, 537 F.3d 804, 812 (7th Cir. 2008) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)).

Constitutionally ineffective assistance of counsel can serve as cause to set aside procedural default. "When a habeas petitioner seeks to excuse a procedural default through an ineffective-assistance claim, the 'cause' and 'prejudice' test from *Wainwright* is replaced by the similar test for ineffective assistance set out in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Wrinkles*, 537 F.3d at 812. Under *Strickland*, to establish ineffective assistance of counsel, the petitioner must show "(1) that his counsel's performance was so deficient as to fall below an objective standard of reasonableness under 'prevailing professional norms'; and (2) that the deficient performance … prejudiced the defense." *Lee*, 328 F.3d at 900 (citing *Strickland*, 466 U.S. at 687-88).

When arguing that an attorney was deficient for failing to present a claim on appeal, a habeas petitioner must show that appellate counsel "abandoned a nonfrivolous claim that was both 'obvious' and 'clearly stronger' than the claim that he actually presented" without "strategic justification." *Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013) (citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). A petitioner establishes prejudice from that

failure by showing "a reasonable probability that the issue not raised would have altered the outcome of the appeal had it been raised." *Lee*, 328 F.3d at 901.

D. Evidentiary hearings in habeas

As discussed above, when determining whether a state-court decision is "contrary to, or involved an unreasonable application of," Supreme Court precedent under Section 2254(d)(1), the federal court is limited to consideration of the state-court record. *See Cullen*, 563 U.S. at 181. But when a federal court holds a state-court decision to be "contrary to" or an "unreasonable application" of Supreme Court precedent, that limit no longer applies. Under Section 2254(e)(2), the court must hold an evidentiary hearing where a petitioner shows that the state-court record does not contain sufficient factual information to adjudicate a claim, and "the petitioner was diligent in his efforts" to develop the record. *Williams v. Taylor*, 529 U.S. 420, 435 (2000); *see Taylor v. Grounds*, 721 F.3d 809, 824 (7th Cir. 2013). As shown below, Famous is entitled to an evidentiary hearing because these criteria have been met.

II. Factual and procedural background

A. Famous's state-court trial and conviction

In 1998, Famous was charged in Wisconsin state court with four counts of sexual assault of a child, V.B., and one count of exposing V.B. to harmful material (explicit videos). D. Ct. Op. 1-2. The charges were "based upon the allegations of V.B." *Id.* 2. William Demark was appointed to defend Famous at trial. App. 136A. In his opening statement, Demark indicated that the jury would hear testimony from several alibi witnesses. *Id.* 64A-65A. During the trial, Famous unsuccessfully sought to have Demark

discharged for poor performance. *Id.* 28A. The day after this request, Demark did not call available alibi witnesses Carolyn Famous, Rosie Marie Kelly, and Lynette Famous. *Id.* 105-106A. Kelly and Lynette Famous have since submitted affidavits indicating that they were prepared to testify that Famous could not have had sexual contact with V.B. nor shown her any videos. *Id.* 76A-79A. V.B. alleged Famous assaulted her and showed her the videos in his bedroom. D. Ct. Op. 2. But Kelly and Lynette Famous would have testified that they were at the house that day, the television was in the living room (not in Famous's bedroom), and V.B. was watching movies with Kelly during the relevant time. App. 76A-79A.

In their affidavits, Kelly and Lynette Famous state that when they appeared at court to testify, Demark informed them he would not call them because they would only hurt Famous. App. 77A, 79A. Demark told Famous that the witnesses did not want to testify. *Id.* Famous maintains, as he has consistently since this federal habeas litigation began in 2010, that Demark refused to call the alibi witnesses in retaliation for Famous's efforts to have Demark discharged. *Id.* 28A; *see* First Amend. Pet. for Habeas Corpus at 9C-9D (D. Ct. ECF No. 12).

Famous was convicted on all counts. D. Ct. Op. 1. He was originally sentenced to life without parole and later resentenced to 168 years. App. 15A-16A.

B. Direct appeal and initial state postconviction motion

Following his conviction and prior to his direct appeal, Famous moved for postconviction relief in the circuit court, which was granted in part and denied in part. App. 2A, 15A-16A. He then directly appealed his conviction together with the partial

denial of postconviction relief to the Wisconsin Court of Appeals. *Id.* 2A. Famous was represented on appeal by Mark Rosen. Rosen raised five issues: two ineffective-assistance-of-counsel claims regarding pretrial motion practice, two claims concerning the admissibility of physical evidence and testimony, and a challenge to the sufficiency of the evidence for conviction on one count. *Id.*

Famous asked Rosen to argue another issue on appeal: that trial counsel rendered ineffective assistance when he did not call available alibi witnesses. App. 74A. Rosen did not do so. *Id.* 2A. The Wisconsin Court of Appeals affirmed the judgment and denial of postconviction relief on September 19, 2001, concluding that "[n]one of Famous's arguments provide a basis for relief." *Id.* The Wisconsin Supreme Court denied discretionary review on November 27, 2001 without an opinion. *See* D. Ct. Op. 3.

C. Famous faced obstacles to filing a federal habeas petition.

After his conviction became final on direct review, Famous faced multiple obstacles to filing a federal habeas petition. First, Rosen, Famous's appellate attorney, did not return Famous's legal file following the conclusion of his direct appeal in November 2001. Between February 2002 and November 2004, Famous sent at least four letters to Rosen asking for his file. App. 80A-81A, 83A-84A. Famous also reached out to another attorney at the public defender's office, whom Famous believed to be Rosen's supervisor. *Id.* 82A. Famous received his file on June 28, 2005. *Id.* 85A.

With file in hand, Famous began working with a jailhouse lawyer, Shaheed Madyun, on collateral-relief filings. Soon after, in July 2005, prison officials confiscated the file

from Madyun when Madyun was transferred to a segregation unit. App. 112A-113A. Famous repeatedly requested the return of his file, *id.* 87A-96A, but did not receive it back until April 30, 2007, *id.* 113A.

The obstacles did not end with the return of the file. Famous maintains that the library at Green Bay Correctional Institution, where he has been incarcerated for most of his sentence, did not contain a copy of the relevant portions of AEDPA, including the statute-of-limitations provision, for the entire period of Famous's incarceration leading up to the filing of his federal habeas petition. App. 108A-109A.

Finally, Famous suffers from severe mental-health conditions, which he maintains also impaired his ability to timely file his petition. In July 2009, he was diagnosed with Delusional Disorder and with possible Paranoid Personality Disorder. App. 97A-98A. A psychiatrist noted that Famous's illness had "persisted for nearly twenty years and ha[d] seemingly become worse over time." *Id.* 101A. Famous often refused to eat because he believed prison officials were trying to poison his food and pump toxic gas into his cell. *Id.* 97A, 101A. He also believed that his food "cause[d] his bones to heat up and dissolve." *Id.* 101A. By 2013, he weighed only 139 pounds despite being over six feet tall, and a psychiatrist concluded that "his delusional system [was] interfering with his functioning" and recommended that he be involuntarily committed for mental-health treatment. *Id.* 103A.

D. State-court collateral review

On August 9, 2013, Famous filed a motion for postconviction relief in Wisconsin circuit court on the grounds of newly discovered evidence and ineffective assistance of

counsel. App. 131A-132A.[1] Famous argued, among other things, that his trial counsel was ineffective for failing to call the alibi witnesses in retaliation against him and that his failure to raise the issue in his 2001 postconviction motion and direct appeal should be excused because his appellate counsel was constitutionally ineffective for not raising it. *Id.* 23A. The circuit court denied his motion. *See id.* 24A.

The Wisconsin Court of Appeals affirmed in part and reversed in part, remanding the case to the trial court for an evidentiary hearing (known as a *Machner* hearing in Wisconsin courts) on Famous's ineffective-assistance-of-counsel claims. App. 28A-29A, 31A. The Court of Appeals concluded:

> If the jury had heard the [alibi] witnesses' testimony and believed it, it would have impeached the State's case. Assuming trial counsel's refusal to call these witnesses was in retaliation for Famous having sought counsel's discharge, as opposed to part of a reasonable trial strategy, and Famous was prejudiced, then counsel's failure would rise to the level of constitutionally ineffective assistance.

Id. 28A-29A (citations omitted).

On remand, the circuit court conducted a *Machner* hearing to determine whether appellate counsel Rosen was constitutionally ineffective. The court restricted the hearing to testimony from Rosen and arguments from both sides and denied Famous's request to subpoena trial counsel and two alibi witnesses. App. 34A-35A, 37A. Rosen

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[1] Famous had twice previously petitioned Wisconsin state courts for a writ of habeas corpus. He filed his first petition in the Wisconsin Supreme Court on June 18, 2007, which was denied on August 14, 2007. App 133A. He filed a second petition in the Wisconsin Court of Appeals on March 16, 2009, which was denied on May 5, 2009. *Id.* 14A, 132A. AEDPA's statute of limitations is tolled while postconviction or collateral petitions, such as these, are pending in state court. 28 U.S.C. § 2244(d)(2); *Socha v. Boughton*, 763 F.3d 674, 678 (7th Cir. 2014).

testified that he did "not recall specifically the discussions of the … alibi witnesses or any discussion of the circumstances in which they were not called" nor "recall the results" of his investigation into potential claims, but that he did remember hiring an investigator. *Id.* 73A.

The circuit court recognized that if trial counsel had retaliated against Famous by not calling the alibi witnesses, "that failure would rise to the level of constitutionally ineffective assistance," assuming Famous was prejudiced as a result. App. 74A-75A. But the court concluded that the record did not establish that retaliation motivated trial counsel nor that Rosen knew of any retaliation: "All I know is that apparently Mr. Famous discussed the issue of alibi witnesses with Mr. Rosen, and Mr. Rosen determined that he would not raise it." *Id.* In light of this uncertainty as to why Rosen failed to raise the ineffective-assistance-of-trial-counsel claim, the court did "not find that any issue claimed by Mr. Famous is clearly stronger than the issues [Rosen] did present." *Id.* In short, the circuit court decided that appellate counsel was not ineffective, and thus the failure to raise the trial-counsel-ineffective-assistance claim on direct review would not be excused. As the circuit court put it, "[f]or some reason Mr. Rosen determined that this was not a viable issue to bring to the Court of Appeals." *Id.* 74A.

The Wisconsin Court of Appeals affirmed the denial of postconviction relief, concluding that "[o]n this sparse record, Famous has not established [appellate] counsel's deficiency." App. 37A. The court of appeals asserted that the circuit court made an "implicit finding that Famous did not tell [appellate] counsel about trial counsel's purported retaliatory refusal to call witnesses." *Id.* The court of appeals also

agreed with the circuit court that Famous "failed to establish that the newly asserted claim is clearly stronger than those actually presented" by Rosen on direct appeal. *Id.* The Wisconsin Supreme Court denied discretionary review on November 13, 2018 without an opinion. *Id.* 116A.

E. Federal-court habeas proceedings below

On August 17, 2010, Famous filed a federal habeas corpus petition in the District Court for the Eastern District of Wisconsin alleging ineffective assistance of counsel (D. Ct. ECF No. 1). He filed an amended petition on November 28, 2010 (D. Ct. ECF No. 12). On January 31, 2011, the district court granted a motion for a stay and abeyance to allow Famous to exhaust his postconviction claims in state court (D. Ct. ECF No. 22), which Famous subsequently did in the state collateral proceedings discussed immediately above.

Having exhausted state remedies, Famous filed an amended federal habeas petition on February 13, 2019, arguing that his trial counsel was ineffective in violation of the Sixth Amendment and that his procedural default—that is, the failure to raise trial counsel's ineffectiveness on direct appeal—should be excused because appellate counsel was also constitutionally ineffective. App. 39A. The district court granted the respondent's motion to dismiss, concluding that Famous's petition is time-barred by AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d)(1)(A). D. Ct. Op. 9.

The district court rejected each of Famous's arguments that the limitations period should be tolled. On Famous's claim that the prison library lacked a copy of AEDPA, the court concluded that "[a] petitioner's ignorance or misunderstanding of the law does

not rise to the level of extraordinary circumstance necessary for equitable tolling." D. Ct. Op. 7. On appellate counsel Rosen's refusal to return Famous's file, the court reasoned that "[e]ven if the ADEPA deadline should have been tolled until Petitioner received his case file," Famous did not diligently pursue his rights once he received the file. *Id.* As for Famous's argument that prison officials had seized his file from his jailhouse lawyer, "an inmate's decision to enlist the help of a jailhouse lawyer does not warrant equitable tolling." *Id.* 8. And on Famous's mental illnesses, the court decided that "[n]one of the medical records submitted suggest that Petitioner was incapable of filing and preparing a habeas petition from 2002 through 2010." *Id.* The district court thus did not reach the merits of either ineffective-assistance claim. *See id.* 9.

This Court then granted a certificate of appealability and appointed undersigned counsel to address whether Famous's petition was timely and whether his trial and appellate counsel were ineffective (7th Cir. ECF No. 9).

SUMMARY OF ARGUMENT

I. Famous alleges sufficient facts to warrant an evidentiary hearing on the timeliness of his petition. Famous's petition would be timely, notwithstanding the one-year limitations period, if he can establish his entitlement to either statutory or equitable tolling such that the statute of limitations did not run for more than one year between when his conviction became final on direct review in February 2002 and when he filed his habeas petition in August 2010.

Statutory tolling occurs when a state-created impediment prevents filing. 28 U.S.C. § 2244(d)(1)(B). An inadequate prison library can be an impediment. Famous maintains

that his prison library did not include a copy of AEDPA, which contains the relevant limitations period. Equitable tolling is warranted when extraordinary circumstances prevent timely filing and the habeas petitioner has diligently pursued his rights. Famous details a series of circumstances that stood in his way: his appellate attorney wrongfully withheld his case file; prison officials seized and refused to return the file; Famous suffers from mental illness; and the prison library was inadequate. In the face of these challenges, Famous made consistent efforts to advance his claims. A hearing is necessary to determine the extent to which these circumstances prevented timely filing and thus Famous's entitlement to statutory or equitable tolling.

II. Famous is entitled to an evidentiary hearing on his claim that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. Under 28 U.S.C. § 2254(d)(1), a federal court does not defer to a state-court decision that unreasonably applies Supreme Court precedent. The circuit court's decision that appellate counsel was not ineffective for failing to raise the ineffective-assistance-of-trial-counsel claim was issued on a record lacking key findings of fact. The Wisconsin Court of Appeals then affirmed the lower court's decision by construing it to include a nonexistent "implicit finding." App. 37A. In doing so, the court unreasonably applied Supreme Court precedent by rendering a decision that was "inadequately supported by the record." *See Badelle v. Correll*, 452 F.3d 648, 655 (7th Cir. 2006).

Having overcome Section 2254(d)(1), Famous is entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2) because he has shown that the state-court record is factually undeveloped and that he diligently pursued his rights. The state-court record does not contain facts essential to determining the merits of Famous's claim, including

whether Rosen was aware of Famous's claim that trial counsel retaliated against him, why Rosen declined to pursue the ineffective-assistance-of-trial-counsel on appeal, and whether Famous was prejudiced by Rosen's failure. Famous attempted to develop his claim by offering his testimony, signed witness declarations, and the testimony of additional fact witnesses. Famous's efforts to introduce additional fact witnesses in support of his claim were rebuffed by the lower court.

III. Famous is also entitled to an evidentiary hearing under Section 2254(e)(2) on his ineffective-assistance-of-trial-counsel claim. The state-court record is inadequate to adjudicate his claim because no court has evaluated its merits. And Famous has presented evidence suggesting that his trial counsel was deficient and that he was prejudiced as a result. Famous maintains that trial counsel retaliated against him by refusing to call alibi witnesses, after Demark indicated in his opening statement that several alibi witnesses would be called. Moreover, Famous was diligent in attempting to develop the record. This Court should therefore grant Famous an evidentiary hearing on his ineffective-assistance-of-trial-counsel claim.

STANDARD OF REVIEW

The district court's decision to dismiss a habeas corpus petition as untimely is reviewed de novo. *Moore v. Knight*, 368 F.3d 936, 938 (7th Cir. 2004). Although equitable tolling decisions are generally reviewed for abuse of discretion, *see, e.g.*, *Mayberry v. Dittmann*, 904 F.3d 525, 530 (7th Cir. 2018), this Court reviews those determinations de

novo where, as here, "the district court did not gather the evidence needed for a decision." *Schmid v. McCauley*, 825 F.3d 348, 350 (7th Cir. 2016); *see* D. Ct. Op. 6-9.

When a state court previously reached the merits of a petitioner's claim, a federal court may grant habeas relief if the state court's decision "was contrary to, or involved an unreasonable application of," Supreme Court precedent or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). When no state court has reached the merits of a petitioner's claim, federal courts review the unreached issues de novo. *See Brown v. Brown*, 847 F.3d 502, 506 (7th Cir. 2017); *Harris v. Thompson*, 698 F.3d 609, 623 (7th Cir. 2012).

ARGUMENT

I. Famous is entitled to an evidentiary hearing on the timeliness of his federal habeas petition.

AEDPA establishes a one-year limitations period for federal habeas petitions challenging state-court convictions, subject to both statutory and equitable tolling. *See* 28 U.S.C. § 2244(d)(1); *Socha v. Boughton*, 763 F.3d 674, 683 (7th Cir. 2014). Famous's conviction became final on February 25, 2002, when the time for him to seek Supreme Court review of his conviction expired. *See* D. Ct. Op. 3; 28 U.S.C. § 2244(d)(1)(A). He filed his federal habeas petition on August 17, 2010. *See* D. Ct. Op. 3. Thus, Famous's petition was timely if, because Famous is entitled to tolling, the statute of limitations did not run for more than one year between February 25, 2002 and August 17, 2010.

A. An inadequate prison library is a state-created impediment that warrants statutory tolling.

The statute of limitations does not run when an "impediment to filing an application created by State action in violation of the Constitution or laws of the United States … prevented [the petitioner] from filing." 28 U.S.C. § 2244(d)(1)(B). Denial of access to an adequate prison library can be a state-created impediment. *Estremera v. United States*, 724 F.3d 773, 776 (7th Cir. 2013).[2] When a habeas petitioner alleges facts that call into question the adequacy of his library access, an evidentiary hearing is warranted to determine the sufficiency of his access and the extent to which inadequacies in the library's materials prevented timely filing. *See id.* at 777; *Moore v. Battaglia*, 476 F.3d 504, 508 (7th Cir. 2007) (remanding for an evidentiary hearing to determine if "the library contained a copy of the statute of limitations").

Famous has met that burden here. He alleges the prison library did not contain relevant portions of AEDPA, including the statute of limitations, which he needed to properly file a petition. App. 108A-109A. This deficiency apparently lasted for the entire period in which the statute of limitations otherwise would have run, from the date the conviction became final in February 2002 to the date the petition was filed in August 2010. *Id.*

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[2] *Estremera* involved Section 2255(f), the sister provision to Section 2244(d)(1)'s statute-of-limitations for prisoners serving a federal sentence. The two provisions use nearly identical language and are interpreted in parallel. *See, e.g.*, *Arreola-Castillo v. United States*, 889 F.3d 378, 383 (7th Cir. 2018); *Lombardo v. United States*, 860 F.3d 547, 553 (7th Cir. 2017).

This Court remanded for an evidentiary hearing based on a nearly identical allegation in *Moore v. Battaglia*. *See* 476 F.3d at 508. Other courts have taken similar paths. *See Egerton v. Cockrell*, 334 F.3d 433, 435, 438-39 (5th Cir. 2003); *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000). Like in those cases, an evidentiary hearing is necessary here to determine if the library contained a copy of 28 U.S.C. § 2244, and if it didn't, to what extent that deficiency prevented Famous from timely filing his petition.

B. Extraordinary circumstances and diligent pursuit of rights warrant equitable tolling.

Famous is also entitled to an evidentiary hearing on his equitable-tolling claim. AEDPA's limitations period is equitably tolled when the petitioner shows "that some extraordinary circumstance stood in his way and prevented timely filing" and "that he has been pursuing his rights diligently." *Socha*, 763 F.3d at 683 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). The inquiry is "highly fact-dependent," so "courts are expected to employ flexible standards on a case-by-case basis." *Id.* at 684 (quotation marks omitted).

1. Famous has alleged that extraordinary circumstances, including attorney misconduct, lack of access to his legal materials, and mental incompetence, prevented timely filing.

When evaluating equitable-tolling claims, "[i]t does not matter that one could look at each of the circumstances encountered by [the petitioner] in isolation and decide that none by itself required equitable tolling." *Socha*, 763 F.3d at 686. Rather than "search for a single trump card," as the district court did here, courts must look at "the entire hand that the petitioner was dealt." *Id.*; *see* D. Ct. Op. 6-9 (rejecting each proffered

reason for equitable tolling in isolation). Famous has presented concrete facts that demonstrate his "entire hand" prevented him from timely filing his petition between February 2002 and August 2010.

First, Famous's appellate attorney, Mark Rosen, wrongfully withheld Famous's file for over three years. Although a "garden variety claim of attorney negligence" may not justify equitable tolling, "more serious instances of attorney misconduct" do. *Holland*, 560 U.S. at 652 (quotation marks omitted). Failure to turn over a former client's file despite multiple requests is serious misconduct, "not 'garden variety' neglect." *Socha*, 763 F.3d at 686. In *Socha*, for example, the petitioner's case file "languished in the possession of his former attorney," who did not respond to the petitioner's "repeated requests for the documents." *Id.* The petitioner's "repeated efforts to obtain an unjustifiably withheld file" contributed to this Court's holding that he was entitled to equitable tolling. *Id.* at 688.

Like the petitioner in *Socha*, Famous offers evidence that his attorney wrongfully withheld his file. The Wisconsin Supreme Court denied review of Famous's direct appeal on November 27, 2001, *see* D. Ct. Op. 3, but Rosen did not return his file until June 28, 2005, App. 85A. Famous first wrote Rosen to request his file in February 2002, just months after his appeal concluded, and repeatedly followed up when Rosen did not comply. *See id.* 80A-81A, 83A-84A (copies of letters dated 2/12/2002, 6/16/2002, 10/20/2003, and 11/27/2004). Undeterred, Famous also wrote another attorney at the public defender's office, believed to be Rosen's supervisor, to ask for the file. *Id.* 82A; *see Socha*, 763 F.3d at 686 (indicating petitioner's request to his attorney's superior for withheld documents supported equitable tolling). "Even the most seasoned attorneys

do not, and should not, draft motions, memoranda, or briefs without access to the basic files underlying the actions." *Socha*, 763 F.3d at 686. A pro se habeas petitioner should not be expected to do so either. *See id.* Rosen's failure to return Famous's file is an extraordinary circumstance that prevented Famous's timely filing prior to June 2005.

Second, Famous was again denied access to his legal file when prison officials seized the file and refused to return it. In July 2005, just one month after Famous finally obtained his file from his attorney, prison officials confiscated it from Shaheed Madyun, Famous's jailhouse lawyer. App. 112A-113A. Despite numerous formal complaints, *id.* 87A-96A, Famous did not receive his file back for nearly two years, on April 30, 2007, *id.* 113A. "The intentional confiscation of a prisoner's habeas corpus petition and related legal papers by a corrections officer is 'extraordinary' as a matter of law." *Weddington v. Zatecky*, 721 F.3d 456, 464 (7th Cir. 2013) (quoting *Valverde v. Stinson*, 24 F.3d 129, 133 (2d Cir. 2000)); *see also Schmid v. McCauley*, 825 F.3d 348, 350 (7th Cir. 2016) ("[I]nability to access vital papers is another" extraordinary circumstance contributing to equitable tolling).

The withholding of Famous's legal file by prison officials in the face of complaints thus contributed to the extraordinary circumstances that prevented filing from July 2005 until April 2007.

Third, Famous suffers from mental illnesses that may have prevented timely filing. Mental incompetence can be the basis for equitable tolling. *Davis v. Humphreys*, 747 F.3d 497, 499 (7th Cir. 2014). To justify equitable tolling, a petitioner's illness must "*in fact* prevent[] the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them" and must "shed[] light on the relevant time period for

purposes of tolling." *Mayberry v. Dittmann*, 904 F.3d 525, 530 (7th Cir. 2018) (quoting *Obriecht v. Foster*, 727 F.3d 744, 750-51 (7th Cir. 2013)). A petitioner seeking an evidentiary hearing must "allege[] facts, which if proven, would entitle him to relief," rather than make only "vague or conclusory allegations." *Id.* at 532.

Famous has offered evidence that meets this standard. He alleges specific facts demonstrating that he suffered a mental illness throughout the entire period from when the statute of limitations purportedly began to run in February 2002, *see* D. Ct. Op. 3, to when he filed his habeas petition in August 2010. On June 21, 2009, Famous was diagnosed with Delusional Disorder, Persecutory Type, and his doctor left open the possibility that Famous also suffers from Paranoid Personality Disorder. App. 97A-98A. Later that year, a psychiatrist noted that Famous's mental illness had "persisted for nearly twenty years and ha[d] seemingly become worse over time." *Id.* 101A. His illness led him to believe prison guards were pumping poison gas into his cell and poisoning his food, so that he often refused to eat. *Id.* 97A, 101A. By 2013, when a psychiatrist examined him again, he weighed only 139 pounds despite standing at over six feet tall. *Id.* 103A. The psychiatrist recommended involuntary commitment for mental-health treatment because Famous was "psychotic and his delusional system [was] interfering with his functioning." *Id.*

Reviewing this evidence, the district court concluded that "[n]one of the medical records submitted" demonstrates Famous is entitled to equitable tolling. D. Ct. Op. 8. But the records alone do not need to carry that burden at this stage. They raise a serious question of Famous's mental competence throughout the decade prior to filing his habeas petition, entitling Famous to an evidentiary hearing to conclusively determine

the propriety of equitable tolling. *See, e.g.*, *Perry v. Brown*, 950 F.3d 410, 412 (7th Cir. 2020); *Schmid*, 825 F.3d at 350; *Davis*, 747 F.3d at 500.

Fourth, the allegedly inadequate prison library contributes to the "entire hand" Famous was dealt for equitable-tolling purposes. *See Socha*, 763 F.3d at 684, 686. This Court has recognized that inadequate library access, apart from its relevance to statutory tolling as a state-created impediment, "shed[s] light on the question" of equitable tolling. *Id.* at 684; *see also Estremera*, 724 F.3d at 777 (expressly leaving open the question whether an inadequate law library can justify equitable tolling); *Moore*, 476 F.3d at 508 (same). And for good reason. Denial of an adequate prison library is an "extraordinary circumstance[] far beyond the litigant's control that prevent[s] timely filing"—the very kind of obstacle equitable tolling seeks to address. *Socha*, 763 F.3d at 684 (quoting *Nolan v. United States*, 358 F.3d 480, 484 (7th Cir. 2004)). As recounted above (at 18-19), Famous maintains that the prison library lacked a copy of AEDPA's statute of limitations throughout his incarceration prior to filing his petition. If substantiated at an evidentiary hearing, this fact adds to the "entire hand" of extraordinary circumstances Famous was dealt from February 2002 to August 2010.

In short, Famous has alleged facts that indicate extraordinary circumstances prevented the timely filing of his habeas petition. Taken together, these circumstances would satisfy this prong of the equitable-tolling doctrine for the entire time period between when Famous's direct review became final and when he filed his habeas petition. *See* D. Ct. Op. 3. Coupled with Famous's diligence, discussed below, equitable tolling would render the petition timely.

2. Famous pursued his rights with reasonable diligence.

A petitioner seeking equitable tolling must show he diligently pursued his rights. *Socha*, 763 F.3d at 683. "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (quotation marks and citations omitted).

Famous clears this bar. For starters, some of the extraordinary circumstances discussed above themselves support a finding of diligence by excusing what would otherwise be an impermissible delay. For example, inadequate prison library access "shed[s] light on the question whether [petitioner] was responsible for the delay or if instead he demonstrated the necessary diligence for equitable tolling." *Socha*, 763 F.3d at 684. Mental illness and inability to access his legal file similarly "shed light" on Famous's responsibility for the delay and thus on his diligence. *See Obriecht*, 727 F.3d at 750-51 (suggesting mental illness, if sufficiently alleged, can be relevant to the diligence inquiry).

Moreover, Famous's actions in the face of these challenges show diligence. He requested his file from his attorney for the express purpose of filing a habeas petition less than three months after the conclusion of his direct appeal. App. 80A-81A. Ignored, he renewed his request at least four times. *Id.* 81A-84A. After finally obtaining his file from his attorney and having it seized by prison officials, Famous filed complaints seeking its return. *Id.* 87A-96A. And once Famous finally got what he needed, he acted promptly, filing his first state habeas petition less than two months after receiving his file in late April 2007, *see id.* 113A-114A, 133A, another habeas petition in state court in 2009, *id.* 14A, and his federal habeas petition in 2010, D. Ct. Op. 1. Considering the

challenges Famous faced, these efforts show he pursued his rights with "reasonable diligence." *Holland*, 560 U.S. at 653.

II. Famous is entitled to an evidentiary hearing on his ineffective-assistance-of-appellate-counsel claim.

A. The Wisconsin Court of Appeals unreasonably applied clearly established law to Famous's ineffective-assistance-of-appellate-counsel claim.

A federal court may grant habeas relief if a person is held in custody pursuant to a state-court decision that "involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A state-court decision that identifies the correct legal rule nonetheless flunks this test if it "unreasonably applies" that rule "to the facts of the particular state prisoner's case." *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1044 (7th Cir. 2001) (quoting *Anderson v. Cowan*, 227 F.3d 893, 896 (7th Cir. 2000)); *see Kubsch v. Neal*, 838 F.3d 845, 859-60 (7th Cir. 2016). A state-court decision is also unreasonable when it is "'so inadequately supported by the record, or so arbitrary' as to be unreasonable." *Badelle v. Correll*, 452 F.3d 648, 655 (7th Cir. 2006) (quoting *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997)); *cf. Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (finding a state-court decision unreasonable because it "merely assumed" the adequacy of trial counsel's investigation).

The Wisconsin Court of Appeals' decision unreasonably applied clearly established law regarding when appellate counsel is constitutionally ineffective. In affirming the circuit court's unsupported rejection of Famous's ineffective-assistance-of-appellate-counsel claim, the court of appeals read a nonexistent "implicit finding" into the record.

See App. 37A. Consequently, under Section 2254(d)(1), the court of appeals' decision was so inadequately supported by the record as to be unreasonable.

1. The circuit court refused to make findings on whether Rosen knew about retaliatory intent and why Rosen failed to raise the trial-level ineffective-assistance claim.

It is clearly established that, to provide constitutionally adequate representation, appellate attorneys must "select[] the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). If an appellate attorney fails to raise a nonfrivolous claim that was both "obvious" and "clearly stronger" than the claims actually presented on appeal, his performance was deficient, unless his choice was strategically justified. *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017); *see Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013). Thus, to reasonably determine whether Rosen was ineffective, the circuit court needed to determine whether Rosen was aware of Demark's alleged retaliation against Famous, and whether Rosen had a strategic justification for failing to raise the underlying ineffective-assistance-of-trial-counsel claim. But the circuit court made neither of those findings at the *Machner* hearing.

First, the circuit court stated that the "very sparse record" before it did "not establish" whether "there was retaliation involved" in Demark's decision not to call alibi witnesses at trial, nor whether "Mr. Famous advised Mr. Rosen that there was some retaliation involved." App. 75A. But without a finding about whether Rosen knew about Demark's alleged retaliatory intent, the circuit court could not reasonably determine whether the ineffective-assistance-of-trial-counsel claim was "obvious" and

"clearly stronger" than the other claims Rosen brought on appeal. *See Smith*, 528 U.S. at 288; *Shaw*, 721 F.3d at 915. As the circuit court itself recognized, if trial counsel's "refusal to call the [alibi] witnesses was in retaliation for Mr. Famous having sought counsel's discharge, … then that failure would rise to the level of constitutionally ineffective assistance," assuming Famous showed prejudice. App. 74A-75A. By extension, if appellate counsel Rosen knew of Demark's alleged retaliatory intent and nonetheless failed to raise that "nonfrivolous claim that was both 'obvious' and 'clearly stronger' than the claim[s] that he actually presented, his performance was deficient, unless his choice had a strategic justification." *Shaw*, 721 F.3d at 915.

Second, as to strategic justification, the court concluded only that "*[f]or some reason* Mr. Rosen determined that [the trial-level ineffective-assistance claim] was not a viable issue." App. 74A (emphasis added). But the court did not determine what that reason was, strategic or otherwise. Moreover, strategic decisions must be preceded by a reasonable investigation. *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005) (citing *Rompilla v. Beard*, 545 U.S. 374, 387 (2005)). Though Rosen recalled hiring an investigator who performed "an investigation of potential appellate issues," Rosen did not remember whether he investigated Famous's retaliation claim. App. 73A. The circuit court merely stated: "All I know is that apparently Mr. Famous discussed the issue of alibi witnesses with Mr. Rosen, and Mr. Rosen determined that he would not raise it." *Id.* 75A.

Without findings as to Demark's alleged retaliatory motive or his reasons for not calling the alibi witnesses, the circuit court had no way of knowing whether the claim that Demark was constitutionally ineffective for failing to call the witnesses was

"obvious" and "clearly stronger" than the other claims Rosen raised. *See Smith*, 528 U.S. at 288; *Shaw*, 721 F.3d at 915. In fact, the circuit court made no effort to compare the strength of the claims, making only a conclusory statement that the test was met. *See* App. 75A. Nor could it determine whether Rosen made a strategic decision in choosing not to raise it. *See Smith*, 528 U.S. at 288. Nonetheless, after reciting these two crucial shortcomings in its factfinding, the circuit court rejected Famous's claim that Rosen was constitutionally ineffective. App. 75A.

2. The Wisconsin Court of Appeals' decision was unreasonable.

In affirming the circuit court's decision, the Wisconsin Court of Appeals read into the *Machner* hearing transcript an "implicit finding that Famous did not tell [appellate] counsel about trial counsel's purported retaliatory refusal to call witnesses." App. 37A. The court of appeals then relied on this "implicit finding" to affirm the circuit court's conclusion that Rosen was not constitutionally ineffective. *See id.* But, as just explained, the circuit court made no such finding as to Rosen's awareness. *See id.* 75A. The court stated that "apparently Mr. Famous discussed the issue of alibi witnesses with Mr. Rosen," but it made no finding about whether Famous specifically mentioned retaliation. *Id.*

The court of appeals' decision cannot survive review under Section 2254(d)(1) because it is "so inadequately supported by the record" as to be unreasonable. *Badelle*, 452 F.3d at 655 (quoting *Hall*, 16 F.3d at 749). In *Taylor v. Grounds*, 721 F.3d 809 (7th Cir. 2013), a state appellate court had held that there was no conflict of interest where an attorney represented two defendants in the same prosecution, stating that the trial

court had made an "implicit credibility finding" in the attorney's favor. This Court held that decision to be unreasonable under Section 2254(d)(1) where the state trial court made no factual findings at all in its "bare rejection" of the habeas petitioner's claim. *Id.* at 812. Like the state appellate court in *Taylor*, the Wisconsin Court of Appeals here read a nonexistent fact into a bare trial-court record and then used that fact to affirm the trial court's decision. Moreover, the court of appeals ignored the circuit court's failure to judge the strength of the unraised claim relative to the raised claims, only to repeat this mistake itself. *See* App. 37A, 75A. "Because the court [of appeals] never actually applied th[e] standard, it too committed unreasonable error." *McManus v. Neal*, 779 F.3d 634, 659 (7th Cir. 2015). The Wisconsin Court of Appeals' decision is therefore unreasonable.

B. Famous is entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2).

A federal court must hold an evidentiary hearing on a petitioner's ineffective-appellate-counsel claim where, as here, the "petitioner has alleged facts that would make [counsel's] conduct objectively unreasonable under *Strickland* and the state's contrary ruling unreasonable under section 2254(d)(1)." *Jordan v. Hepp*, 831 F.3d 837, 850 (7th Cir. 2016). Under 28 U.S.C. § 2254(e)(2), an evidentiary hearing is warranted when the state-court record does not contain sufficient factual information to adjudicate a claim, and "the petitioner was diligent in his efforts" to develop the record. *Williams v. Taylor*, 529 U.S. 420, 435 (2000). Famous satisfies both requirements.

1. The state-court record does not contain sufficient factual information to adjudicate Famous's claim.

That Famous was granted a *Machner* hearing does not obviate the need for a federal-habeas evidentiary hearing because the *Machner* hearing did not adequately ascertain the relevant facts. As discussed above (at 26-28), on the state-court record, it is impossible to determine whether the unraised ineffective-assistance-of-trial-counsel claim was "obvious" and "clearly stronger" than the claims Rosen raised on appeal. *See Shaw*, 721 F.3d at 915. The circuit court "refrained from making any findings of fact on the [relevant] question[s]": whether Rosen knew about Famous's allegation of retaliatory intent and whether Rosen had a strategic justification for failing to raise the claim. *Taylor*, 721 F.3d at 824; *see Jordan*, 831 F.3d at 849-50. "This factual void then found its way" into the Wisconsin Court of Appeals' opinion. *Taylor*, 721 F.3d at 824.

Moreover, the state-court record does not contain sufficient information to determine whether Famous was prejudiced by Rosen's failure to raise the alibi-witness claim—that is, whether there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Campbell v. Reardon*, 780 F.3d 752, 769 (7th Cir. 2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 104 (2011)). Neither state court discussed prejudice, as they disposed of Famous's claim on the (unsupported) ground that Rosen's performance was not deficient. Where a state court decides to reject a claim on one ground, and that ground is unreasonable under Section 2254(d), an evidentiary hearing is needed to consider other parts of the claim that were not addressed. *Cullen v. Pinholster*, 563 U.S. 170, 205 (2011) (Breyer, J., concurring in part and dissenting in part) (cited approvingly in *Taylor*, 721 F.3d at 824).

2. Famous did not fail to develop the factual basis for his claim because he was diligent.

Under Section 2254(e)(2), a federal court may not grant an evidentiary hearing where there is a "failure to develop the factual basis of a claim" in state court attributable to "a lack of diligence, or some greater fault," by the "prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. That bar does not apply when a "prisoner was diligent in his efforts" to discover the factual predicate of his claim. *Id.* at 435. In *Lee v. Kink*, 922 F.3d 772 (7th Cir. 2019), for example, this Court held that a petitioner was diligent where "affidavits that corroborated [petitioner's] story or provided exculpatory details" along with "requests for hearings, show[ed] that [petitioner] did try to develop a record in state court." *Id.* 773-74.

Famous easily meets this threshold. The allegations in his state postconviction petition were "detailed and not conclusory," and he included signed declarations by the alibi witnesses, indicating the significance and substance of their omitted testimony. App. 28A; *see id.* 76A-79A. At the *Machner* hearing, whose purpose was in part to determine whether trial counsel had retaliatory intent, Famous "filed a motion seeking to have the court subpoena three additional witnesses"—two alibi witnesses and trial counsel Demark—"for the upcoming hearing." *Id.* 34A, 37A. After the circuit court denied this motion, Famous yet again demonstrated diligence by appealing, but his appeal was denied. *Id.* 35A, 38A. Famous exceeds the standard for diligence and is thus entitled to an evidentiary hearing on his ineffective-assistance-of-appellate-counsel claim.

III. Famous is entitled to an evidentiary hearing on his ineffective-assistance-of-trial-counsel claim.

The state court did not reach Famous's ineffective-assistance-of-trial-counsel claim because Rosen failed to raise it on direct appeal, thereby procedurally defaulting it. App. 36A-37A. A federal court may reach a procedurally defaulted claim if the petitioner shows "both 'cause' for failing to abide by the state procedural rules, and a resulting 'prejudice' from that failure." *Wrinkles v. Buss*, 537 F.3d 804, 812 (7th Cir. 2008) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). Attorney error that constitutes ineffective assistance of counsel can be cause to set aside a procedural default. *Id.* As just explained in Part II, Famous is entitled to an evidentiary hearing on whether Rosen was ineffective for failing to raise trial counsel's ineffective assistance. If the district court finds ineffective assistance of appellate counsel, Famous's procedural default of the underlying ineffective-assistance-of-trial-counsel claim will be excused, allowing a federal court to reach its merits.

This Court reviews the underlying claim—which was not "adjudicated on the merits in State court proceedings"—de novo, without applying 28 U.S.C. § 2254(d)'s deference to the state court. *See Harris v. Thompson*, 698 F.3d 609, 623 (7th Cir. 2012). Under Section 2254(e)(2), an evidentiary hearing must be held on the claim if the state-court record does not contain sufficient factual information to adjudicate a claim and "the petitioner was diligent in his efforts" to develop the record. *Williams v. Taylor*, 529 U.S. 420, 435 (2000). Famous satisfies these requirements.

A. The state-court record does not contain enough factual information to adjudicate Famous's ineffective-assistance-of-trial-counsel claim.

For ineffective-assistance-of-trial-counsel claims, as explained above, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The state-court record lacks the factual predicates necessary to adjudicate either prong of this standard.

Deficiency. The existing record does not contain enough information to determine whether Demark's failure to call the alibi witnesses "fell below an objective standard of reasonableness." *Blackmon v. Williams*, 823 F.3d 1088, 1102-03 (7th Cir. 2016) (quoting *Strickland*, 466 U.S. at 688). As the Wisconsin Court of Appeals correctly observed, if Demark's "refusal to call these witnesses was in retaliation for Famous having sought counsel's discharge … and Mr. Famous was prejudiced," then Demark was constitutionally ineffective. App. 28A-29A. Famous maintains that Demark indicated in his opening statement that he would call alibi witnesses during trial. *Id.* 65A. Then, the day before the alibi witnesses were scheduled to testify, Famous requested that the court "remove [Demark] from the case and allow Famous to represent himself" because Demark was ineffective. *Id.* 28A, 65A. Famous maintains that Demark then retaliated against him by refusing to call the alibi witnesses. *Id.* 106A.

The record does not contain any testimony or other evidence from Demark explaining his decision not to call the available alibi witnesses. Nor does it contain the state-court trial transcript. According to Famous, Demark told him that the alibi witnesses were not called because they refused to testify, App. 28A, but the witnesses

themselves submitted signed affidavits saying that is false, *id.* 76A-79A. Famous maintains that Demark's decision was retaliatory, which would "rise to the level of constitutionally ineffective assistance" if Famous suffered prejudice as a result. *Id.* 28A-29A.

Even if Demark's failure to call the alibi witnesses was not motivated by retaliation, Demark's performance could still be deficient. This Court has held that, in a credibility contest characterized by the absence of physical evidence and reliance on competing witness testimony, "counsel's failure to call two useful, corroborating witnesses" can "constitute[] deficient performance." *Toliver v. Pollard*, 688 F.3d 853, 862 (7th Cir. 2012) (citing *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006)); *see also Jones v. Calloway*, 842 F.3d 454, 464 (7th Cir. 2016) ("As a general matter, a defense attorney's failure to present a material exculpatory witness of which he was aware qualifies as deficient performance."). With the benefit of a fully developed record, the district court could determine whether Demark's failure to call the available alibi witnesses was similarly inadequate.

Famous was convicted based primarily "upon allegations made by" the victim. App. 3A. The alibi witnesses "would have testified that the victim was with one of them in the living room" when the alleged crime occurred and that "Famous never moved the television and VCR from the living room into his room," where the victim alleged Famous assaulted her. *Id.* 28A. As in *Toliver*, Famous's trial was apparently "a swearing match [or credibility contest] between the two sides" that lacked the benefit of "two useful, corroborating witnesses" who would have impeached the victim's testimony. 688 F.3d at 862 (quotation marks omitted); *see* App. 28A, 76A-79A. The record does

not reveal why Demark failed to call the witnesses, but it suggests that a defense lawyer, acting competently, would have included their testimony as part of the defense.

In sum, an evidentiary hearing is needed to determine why Demark failed to call Famous's alibi witnesses to testify and to determine whether his failure to do so was constitutionally deficient. *See Taylor v. Grounds*, 721 F.3d 809, 824 (7th Cir. 2013).

Prejudice. After determining that a trial counsel's performance was deficient, courts must evaluate "whether counsel's errors prejudiced the [petitioner];" that is, whether there is "a reasonable probability that, but for those errors, the result of the proceeding would have been different." *Blackmon*, 823 F.3d at 1103 (citing *Strickland*, 466 U.S. at 694). "In weighing the effect of counsel's errors, the court must consider the totality of the evidence before the judge or jury." *Hough v. Anderson*, 272 F.3d 878, 891 (7th Cir. 2001) (citing *Strickland*, 466 U.S. at 696). No court has ever addressed whether Demark's refusal to call the alibi witnesses prejudiced Famous's defense so, unsurprisingly, the record does not contain sufficient factual information to adjudicate the claim. *See Taylor*, 721 F.3d at 824 (citing *Cullen v. Pinholster*, 563 U.S. 170, 205 (2011) (Breyer, J., concurring in part and dissenting in part)).

Nonetheless, the sparse record indicates that Famous may well have been prejudiced by Demark's failure to call the alibi witnesses. In *Goodman v. Bertrand*, 467 F.3d at 1030, this Court held that failure to call an eyewitness in a credibility-contest case, combined with other errors, was prejudicial. Similarly, in *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985), the Fifth Circuit found prejudice where the verdict "rest[ed] primarily on the testimony" of an accomplice, was only weakly supported by other evidence, and trial

counsel failed to call alibi witnesses who would have directly contradicted that testimony and supported the defendant's theory of the case. *Id.* at 1179-80.

"[U]nlike so many cases involving a similar claim of failure to call potential witnesses," Famous "has pointed to … specific witness[es] whose missing testimony would have been exculpatory." *Montgomery v. Petersen*, 846 F.2d 407, 415 (7th Cir. 1988). Had these witnesses testified, the trial could "have been transformed from a one-sided presentation of the prosecution's case into a battle" between competing testimony, giving Famous the opportunity to generate "reasonable doubt as to [his] guilt." *Stitts v. Wilson*, 713 F.3d 887, 894 (7th Cir. 2013). Indeed, the Wisconsin Court of Appeals remarked that "[i]f the jury had heard the witnesses' testimony and believed it, it would have impeached the State's case." App. 28A.

Moreover, as previously noted, Demark indicated in his opening statement that alibi witnesses would be called. App. 65A. In *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990), this Court held that counsel's failure to produce witnesses referred to in the opening statement was prejudicial. *Id.* at 879. Similarly, in *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000), this Court found prejudice when trial counsel failed to call any alibi witnesses after specifically mentioning at least one of the witnesses at voir dire. *Id.* at 634. Like in *Harris* and *Washington*, Demark's failure to call available alibi witnesses to testify after mentioning them in the opening statement may have caused the jury to draw a negative inference against Famous. App. 65A.

B. Famous did not fail to develop the factual basis for his claim because he was diligent.

As discussed above (at 31), Section 2254(e)(2) permits an undeveloped state-court record to be supplemented by an evidentiary hearing where a petitioner was "diligent in his efforts" to "search for evidence." *Williams*, 529 U.S. at 435; *see* 28 U.S.C. § 2254(e)(2). Famous met that standard here.

Famous "did what he could" to develop the state-court factual record, thus the absence of necessary evidence "must be attributed to the state judiciary's failure to afford him a hearing." *Lee v. Kink*, 922 F.3d 772, 774 (7th Cir. 2019). Famous requested and was granted a *Machner* evidentiary hearing in state court. *See Williams*, 529 U.S. at 437. At that hearing, the circuit court denied Famous's request to subpoena the alibi witnesses and trial counsel. App. 34A-35A. Famous also obtained sworn affidavits from two witnesses to further develop the factual record. *Id.* 34A; *see Lee*, 922 F.3d at 774 (concluding "the affidavits, plus the multiple requests for hearings, show that [the petitioner] did try to develop a record in state court"). Nothing more is required.

Famous should be granted an evidentiary hearing to determine whether trial counsel's failure to call these witnesses was constitutionally deficient and prejudiced Famous's defense. Only then "can the district court make a reliable decision about the ineffective-assistance claim." *Lee*, 922 F.3d at 774-75.

CONCLUSION

The judgment of the district court should be reversed and remanded for an evidentiary hearing on the merits of Famous's statutory and equitable tolling claims, ineffective-assistance-of-appellate-counsel claim, and ineffective-assistance-of-trial-counsel claim.

Respectfully submitted,

/s/ Hannah Mullen

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March 12, 2021

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 10,031 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013, set in Garamond font in 14-point type.

/s/ Hannah Mullen
Hannah Mullen

ATTACHED APPENDIX

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

In accordance with Circuit Rule 30(d), I certify that this appendix contains all of the materials required by Circuit Rule 30(a) and that the separately submitted appendix contains all of the materials required by Circuit Rule 30(b).

/s/ Hannah Mullen
Hannah Mullen

United States District Court

EASTERN DISTRICT OF WISCONSIN

RONNIE L. FAMOUS,

Petitioner,

v.

SUSAN NOVAK,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No. 10-C-707

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that the petition is DENIED as untimely and this action is DISMISSED. A certificate of appealability will be DENIED.

Approved: s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

Dated: October 10, 2019

STEPHEN C. DRIES
Clerk of Court

s/ Mara A. Corpus
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RONNIE L. FAMOUS,

Petitioner,

v. Case No. 10-C-707

SUSAN NOVAK,

Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Petitioner Ronnie L. Famous, who is currently incarcerated at Columbia Correctional Institution, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that his state court conviction and sentence were imposed in violation of the Constitution. In 1998, Petitioner was convicted in Racine County Circuit Court of four counts of first-degree sexual assault of a child and one count of exposing a child to harmful material. He was sentenced to 168 years of confinement. On August 17, 2010, Petitioner filed his petition for federal relief under 28 U.S.C. § 2254. The case was originally assigned to Judge Clevert, who granted Petitioner's motion to stay the case on January 31, 2011, so he could exhaust his state court remedies. Upon Judge Clevert's retirement, the case was reassigned on December 19, 2018. On February 15, 2019, the court lifted the stay, screened the petition and ordered a response. On April 15, 2019, Respondent filed a motion to dismiss the petition as untimely. For the reasons that follow, Respondent's motion to dismiss will be granted and the case will be dismissed.

BACKGROUND

The sexual assault charges against Petitioner were based upon the allegations of V.B., who was ten years old at the time of the incident and eleven years old at the time of Petitioner's trial. The victim testified that, in May 1998, she and her family were at a house in which Petitioner and others resided. She stated that when she went in Petitioner's bedroom to try to calm her baby sister, Petitioner entered the room with a television and VCR, barricaded the door with a dresser, showed her a sexually explicit video, and sexually assaulted her. When the victim's younger brothers banged on the bedroom door, Petitioner removed the barricade and the victim went downstairs.

ANALYSIS

Respondent has filed a motion to dismiss the petition as untimely. As an initial matter, Petitioner asserts that Respondent has waived the statute of limitations defense by not raising it when the petition and motion for stay and abeyance were originally filed in 2010. But a respondent to a habeas petition is not required to respond to the petition until after the court screens the petition and orders a response. *See* Rule 4, Rules Governing § 2254 Cases ("If it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time . . . ."). In this case, the court screened the petition on February 15, 2019, and directed Respondent to either file an appropriate motion seeking dismissal or answer the petition within 60 days. Respondent subsequently filed the instant motion to dismiss on April 15, 2019. In short, the court finds that Respondent has not waived the statute of limitations defense and will consider the merits of the motion.

The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year statute of limitations for filing a habeas petition in federal court. A state prisoner seeking federal relief under 28 U.S.C. § 2254 must generally file his petition within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

Petitioner was convicted of the charges following a November 1998 jury trial, and he subsequently pursued a direct appeal of his conviction. The Wisconsin Court of Appeals affirmed his convictions in 2001, and the Wisconsin Supreme Court denied Petitioner's petition for review on November 27, 2001. Because Petitioner did not file a certiorari petition in the United States Supreme Court, the one-year statute of limitations period began running on February 25, 2002. As a result, Petitioner had one year, until February 25, 2003, to file a federal habeas petition challenging his conviction and confinement. Petitioner did not file his federal habeas petition until August 17, 2010, well after the one-year limitation period had run. Therefore, Petitioner's federal habeas petition is untimely.

Petitioner asserts that his petition is not time-barred for three reasons: (1) Petitioner is actually innocent; (2) the institutional law library does not maintain a copy of the AEDPA statutes and he was unaware of the time limitations; and (3) a combination of ineffective assistance of appellate counsel, Petitioner's mental health issues, and prison conditions warrants equitable tolling. The court will address each argument in turn.

A. Actual Innocence

Petitioner asserts that he can avoid his procedural default because he is actually innocent. He has provided affidavits created in 2013 from his "alibi" witnesses—Lynette Famous, Petitioner's

niece, and Rosie Kelly, an individual that resided in the same house as Petitioner. Lynette Famous and Kelly assert that they would have testified at trial that Petitioner could not have barricaded V.B. into his bedroom with the television because Kelly, V.B., and V.B.'s siblings were watching the television in the living room, but Petitioner's trial counsel did not want them to testify. Petitioner also discusses the October 2005 affidavit from Charles Famous, his father, and the November 2001 affidavit of Candice Streeter, who both allege that the victim told them in 1999 that Famous "did not do anything to her." Dkt. No. 53-1 at 2.

"The actual innocence gateway is narrow." *Gladney v. Pollard*, 799 F.3d 889, 895 (7th Cir. 2015). A petitioner's procedural default can be excused only if he presents new and reliable "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free from nonharmless constitutional error." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Petitioner must show 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) (quoting *Schlup*, 513 U.S. at 327). "[B]ecause an actual-innocence claim involves evidence the trial jury did not have before it," the habeas court must assess "how reasonable jurors would react to the overall, newly supplemented record." *Jones v. Calloway*, 842 F.3d 454, 461 (7th Cir. 2016) (internal quotation marks omitted).

Petitioner's affiants do not have the credibility necessary to open the actual innocence gateway. *See McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (directing courts to consider "the timing of the submission and the likely credibility of [a petitioner's] affiants" in assessing the reliability of actual innocence evidence). In evaluating reliability, the identity of the affiant and his or her relationship to the petitioner matters. Indeed, the testimony of new witnesses who had "no

evident motive to lie" stands in stark contrast to testimony "from inmates, suspects, or friends or relations of the accused." *House*, 547 U.S. at 552; *see also Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005) (describing reliable evidence for the purpose of the actual innocence exception as the testimony of "some non-relative" who could provide a corroborated alibi); *Jackson v. Ramos*, No. 08 CV 7413, 2010 WL 4363204, at *12 (N.D. Ill. Oct. 27, 2010) ("The affidavits of two co-defendants and family members are not the type of 'trustworthy eyewitness accounts' envisioned by *Schlup* . . . ."). Rather than being reliable and disinterested witnesses, the affiants are Petitioner's family members, house mate, and friend who have a motivation to lie.

The district court may also "consider how the timing of the submission . . . bear[s] on the probable reliability of that evidence." *House*, 547 U.S. at 538; *McQuiggin*, 569 U.S. at 399 (noting that "unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing"). In this case, both affidavits of the alibi witnesses were obtained fifteen years after the 1998 trial, and the affidavits of Petitioner's father and Candice Streeter were obtained two years after the victim allegedly told them that Petitioner did not rape her. Petitioner has not explained the lateness of obtaining these affidavits. In short, Petitioner has not met the high hurdle that he must in order to establish actual innocence. Therefore, the court cannot excuse the untimeliness of the petition on this basis.

The state court postconviction proceedings offer further reasons for concluding Petitioner's showing falls short. According to the Wisconsin Court of Appeals' decision affirming the circuit court's order denying Petitioner's motion for postconviction relief based on ineffective assistance of postconviction counsel, Petitioner failed to establish that he ever told his attorney of his "alibi witnesses." Postconviction counsel testified that he filed a postconviction motion that resulted in

resentencing, and then filed a direct appeal. Postconviction counsel stated that before filing the motion, he discussed the case with Petitioner and retained an investigator. He recounted several issues he discussed with Petitioner but testified he did not recall Petitioner telling him that his trial attorney had engaged in retaliatory conduct, told the fact witnesses that their testimony would only harm Petitioner, or told him that the fact witnesses refused to testify. Had Petitioner told him any of these things, postconviction counsel testified he would have investigated further. *State v. Famous*, No. 2016AP1175, 2018 WI App 62, ¶ 8, 384 Wis. 2d 270, 921 N.W.2d 17. Given this history, there is no reason to excuse Petitioner's procedural default on the ground of actual innocence.

B. Equitable Tolling

Petitioner argues that he is entitled to equitable tolling because his appellate counsel, prison officials, the state courts, and his mental illness prevented him from timely filing his petition. Equitable tolling is an "extraordinary remedy that is 'rarely granted.'" *Carpenter v. Douma*, 840 F.3d 867, 870 (7th Cir. 2016) (quoting *Obriecht v. Foster*, 727 F.3d 744, 748 (7th Cir. 2013)). "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.'" *Socha v. Boughton*, 763 F.3d 674, 683 (7th Cir. 2014) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). The petitioner has the burden to establish both elements, and if the petitioner fails to do so, "equitable tolling will not be applied." *Carpenter*, 840 F.3d at 870 (citations omitted).

Petitioner asserts that the limitations period should be tolled because the prison law library failed to provide him with a copy of the AEDPA statute and he lacked knowledge of the limitations

period as a result. He requests that he be allowed to complete discovery to fully develop the factual record that would demonstrate that the law library did not give him a copy of the AEDPA statute during his appeal process. A petitioner's ignorance or misunderstanding of the law does not rise to the level of extraordinary circumstances necessary for equitable tolling. *See Carpenter*, 840 F.3d at 872 (holding that "lack of legal training" is not an extraordinary circumstance); *see also Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006) ("Mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting invocation of the doctrine of equitable tolling." (citation omitted)). Accordingly, this does not warrant applying the doctrine of equitable tolling to his case, and Petitioner's request to conduct discovery is denied.

Petitioner argues that his appellate counsel, Attorney Mark Rosen, prevented him from preparing and filing a timely habeas petition. The Wisconsin Supreme Court denied Petitioner's petition for review on November 27, 2001. Although Petitioner claimed he made many attempts to obtain his legal file from Rosen, Petitioner did not receive his case file until June 28, 2005. Petitioner argues he was unable to file a habeas petition until he received the case file. Even if the ADEPA deadline should have been tolled until Petitioner received his case file, Petitioner did not file the petition until August 17, 2010, over five years later. In short, Petitioner has not established that he diligently pursued his legal rights once he received his case file. Accordingly, any delay in receiving the file does not warrant equitable tolling.

Petitioner further asserts that the doctrine of equitable tolling applies because his history of mental illness prevented him from filing a timely petition. He claims he suffers from several severe disorders, including delusional disorder, paranoid personality disorder, and depressive disorder, that cause Petitioner to lose touch with reality. Dkt. No. 53 at 21. The medical records submitted by

Petitioner do not support his claim of mental illness sufficient to invoke the doctrine of equitable tolling. Although a November 14, 2013 referral for on-site health services notes that Petitioner has a "long [history] of psychotic symptoms and delusional beliefs," Dkt. No. 64-1 at 17, a July 21, 2009 psychological services clinical contact note stated that Petitioner's thought processes were "well-organized and did not show signs of loose associations, neologisms, or derailment that would be characteristic of thought disorder/psychosis," that Petitioner's "functioning is not noticeably impaired," and that Petitioner "himself does not believe he has any type of mental health issue." Dkt. No. 53-1 at 26–27. None of the medical records submitted suggest that Petitioner was incapable of filing and preparing a habeas petition from 2002 through 2010. Stated differently, there is no evidence that Petitioner was incapable of acting upon his legal rights during the limitations period.

Petitioner also argues that his inability to obtain his legal papers from his jailhouse lawyer when that inmate was transferred to another institution warrants equitable tolling. Petitioner contends that he sent his legal materials to the inmate in July 2005 and did not receive them until April 2007. It is well established that an inmate's decision to enlist the help of a jailhouse lawyer does not warrant equitable tolling because inmates do not have a constitutional right to the assistance of counsel in habeas corpus proceedings. *See Socha*, 763 F.3d at 685; *see also Sturdivant v. Butler*, No. 15-cv-9405, 2016 WL 7324566, at *3 (N.D. Ill. Dec. 16, 2016) ("[E]quitable tolling is not warranted where a petitioner entrusts his legal papers to another inmate and, through a housing transfer, loses access to them."); *United States v. Cicero*, 214 F.3d 199, 205 (D.C. Cir. 2000) ("[The petitioner] entrusted [the jailhouse lawyer] with his legal documents at his peril."); *Paige v. United States*, 171 F.3d 559, 561 (8th Cir. 1999) (noting that equitable tolling is not

available to prisoner whose petition, prepared by an inmate in a different institution, was delayed in the mail). As a result, he is not entitled to equitable tolling for his delay in obtaining his legal material from his jailhouse lawyer. Petitioner has therefore failed to demonstrate that he is entitled to equitable tolling.

CONCLUSION

Petitioner allowed the one-year statute of limitations period for federal habeas review to lapse. The circumstances of this case do not allow him to take advantage of statutory or equitable tolling. Accordingly, Petitioner's habeas petition is time-barred and must be dismissed. Respondent's motion to dismiss (Dkt. No. 49) is therefore **GRANTED**. Petitioner's motion for verification of mental health records (Dkt. No. 54) is **GRANTED**. Petitioner's motions to dismiss Respondent's motion to dismiss and to decide Respondent's motion to dismiss without the benefit of Respondent's reply brief (Dkt. Nos. 60, 61) are **DENIED**.

Under Rule 11(a) of the Rules Governing Section 2254 Cases, the court must consider whether to issue a certificate of appealability. A court may issue a certificate of appealability only if the applicant makes a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). The standard for making a "substantial showing" is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The court concludes that its decision is neither incorrect nor debatable among jurists of reason. Accordingly, a certificate of appealability will be denied.

The Clerk is directed to enter judgment denying the petition as untimely and dismissing the action. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. *See* Fed. R. App. P. 3, 4. In the event Petitioner decides to appeal, he should also request that the court of appeals issue a certificate of appealability. Fed. R. App. P. 22(b).

SO ORDERED this 10th day of October, 2019.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

STATUTORY ADDENDUM

Table of Contents

Statutes

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

28 U.S.C. § 2244. Finality of determination

* * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody

pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * *

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

CERTIFICATE OF SERVICE

I certify that on, March 12, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Hannah Mullen
Hannah Mullen