IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 17-3624

BILL CONROY,
Petitioner-Appellant,

vs.

KAREN JAIMET,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois
The Honorable David R. Herndon, Presiding
Case No. 16-cv-00338

Brief of Petitioner-Appellant

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Appeal No. 17-3624

BILL CONROY,	)	
	)	
Plaintiff-Appellee	)	
	)	Case No. 16-cv-00338
vs.	)	
	)	
KAREN JAIMET,	)	
	)	
Defendant-Appellant	)	

CERTIFICATE OF INTEREST

1. Petitioner-Appellant's name is Bill Conroy (hereafter "Appellant Conroy" or "Appellant").

2. Appellant is not a corporation.

3. Assistant Federal Public Defender Todd M. Schultz states that he is the attorney for Petitioner-Appellant in this case and the only attorney expected to appear for Petitioner-Appellant in this case.

Respectfully submitted,

s/ Todd M. Schultz

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JURISDICTIONAL STATEMENT

On May 8, 2007, the Circuit Court of Cook County, Illinois, convicted Appellant Conroy of solicitation of murder for hire (two counts) and attempted first degree murder, and sentenced Appellant to a total of thirty years imprisonment, for which Appellant is currently incarcerated in Pinckneyville Correctional Center. On March 28, 2016, Petitioner filed a Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus relief. (Doc.[1] 1). Defense Counsel filed an Amended § 2254 Petition on July 10, 2017. (Doc. 16). On December 12, 2017, the District Court entered a final order finding Appellant's petition was untimely, rejecting his claim that he was entitled to equitable tolling, and dismissing his petition with prejudice; the District Court also declined to issue a certificate of appealability. (Docs. 26, 28). On December 22, 2017, Appellant filed a Notice of Appeal from the District Court's final judgment of December 12, 2017. (Doc. 28). On July 9, 2018, this Court granted a certificate of appealability in Appellant's case.

The District Court had jurisdiction pursuant to 28 U.S.C. § 2254. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

[1] "Doc." refers to documents in the District Court's electronic filing system for the underlying case, #16-cv-00338-DRH-CJP, in the United States District Court for the Southern District of Illinois.

STATEMENT OF ISSUES

1. Whether Appellant's attorney in his underlying state criminal case was ineffective for not arguing, in the competency proceedings, that the state psychologist's evaluation revealed that Appellant did not meet the fitness standard articulated by the Supreme Court in *Drope v. Missouri*, 420 U.S. 162, 172 (1975), and *Dusky v. United States*, 362 U.S. 402, 402 (1960), where the record demonstrated that, at the time of the plea proceedings, he was unable to "consult with his lawyer with a reasonable degree of rational understanding." *Drope*, 420 U.S. at 172.

2. Whether the District Court abused its discretion in finding Appellant's mental conditions and other deficiencies did not entitle him to equitable tolling of the one-year limitations period governing § 2254 petitions, where this Court has found that mental conditions can equitably toll a statute of limitations "but only if the illness *in fact* prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them" (*Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016), *cert. denied*, 137 S.Ct. 2300 (2017) (internal quotation marks omitted)), and where this Court also holds that, to make this showing, a petitioner must show "[s]omething more than but-for causation." *Davis v. Humphreys*, 747 F.3d 497, 500 (7th Cir. 2014).

STATEMENT OF THE CASE

A. Criminal Case. On July 9, 2004, Appellant was indicted in the Circuit Court of Cook County, Illinois, on two counts of solicitation of murder (720 ILCS 5/8-1.1(a)), two counts of solicitation of murder for hire (720 ILCS 5/8-1.2(a)), and one count of attempted first degree murder (720 ILCS 5/8-4; 720 ILCS 5/9-1); the offense conduct was alleged to have taken place between December 16, 2003 and June 15, 2004. On November 18, 2004, a second indictment charged Appellant with additional offenses based on conduct alleged to have taken place between October 12, 2004 and October 29, 2004: three counts of solicitation of murder, three counts of solicitation of murder for hire, and three counts of attempted first degree murder.

On December 8, 2005, and January 4 and 6, 2006, the Cook County court held a competency hearing, which included testimony from two State experts and one Defense expert. At the conclusion, the court found Appellant fit to stand trial. (Doc. 16-1, 17, 18). On May 8, 2007, Appellant entered a negotiated plea of guilty to four of the counts: three counts of solicitation of murder for hire, and one count of attempted first degree murder. The remaining counts were dismissed. Appellant was sentenced to twenty years on each solicitation count, to run concurrently, and ten years on the attempt count, to run consecutively to his twenty-year terms. He was represented by a Cook County Public Defender. (Doc. 16-2). No direct appeal was filed.

B. State post-conviction filings. On May 21, 2009, Appellant, pro se, timely filed a post-conviction petition in Cook County. 725 ILCS 5/122-1(c) (Setting a deadline of 3 years from the conviction if no direct appeal is filed). His various claims included that his guilty plea was not knowing and voluntary because he was incompetent and illiterate. He requested appointment of counsel, which the court denied on July 24, 2009. (Doc. 16-3).

On July 24, 2009, the Cook County court dismissed the petition without a hearing, stating, *inter alia*, Appellant could not show his plea was involuntary because he was admonished before accepting the plea, cited no outside evidence, and never tried to withdraw it; moreover, failing to raise the issue on direct appeal waived it. (Doc. 16-4).

On August 12, 2009, Appellant appealed the summary denial of the post-conviction petition. The Illinois Public Defender was appointed and raised only two constitutional claims: Appellant's plea was involuntary because he was misinformed about one of the charges, and the judge's participation in the plea negotiations were coercive. On May 13, 2011, the Illinois Appellate Court affirmed, finding, *inter alia*, the claim of misinformation was lacking a factual basis, the claim about the judge's participation lacked a legal basis, and neither was bolstered by affidavits, records, or other evidence. (Doc. 16-5; *People v. Bill Conway a/k/a Bill Conroy*, 2011 WL 9717459 (Ill. App. 2011) (unreported)).

On February 4, 2014, Appellant filed a pro se Petition for Relief from a Void Judgment, a House Bill Sentence Reduction Motion, and motions for appointment of counsel and to proceed in forma pauperis. His Petition for Relief alleged violations of the Illinois Constitution and that the statute of conviction was unconstitutional. His Sentence Reduction Motion alleged, inter alia, ineffective assistance and incompetence at the time of his plea. A February 11, 2014 docket entry notes "prose petition dismissed." (Docs. 24-4, 24-5).

C. 28 U.S.C. § 2254 proceedings. On March 28, 2016, Appellant filed a 28 U.S.C. § 2254 Petition, alleging 1) his mental capacity and background left him unable to understand the consequences of his guilty plea, 2) although his petition was late, he was unaware of the time limits, had no one to assist him, and cannot read or write. (Doc. 1). On April 22, 2016, the Federal Public Defender was appointed to file an amended petition, including a statement of the

grounds for relief he intends to bring in his federal *habeas case*, a statement of whether he has exhausted those claims, and if he has not, an explanation of good cause for his failure. (Doc. 4).

On July 10, 2017, Defense Counsel filed an amended petition. He asserted equitable tolling should excuse Appellant's late filing of his petition, based on Petitioner's incompetence, mental illness, cognitive limitations, inability to communicate with and relate to others, and his illiteracy. He cited case law supporting equitable tolling premised on such conditions, "if the illness in fact prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them." (Doc. 16, p. 13-18).

Defense Counsel noted Appellant had no daily record of his fluctuating mental health conditions leading up to the filing of his § 2254 petition. Nor could Appellant recount the events leading him to be able to file, with assistance, his 2009 state court petitions. However, Appellant's affidavit, prepared with the assistance of his cell mate, explained he cannot read or write well enough (without assistance) to be understood, and he feels a division between himself and others, upon whom he relies for legal help. He is also incapable of effectively communicating his thoughts, and does not understand his legal situation. With these limitations, he is generally unable to get help from the prison law library staff, who does not have the time to figure out what he is trying to say. He also has no money for prison lawyers, and his medications and emotional problems have prevented him from being able to seek help from other prisoners, resulting in his untimely filing. (Doc. 16, p. 18-19, Doc. 16-6).

Defense Counsel also submitted Appellant's mental evaluations in his criminal case, transcripts of expert testimony, prison mental health and education records, and Appellant's ex-fiance's statements regarding his limitations prior to his arrest. (Docs. 16-7, 16-8, 16-9, 17-19). Referencing those records, Defense Counsel noted the State's primary expert in the underlying

criminal case, Dr. Neu, concluded Appellant was fit to stand trial. Dr. Neu assessed Appellant's IQ at 59, although he suspected malingering, although two malingering tests he gave were inconclusive. He confirmed Appellant "does appear to have some legitimate cognitive problems [and] there is evidence of some degree of receptive and expressive language impairment." (Doc. 16 p. 19).

Dr. Neu found Appellant had other limitations, as set out in the amended petition,

> Dr. Neu also found Petitioner had personality problems that negatively affected his interaction with his attorney. (Exh. 7, Neu Dec. 6, 2004: Petitioner "was likely to behave in an oppositional manner towards defense counsel . . . due to maladaptive personality traits."). Dr. Neu said Petitioner's behavior fit a diagnosis of "antisocial personality disorder." However, Dr. Neu indicated that these problems could not affect his opinion on Petitioner's competency to stand trial, because they were not classified as a "mental illnesses." (Dec 8, 2005 tr p. 92-97).
>
> He further explained:
>
> > [T]hese were comments that were reflective of a hostile, oppositional, cynical personality and that they were completely volitional . . . [i]f a person chooses to not cooperate with defense counsel, that is irrelevant to the issue of fitness . . . People with as I had diagnosed him with, antisocial personality disorder tend to take on the mantra about the world . . . it's a type of cynical hostile-type of personality that leads people to be suspicious of other peoples'motives not due to delusions but due to their personality mind set . . . The only way that [hostile behavior toward Defense Counsel] would impact my opinion would be if I believed due to a mental illness or defect that was what was producing the defendant's hostility and mistrust of defense counsel. I do not believe one bit that a mental illness or defect is causing those beliefs, but I feel that it's simply the defendant's personality that is causing those beliefs. *Id.*

(Doc. 6, p. 19).

The petition noted the State's second expert, Dr. Selzberg, did not believe Appellant was malingering, did not perform any testing, but also found Appellant competent. She opined he sufficiently understood the duties and roles of his lawyer and the judge, partly because he had

reported getting some information about his charges from the law library, and expressed an interest in looking at his discovery. (Doc. 16, p. 20).

The petition recited the findings of Dr. Fields, the defense's competency expert, finding Appellant unfit for trial, partly based on testing showing "significant problems processing verbal information effectively." Dr. Fields reported Appellant performed poorly on a test designed to measure fitness for trial, and testing showed him to have a "very limited level intellectually," with an IQ of 63, within the mildly mentally retarded range. He also found Appellant had significant depression and other emotional problems, and had been mostly in isolation for the previous 1.5 years. Objective testing showed Appellant was not malingering. (Doc. 16, p. 21).

Dr. Fields also opined Appellant may have antisocial personality disorder, causing difficulty in his relating to and trusting others, and controlling his impulses. Dr. Fields also noted Appellant reported hearing voices since he was a teenager. His diagnosis was Axis I major depressive disorder, cocaine dependence, alcohol dependence, rule out schizo-effective disorder depressive type, mild mental retardation, provisional, and personality disorder, including antisocial, paranoid, and borderline features, all of which impaired Appellant's fitness for trial. Dr. Fields also found Appellant had significant emotional limitations, intellectual limitations, and confusion in processing information. (Doc. 16, p. 21).

The petition referenced Appellant's IDOC mental health records (Doc. 19) demonstrating persistent difficulties communicating, maintaining emotional stability, and relating to others:

> as far back as October 2007, while in Menard Correctional Center, Petitioner was diagnosed with and treated for schizoaffective disorder, depressive type. An October 4, 2007 social work note shows Petitioner was referred by the counseling staff because of suicidal thoughts, related to the impending death of his son, who had been ill since birth. Petitioner was noted to have "poor insight and judgment," and was diagnosed with depression, and schizoaffective disorder, depressed type, with a history of borderline intellectual functioning. (Exhibit

IDOC MH p. 112-116). Later that month, Petitioner reported the devil had been talking to him for 22 years, and he was depressed because his mother had died, and now his son was dying. His affect was "anxious, somewhat," and "Speech is difficult to understand at times because of his speech impediment." (Exhibit IDOC MH p. 107).

An November 16, 2007 note, following the death of Petitioner's son, records a diagnosis of adjustment disorder with depressed mood-resolved, and borderline intellectual functioning. On December 20, 2007, Petitioner reported still hearing voices. On January 11, 2008, he reported his medications were not working, and he still experienced nervousness, paranoia, and trouble sleeping; his GAF was 60. A January 24, 2008 note indicates Petitioner reported still hearing voices, which told him to get into trouble. On February 5, 2008, he reported he could not concentrate, and heard voices telling him to kill himself. He was noted to have "active psychosis." (Exhibit IDOC MH p. 100-107).

A March 6, 2009 note says "I/M stated that he usually stays in his cell and watches television in order to 'stay out of trouble.' I/M has cellie who helps him with reading and writing." An October 24, 2009 note says, "I/M states that he is not sleeping . . . I/M does not read or write, has difficulty who will help . . . I/M's mood and affect are anxious . . .." (Exhibit IDOC MH p. 71-81).

A May 18, 2010 Pinckneyville note said Petitioner had transferred from Menard in March, 2010, and had limited educational abilities and marginal skills. His mental health issues were described as "chronic," and his diagnosis was schizoaffective disorder. (Exhibit IDOC MH p. 61-62). A note from November 12, 2010 indicated Petitioner's insight, judgment and mood were "poor," and he had thoughts of hurting his cellmate. A note from January 27, 2011 records a diagnosis of depression and antisocial personality disorder. The note indicates he was angry with other inmates making fun of his speech impediment, was thinking of assaulting one or more of them, was sleeping only a couple of hours a night, and that his "insight and judgement are impaired." His diagnoses was depressive disorder and antisocial personality disorder. (Exhibit IDOC MH p. 56-60, 65).

Notes from a year later, February 2012, indicate Petitioner was experiencing paranoia, anger, and reported hearing voices. His judgment and impulse control were assessed as "poor." He continued to report paranoia two months later. Other notes regarding Petitioner's treatment for an ankle fracture around the same time list a history of antisocial personality, borderline intellectual functioning, and depressive disorder. Another note lists his diagnosis as bipolar disorder with psychotic features. The notes further indicates he had a speech impediment, and difficulty communicating. (Exhibit IDOC MH p. 53-58). An August 16, 2012 note reports Petitioner had a "somewhat sluggish, unsophisticated demeanor. Poor eye contact. Poverty of speech, likely undereducated. Coping w/ long sentence . . .." His diagnoses were listed as "mood d/o", "ASPD," and "Borderline Intellectual Functioning." His GAF score was assessed as 70. Notes from the remainder of 2012 indicate Petitioner's mood

> and insight improved later in the year, with medication adjustments. (Exhibit IDOC MH p. 50-52).
>
> 2014 notes record a segregation placement on April 11, 2014. A May 22, 2014 note recorded Petitioner presented depressed and anxious; he was tearful and had visual and auditory hallucinations. A June7, 2014 note indicates Petitioner reported gangs were after him for owing them money and soap. His speech impediment and inability to read or write were again noted. By October 29, 2014, Petitioner reported losing his job because of his psychotropic medications. Also, he was hearing voices telling him to escape. On January 6, 2015, Petitioner presented "somewhat apathetic, unmotivated," and noted his depressive profile. On March 5, 2015, he reported still not sleeping well and having no appetite; it was again noted he could not read or write. On May 1, 2015, Petitioner reported hearing voices again. On June 4, 2015, he reported he still could not sleep. On August 19, 2015, Petitioner again reported hearing voices. (Exhibit IDOC MH p. 18-45).
>
> A December 31, 2015 mental health evaluation indicates Petitioner tried to hang himself in Menard in 2008, frequently heard the devil's voice, and could not recall the medications he was taking. The evaluation noted, "I/M appears to have cognitive delays." Another note from the same day reports Petitioner said, "I'm doing okay but the voices won't go away. I can't ignore them. I think it's the devil talking to me." (Exhibit IDOC MH p. 15-28).

(Doc. 16, p. 21-24).

Appellant's IDOC education records showed in May, 2011, Appellant failed to meet the threshold for having a Sixth Grade skill level, in an assessment of basic education needs. After 90 days of instruction, he scored at a grade 2.1 level for vocabulary, grade 2.1 level for reading comprehension, grade 4 for comprehension, and grade 3.4 for math. (Doc. 16, p. 24).

The petition recited results of a Federal Public Defender investigator's interviews with Appellant and his ex-fiance: Appellant went to "special schools," where he performed poorly and did not learn to read or write. While incarcerated, he paid other inmates to help him with legal documents, but his only funds were a monthly $10 commissary credit. Appellant's cell mate drafted his *pro se* § 2254 petition for free, because either he likes him or feels sorry for him. Appellant usually can find someone to write letters to his family from him for free. His ex-fiance confirmed any letters she received from him were not written by him, since the

penmanship was too neat, and Appellant is not capable of composing an intelligible letter. She also reported she used to manage Appellant's paperwork before he was arrested, because of his limited literacy and inscrutable penmanship. (Doc. 16, p. 24-25).

Defense Counsel argued that these facts and history demonstrate Appellant's trial counsel's performance fell below an objective standard of reasonableness and that deficiency was prejudicial. Dr. Neu recognized Appellant suffered from, *inter alia*, a "personality disorder," which negatively affected his interaction with his attorney. However, Dr. Neu disregarded the effects of this condition in determining competence, explaining he did not classify a personality disorder as a "mental illness." Appellant's trial counsel argued Appellant's personality disorder was a "mental disease or defect," but did not argue that the Supreme Court's competency standard clearly did not require a mental condition to be a "mental disease or defect," nor that Dr. Neu's opinion was flawed for failing to consider the effects of Appellant's personality disorder. Trial counsel's deficient performance resulted in a finding of competency based on a standard inconsistent with Supreme Court precedent and in a guilty plea that was not knowing and voluntary. The trial court's determination of competency based on an expert opinion that was clearly inconsistent with Supreme Court standards was error "beyond any possibility for fairminded disagreement." In addition, the trial court's competency determination ignored the clear and convincing weight of the evidence, when viewed in the context of the Supreme Court's competency standard. (Doc. 16, p. 27-32).

On July 18, 2017, the District Court found Appellant sufficiently raised arguments regarding timeliness, and other procedural issues to survive preliminary review; the District Court ordered "a Response so that it may consider the issues raised by the Petition, and any other issues Respondent would like to raise, on a more developed record." (Doc. 20).

Respondent filed a Motion to Dismiss on August 17, 2017, on the sole ground of untimeliness, asserting June 7, 2008 was the last day for filing, making Appellant's March 2016 petition eight years late. 28 U.S.C. § 2244(d)(1)(A). (Doc. 24 p. 1-7). Respondent asserted Appellant "has not shown a mental impairment of such an extraordinary nature that it actually prevented him from filing a timely habeas petition," and he failed to demonstrate "how his eight-year delay could reflect the diligent pursuit of his habeas claims." (Doc. 24 p. 7-8). Respondent noted Appellant "was able to file multiple, coherent (albeit, meritless) pro se state collateral attacks." In addition, in his original petition, Appellant attributed his late filing to his being "unaware of time limits." Also, inability to write does not justify tolling where a petitioner is able to find assistance in filing pleadings. *Montenegro v. United States*, 248 F.3d 585, 594 (7th Cir. 2001); (Doc. 24, p. 9-11). Respondent cited Dr. Seltzberg's conclusion, with no testing, Appellant understood the charges against him and the nature of the proceedings and was able to assist in his defense, and Dr. Neu's conclusion that Appellant's thoughts were organized and coherent, and that Appellant was malingering. (Doc. 24, p. 12-13).

Respondent further argued Appellant overstated his impairments by referencing his self-reports about his mental state over the years, rather than prison staff observations about his thought processes. Also, Appellant's diagnoses of schizoaffective disorder and depression do not show these disorders "in fact" prevented him from timely filing, nor did his low IQ or reading level. Respondent stated "cumulative consideration of these factors" failed to show Appellant faced obstacles that were "nearly insurmountable." Also, Appellant failed to show due diligence in pursuing his claims. (Doc. 24, p. 13-18).

Appellant replied that Respondent overlooked the fact that Appellant paid inmates to write his other prior *pro se* filings, and overlooked IDOC records showing Appellant's reading

and writing to be at a second grade level, his ex-fiance's report she managed his paperwork for him because Appellant was unable even to compose a letter, and the State expert's finding Appellant had some cognitive problems, including some degree of receptive and expressive language. In addition, Appellant's affidavit explained that, although he visited the law library, these visits were not fruitful because of his various limitations, and do not demonstrate an ability to understand the legal process. These facts contradict Respondent's speculation that Appellant directed or understood the content of his other *pro se* filings. (Doc. 25, p. 1-5).

Appellant pointed out being entitled to equitable tolling does not require a showing of complete insanity, such that his claim would be defeated by the observations of IDOC staff that Appellant was thinking clearly or showing insight on a particular day, and said his equitable tolling claim was based on a combination of difficulties, not merely his mental state. In addition, Appellant pointed out the measure of diligence is reasonable diligence, taking into account Appellant's particular impediments. (Doc. 25, p. 5-8).

On December 8, 2017, the District Court issued a Memorandum and Order granting Respondent's Motion to Dismiss, finding the time for filing a § 2254 petition expired June 7, 2008. (Doc. 26, p. 3). The District Court acknowledged mental incompetence can justify tolling if it "in fact" prevents an individual from understanding his legal rights and acting upon them, but concluded Appellant "has not shown he was incapable of understanding or acting upon his legal rights . . . the facts weigh strongly in favor of the opposite conclusion." (Doc. 26, p. 4-8). The District Court pointed to Appellant's other *pro se* filings, and that he did not claim his problems were worse during the limitations period. The court said although Appellant could not file a claim without assistance, many people cannot cope with the legal system. Also, Appellant previously found legal assistance and visited the law library, showing he "was capable of

understanding and acting upon his legal rights." (Doc. 26, p. 8-9). The court also found Appellant's IDOC records showed, during most of the limitations period, Appellant

> demonstrated logical and coherent thought processes, he was alert and oriented, and his psychiatrist opined his judgment and insight were fair . . . Petitioner was cognizant of his right to file the instant motion and even took steps toward doing so. He cannot show his mental conditions in fact caused his untimely filing and he therefore fails to show extraordinary circumstances impacted his ability to timely file his claim.

(Doc. 26, p. 9-10). The District Court concluded Appellant's reference to visiting the law library and asking for assistance was insufficient to demonstrate he diligently pursued his claim during such a lengthy period. (Doc. 26, p. 10-11). The District Court found it was beyond debate that Appellant's petition was time barred, and issued no certificate of appealability. (Doc. 26, p. 12).

On December 12, 2017, the District Court entered a final order dismissing Appellant's § 2254 petition with prejudice. (Doc. 27). On December 22, 2017, Appellant filed a Notice of Appeal from the December 12, 2017 final judgment. (Doc. 28). On July 9, 2018, this Court issued a certificate of appealability, to wit:

> We find that Conroy has made a substantial showing of the denial of a constitutional right . . . specifically as to whether trial counsel was ineffective for not arguing that the state psychologist's evaluation revealed that Conroy did not meet the fitness standard articulated by the Supreme Court in *Drope v. Missouri*, 420 U.S. 162, 172 (1975), and *Dusky v. United States*, 362 U.S. 402, 402 (1960). In particular, the parties should consider Conroy's ability during the plea proceedings to "consult with a lawyer with a reasonable degree of rational understanding," *Drope*, 420 U.S. at 172.
>
> We also find debatable Conroy's argument that his mental illness or deficiency entitles him to equitable tolling of the one-year limitation period governing § 2254 petitions. We have said that mental illness can equitably toll a statute of limitations, "but only if the illness *in fact* prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them" *Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016), *cert. denied*, 137 S.Ct. 2300 (2017) (internal quotation marks omitted). The petitioner must show "[s]omething more than but for causation." "Something more," however, is a question that we left open in *Davis* and that the parties should address here.

SUMMARY OF THE ARGUMENT

1. Appellant's trial counsel's performance fell below an objective standard of reasonableness, and, without his error, there is a reasonable probability the result would have been different. Appellant was evaluated by two State and one Defense competency experts. The primary State expert and Defense expert both found Appellant had some degree of cognitive impairment, including in language comprehension, and a personality disorder. They agreed the personality disorder affected Appellant ability to trust and relate to others, and both experts acknowledged Appellant expressed much hostility toward his trial attorney. However, the primary State expert, in finding Appellant competent, disregarded the influence of the personality disorder because he did not believe it met the classification for a mental disorder or defect. Trial Counsel failed to argue the Supreme Court's competency standard contained no such requirement. Because Appellant's personality disorder negatively impacted his ability to consult with his attorney and assist in his defense, and the Defense expert found Appellant incompetent based partly on this impediment, the trial court's finding of competency, in reliance on the State expert, would likely have been different, but for trial counsel's lapse.

2. The District Court abused his discretion in finding equitable tolling was not warranted. The District Court relied on clearly erroneous findings that Appellant was able to seek out legal assistance to file his § 2254 petition, based on cursory notations in his prison records that he appeared to be lucid and have good judgment at times, and based on his occasional ability to find assistance. Viewed in context, these factors do not overcome the strong evidence Appellant suffered from extraordinary circumstances that prevented him from timely filing his petition, and prevented him from seeking legal help. In addition, an evaluation of whether Appellant diligently pursued his rights should take into account his history of certain past efforts proving futile.

ARGUMENT

I. Appellant's attorney was ineffective for not arguing, in the competency proceedings, that the state psychologist's evaluation revealed Appellant did not meet the Supreme Court's fitness standard in *Drope v. Missouri*, 420 U.S. 162, 172 (1975), and *Dusky v. United States*, 362 U.S. 402, 402 (1960), where the record demonstrated that, at the time of the plea proceedings, Appellant was unable to "consult with his lawyer with a reasonable degree of rational understanding." *Drope*, 420 U.S. at 172.

A. Standards of Review.

This Court reviews *de novo* habeas issues the state courts did not reach on the merits. *Cone v. Bell*, 556 U.S. 449, 472 (2009).

B. Legal Standards.

A state prisoner may seek habeas relief "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The writ may not be granted unless adjudication of the claim on the merits "(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." 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court applies a rule different from the governing law as set out by the Supreme Court, or if it decides a case differently than the Supreme Court based on "materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

For an ineffective assistance claim, a defendant must show deficient performance of counsel and prejudice. *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S.Ct.1411, 1419, 173 L.Ed.2d 251 (2009). A petitioner must show his attorney's representation "fell below an objective standard of reasonableness," and that, but for counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. *Strickland v.*

Washington, 466 U.S. 668, 688, 694 (1984). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the likelihood of a different result must be 'substantial, not just conceivable.'" *Campbell v. Reardon*, 780 F.3d 752, 769 (7th Cir. 2015) (*quoting Harrington v. Richter*, 562 U.S. 86, 111-12 (2012)).

The failure of a competency expert to consider an individual's complete mental health history may undermine that expert's opinion as to competency, and thus undermine the conclusions of a judge relying on that expert's opinion. *See Brown v. Sternes*, 304 F.3d 677, 696–98 (7th Cir. 2002) (Trial counsel's failure to supply the competency expert with documentation of the defendant's mental health history "prejudiced his defense by providing the trial judge with less than reliable information . . . it is the imprecise and imperfect nature of the science known as psychiatry that makes a review of the past available psychiatric records an essential part of an evaluation of a defendant's competency to stand trial.").

The Supreme Court explains its competency standard, as follows:

> The two cases that set forth the Constitution's "mental competence" standard, *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam), and *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), specify that the Constitution does not permit trial of an individual who lacks "mental competency." *Dusky* defines the competency standard as including both (1) "whether" the defendant has "a rational as well as factual understanding of the proceedings against him" and (2) whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." 362 U.S., at 402, 80 S.Ct. 788 (emphasis added; internal quotation marks omitted). *Drope* repeats that standard, stating that it "has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." 420 U.S., at 171, 95 S.Ct. 896 (emphasis added).

Indiana v. Edwards, 554 U.S. 164, 169-70 (2008). Assistance must be *meaningful*, not just *meager*. *Newman v. Harrington*, 726 F.3d 921, 927–36 (7th Cir. 2013) (" A defendant's role in

assisting counsel in his own defense is to 'recognize and relat[e] relevant information to counsel and make the few trial-related decisions reserved for defendants (i.e., whether to plead guilty, whether to request a jury trial, whether to be present at trial, and whether to testify).'"

Competency focuses on an individual's "present" abilities. Mental illness, and thus competency, "can vary over time" and "interfere[s] with an individual's functioning at different times in different ways." *Edwards*, 554 U.S. at 175; *Burt v. Uchtman*, 422 F.3d 557, 568 (7th Cir. 2005) (same, *citing Drope*). The competency standard for pleading guilty is no higher than for standing trial. *Washington v. Boughton*, 884 F.3d 692, 702 (7th Cir. 2018) (citation omitted).

C. Argument.

The district court dismissed Appellant's 28 U.S.C. § 2254 petition, based only on untimeliness, the only procedural defense Respondent raised, and rejected Appellant's claim of procedural default. Hence, the District Court did not rule on Appellant's ineffective assistance or incompetency claim; nor did the state court. *See Johnson v. Williams,* 568 U.S. 289, 302 (2013) (defining judgment on the merits). However, an appeal of a district court's dismissal of a 28 U.S.C. § 2254 petition on a purely procedural ground also requires consideration of a petitioner's underlying claim of the denial of a constitutional right. *Ramunno v. United States*, 264 F.3d 723, 725 (7th Cir. 2001) ("Disputes about a petition's timeliness do not support an appeal unless a substantial constitutional issue lurks in the background, and the statutory question is independently substantial."); *Flores-Ramirez v. Foster*, 811 F.3d 861, 865 (7th Cir. 2016) (same).

Two State and one Defense expert evaluated Appellant for competency. The State's primary expert, Dr. Neu, concluded Appellant was fit to stand trial, even considering Appellant's IQ of 59, which Dr. Neu suspected was too low because of some malingering and education deficits, and considering that Appellant had "some legitimate cognitive problems [and] there is

evidence of some degree of receptive and expressive language impairment." (Doc. 16 p. 19). However, in determining competency, Dr. Neu admitted he excluded from his consideration Appellant's personality disorder and its effects, despite that Dr. Neu acknowledged Appellant's condition affected the way he related to other people, including his attorney:

> People with as I had diagnosed [Appellant] with, antisocial personality disorder tend to take on the mantra about the world, that it's a dog-eat-dog world, that people are just out there for themselves, you might as well take advantage of other people because they're trying to take advantage of you, so it's a type of cynical hostile-type personality that leads people to be suspicious of other people's motives not due to delusions but due to their personality mind set . . . I felt as though he was a cynical, mistrusting type person . . . he tends to in general mistrust other people.

(Doc. 18, p. 94-96).

Defense Counsel asked Dr. Neu whether, if Appellant believed his "lawyer is set against him," it would affect his fitness for trial. Dr. Neu answered, "The only way that would impact my opinion would be if I believed due to a mental illness or defect that was what was producing the defendant's hostility and mistrust of defense counsel. I do not believe one bit that a mental illness or defect is causing those beliefs, but I feel that it's simply the defendant's personality that is causing those beliefs." (Doc. 18, p. 97). Dr. Neu confirmed Appellant had expressed much hostility toward his lawyer, and had said his lawyer was working for the State to have him convicted, but dismissed this behavior as part of his cynical personality:

> He made similar comments towards the judge such as the judge wants to suck his dick; he said I was the Number One ass hole. He was making comments like that to everybody involved in the court, so I did not at all believe that those were literal comments that he believed, but I indicated in my evaluation that these were comments that were reflective of a hostile, oppositional, cynical personality and that they were completely volitional * * * There is a difference between what somebody with a personality disorder says and what they mean. When the defendant was making vulgar and profane comments about defense counsel, myself, the judge and the State's Attorney, he was not really meaning those or thinking literally those, he was just simply expressing his hostility.

(Doc. 18, p. 91-93).

During the argument portion of the competency hearing, trial counsel argued that, contrary to Dr. Neu's opinion, Appellant's antisocial personality disorder, resulting in his skewed world view and hostility, was a "mental disease" or defect; the State's attorney argued that antisocial personality disorder is not a disease or defect, as Dr. Neu believed, and thus was of no consequence for competency. (Doc. 16-1, p. 14-15, 19-21). Thus, Defense Counsel let stand unchallenged Dr. Neu's premise that a personality disorder and its effects could only affect an person's fitness for trial if it were classified as a "mental illness or defect."

Dr. Neu's refusal to consider the effects of Appellant's personality disorder in formulating his opinion about competency cannot be reconciled with the Supreme Court's standard for competency, that an individual must have a "rational as well as factual understanding of the proceedings against him," along with "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and the ability "to assist in preparing his defense." *Edwards*, 554 U.S. at169-70 (citations omitted). This well-established standard plainly includes no requirement that any underlying conditions impeding a defendant's abilities in these areas meet a particular technical classification for mental illness before the effects may be considered in evaluating competency. Despite this clear standard, Appellant's Trial Counsel failed to argue Dr. Neu's competency opinion was based on a stricter standard than that of the Supreme Court, resulting in an opinion that was unreliable.

Trial Counsel's lapse constituted ineffective assistance and was prejudicial. In *Brown v. Sternes*, 304 F.3d 677, 692–98 (7th Cir. 2002), this Court considered a similar situation, whether defense counsel was ineffective where he had reason to know sanity and competency were

genuine issues, but failed to supply court-appointed psychiatrists with available documentation regarding the defendant's mental health condition. In finding defense counsel's lapse fell below an objectively reasonable standard of performance, this Court explained the importance a complete record in formulating an expert opinion on competency, "it is the imprecise and imperfect nature of the science known as psychiatry that makes a review of the past available psychiatric records *an essential part* of an evaluation of a defendant's competency to stand trial." *Id*. at 696. This Court concluded defense counsel's lapse was prejudicial:

> we are convinced that Dr. Kaplan's lack of information concerning Brown's medical history renders his opinions on Brown's competency and sanity useless and unreliable * * * We disagree with the *Illinois Appellate Court's conclusion that Brown suffered no prejudice from counsel's error,* for we are of the opinion that the *prejudice is clear and readily apparent*. Because of *Brown's attorneys' failure to present evidence* of his *mental condition,* the court admitted, *without even a whisper of an objection from counsel,* the finding of *Dr. Kaplan* that *Brown was competent to stand trial and sane at the time he committed the crime.*

Id. at 698 (emphasis in original); *see also Burt v. Uchtman*, 422 F.3d 557, 566 (7th Cir. 2005) ("The relevant inquiry on the prejudice prong focuses on whether counsel's deficient performance renders the result of the trial unreliable or fundamentally unfair.").

It is true that, in Appellant's case, Dr. Neu possessed information regarding Appellant's personality disorder and its effects. However, in assessing Appellant's competency, Dr. Neu's opinion was just as infirm as if he never had been given that information. As he explained on cross-examination, he intentionally disregarded it in formulating his opinion. Although trial counsel told the court this information was important and should be considered, he did so only by arguing it fit into the classification of a mental illness or defect, adopting Dr. Neu's assertion that nothing else counts. He did not argue Dr. Neu's position conflicted with the Supreme

Court's competency standard. Thus, as in *Sternes*, trial counsel was ineffective, resulting in the trial court substantially relying on Dr. Neu's unreliable opinion that Appellant was competent.

Had trial counsel pointed out how Dr. Neu's opinion was based on an incorrect competency standard, the trial court's finding of competency was reasonably likely to have been different. First, Dr. Neu's testimony and report confirmed Appellant's personality disorder negatively affected his ability to consult with and assist his attorney. As recounted above, Dr. Neu testified Appellant's personality disorder made him suspicious of other peoples' motives, and he did not trust his lawyer and exhibited much hostility toward him. Dr. Neu's December 6, 2004 report asserted Appellant "is likely to behave in an oppositional manner towards defense counsel." Dr. Neu's March 20, 2006 report recounted Appellant "was initially cooperative during today's evaluation, but became increasingly oppositional and uncooperative as the evaluation progressed," eventually stopping the evaluation when he asked to see his lawyer.

Dr. Fields, for the defense, considered Appellant's personality disorder and effects, and explained the severe impact on his ability to cooperate with his attorney and assist in his defense:

> I mean being very leery of your public defender, not wanting to cooperate with the public defender, saying nasty things about them whatever it might be would certainly imply to me that there may be some significant problems in getting along with that public defender in helping to defend himself if he can't relate to the person trying to help him . . . [those things] would be consistent with somebody who has led a lifestyle like he has led, very limited structure in his life, intense trauma, very limited ability or desire to trust anyone, so he creates the kind of a shell around himself of significant distrust of the world around him with potential of all sorts of rather explosive impulse behavior, too.

(Doc. 17, p. 36-37).

The State's second expert, Dr. Seltzberg, performed no testing. She reviewed, but did not rely on, Dr. Neu's testing. She found Appellant adequately explained the roles of the judge, attorneys, and the jury, and gave "an accounting" of the allegations and some details, and some

plea bargain history. (Doc. 18, p. 12-55). Dr. Seltzberg did not address Appellant's personality disorder and effects, confirmed by Neu and Fields. Thus, her opinion does not refute that of Dr. Fields, the only expert to consider all available relevant information on competency.

The trial court noted the State's two experts, and summarily found Appellant competent, "for all the reasons that the State argued . . . he does understand the nature of the proceedings and that he can cooperate with counsel." (Doc. 16-1, p. 23). A challenge to Dr. Neu's opinion based on the Supreme Court's competency standard would have called his opinion into question, and the result was reasonably likely to have been different. Dr. Fields's incompetency finding would have carried more weight, as he, unlike Dr. Neu, considered all of the factors pertinent to Appellant's ability to consult with his lawyer with a reasonable degree of rational understanding, including Appellant's poor scores on peer-reviewed testing for fitness, his "significant problems processing verbal information effectively," and limited intellect, along with his personality disorder and other conditions. (Doc. 17, p. 14-24, 34-37, 41-45). As Dr. Field's explained:

> How can you be certain that he is really understanding and processing questions that you posed to him. Would he get this very confused and garbled, nodding his head and saying uh-huh, yes, or something is not an indication whether he has a real appreciation of what is going on let's say in a discussion between you and me.

(Doc. 17, p. 23). Appellant responded precisely in this manner during his guilty plea, mostly answering "yes," "no," "okay," or "alright," when prompted, with no meaningful inquiry to confirm his understanding was not hampered by his comprehension problems. (Doc. 16-2, p 6-18); *see Uchtman*, 422 F.3d at 565 (Admonishments to defendant during plea are of no consequence if he is unable to understand the proceedings). This record supports Appellant was unable to consult with his lawyer with a reasonable degree of rational understanding at the time of his plea proceedings because of his limitations, and was prejudiced by his attorney's lapse.

II. The District Court abused his discretion in finding Appellant's mental conditions and other deficiencies were not extraordinary circumstances that prevented him from understanding and acting upon his legal rights, as required for equitable tolling.

A. Standards of Review.

This Court reviews legal questions *de novo* and findings of fact for clear error. *Morris v. Bartow*, 832 F.3d 705, 709 (7th Cir. 2016) (citations omitted). This Court reviews a decision on equitable tolling for abuse of discretion. *Schmid v. McCauley*, 825 F.3d 348, 350 (7th Cir. 2016).

B. Legal Standards.

Equitable tolling of a habeas deadline requires a defendant to establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010). These requirements are construed with some flexibility, resistant to rigid rules, as noted in *Holland*:

> We have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946), we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 Led. 1250 (1944). The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid* (permitting postdeadline filing of bill of review) . . . Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Holland, 560 U.S. at 650 (rejecting a rule that attorney negligence can never justify tolling).

Diligence refers to reasonable diligence, not maximum diligence. *Id.* at 653. Diligence "covers those affairs within a litigant's control." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S.Ct. 750, 756 (2016). The extraordinary circumstance requirement applies "to

circumstances outside of the litigant's control." *Mayberry v. Dittmann*, --F.3d--, 2018 WL 4376884, at *3 (7th Cir. 2018) (citation omitted). In *Davis v. Humphreys*, 747 F.3d 497 (7th Cir.2014), this Court held mental incompetence may support equitable tolling, but declined to articulate "[w]hat sort of mental limitations justify tolling." *Davis*, 747 F.3d at 499–500. This Court since held a mental condition may toll a statute of limitations, "if the illness in fact prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them." *Mayberry*, 2018 WL 4376884, at *3. Even defendants capable of standing trial may have insufficient mental functioning to exercise their legal rights. *Edwards*,554 U.S. at 177-78 (Defendant competent to stand trial not be competent to conduct trial proceedings alone).

A litigant's combined circumstances may be "sufficiently extraordinary to prevent him from timely filing his petition." *Id.* (citations omitted). A "physical illness or other health issue could also justify equitable tolling if that issue was severe enough to actually prevent timely filing." *Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016). A defendant must show his "physical and mental health issues, even when combined with the other circumstances he classifies as extraordinary, actually impaired his ability to pursue his claims." *Id.*

A district court abuses his discretion in failing to hold a hearing where "a petitioner alleges facts, which if proven, would entitle him to relief." Mayberry, 2018 WL 4376884, at *4 (citation omitted). A district court abuses his discretion when, *inter alia*, his decision is based on clearly erroneous fact findings. *Walker v. Price*, 900 F.3d 933, 938 (7th Cir. 2018).

C. Argument.

The District Court found June 7, 2008 was the last day of Appellant's one-year period to file his § 2254 petition, which he filed in March of 2016. (Doc. 26, p. 2). Appellant conceded his petition was untimely, but argued for equitable tolling, based on incompetence, mental illness, personality disorder, cognitive limitations, inability to effectively communicate with and relate to others, illiteracy, and lack of funds to pay someone to assert his legal rights. (Docs. 16, 25, 26).

The District Court reviewed the competency experts' opinions, and information about their diagnoses. (Doc. 26, p. 4-6). The court also reviewed Appellant's IDOC mental health records, noting that, during the limitations period, Appellant was reported in monthly records to have appeared alert and oriented, with logical and coherent thoughts, and fair insight and judgment, and denied medication side effects; the court referenced noted from October 2007 through December 2008. The court listed various other details from those records. In October 2007, Appellant reported the devil had been talking to him for twenty-two years; he was diagnosed with schizoaffective disorder, and improved with medication later that month. The voices returned in November and December 2007, and he was diagnosed with adjustment disorder, depressed mood, and borderline intellectual functioning. In January 2007, Appellant reported feeling nervous and paranoid and was still hearing voices; his medications were changed. In February 2008, he heard a voice telling him to kill himself; it was noted he had attempted suicide five months prior. Appellant reported doing okay in March 2008, but still heard voices. (Doc. 26, p. 4-9; Doc. 19, p. 80-107).

The District Court found the periodic mentions of Appellant's clear thinking and good judgment in his IDOC records showed his conditions were not "extraordinary." The District Court also concluded Appellant did not show he was unable to understand or act upon his legal

rights, pointing to his 2009 filings of a post-conviction petition, a request for counsel, and an appeal of the petition's denial, his 2014 filings of a petition for relief of a void judgment, motion for house bill sentence reduction, in forma pauperis motion, and appointment of counsel motion, and his March 2016 § 2254 petition. The District Court found Appellant's inability to prepare legal documents without assistance was true of "many persons of normal intellect," falling short of an extraordinary circumstance. The court concluded Appellant clearly was capable of understanding and acting upon his legal rights in that "he sought out assistance from other inmates and visited the law library in pursuit of his § 2254," although these efforts were "insufficient to show diligence for such a lengthy period." (Doc. 26, p. 8-10).

The District Court's finding that Appellant's IDOC records, recording he was thinking clearly and had good judgment at various times, proved his circumstances were not extraordinary is clearly erroneous. These notes do not reflect any in depth assessment of Appellant on those occasions, but appear to be quick observations based on routine questions, as part of monthly medication checks. (Doc. 19 p. 80-110). These cursory references to Appellant's reported or observed abilities must be viewed in this context, and, thus, fall short of refuting the credible evidence of Appellant's severe cognitive limitations, his mental health issues, his difficulties communicating with and understanding others, and his difficulties relating to and trusting others. Because the District Court's inference that these records establish Appellant was generally clear thinking and coherent during the limitations period was unreasonable, the District Court's finding that these notes establish Appellant's circumstances were not extraordinary was clearly erroneous.

The District Court's finding Appellant was capable of seeking help to act on his legal rights (with assistance) is also clearly erroneous in light of credible evidence. Appellant

explained in his affidavit (prepared with his cell mate's help), "It has almost been impossible for me to obtain any kind of legal help that I could understand as there has always existed a division between myself and the people who did show intrest [sic] in helping and me not knowing how to communicate any thoughts as I really had no idea about my legal situation." He explained his law library visits were useless because the staff "don't have the time to figure out" what he is talking about. Also, he had no money for prison lawyers, and has mental and emotional problems, requiring medication, which are a "huge disadvantage." (Doc. 16-6).

Appellant's report that his problems prevented him from successfully seeking assistance is corroborated by the findings of Drs. Neu and Fields, discussed in Point 1, that Appellant suffered from a personality disorder, characterized partly by a mistrust of others. Also, Dr. Neu acknowledged Appellant has "some legitimate cognitive problems" and "some degree of receptive and expressive language impairment." Dr. Fields's testing showed Appellant had "significant problems processing verbal information effectively." (Doc. 16 p. 19-21). Dr. Fields explained it would be difficult to know if Appellant was comprehending in a conversation, since he was apt to simply say "yes," or something similar, when he does not understand. (Doc. 16-2, p 6-18).

Appellant's IDOC records also document conditions that would prevent him from effectively and successfully seeking help from other inmates, let alone act on his rights without assistance. In addition to noting problems with mood, sleep, and hearing voices off and on, the records contain numerous mentions of Appellant's illiteracy, speech impediment--for which he was sometimes mocked, and his conflicts with others. An October 2007 note says, "speech is difficult to understand at times because of his speech impediment." A September 19, 2008 note say "I/M has concerns about cellie—he states that they have been arguing for the past three

weeks." A March 2009 note records Appellant usually "stays in his cell and watches television in order to 'stay out of trouble.'" A January 2011 note records he was angry because other inmates were "making fun" of his speech impediment. A February 2012 note also mentions his speech impediment, and his difficulty communicating. An August 16, 2012 note reports his poverty of speech and sluggish demeanor; notes from 2014 also mention his speech impediment and inability to read or write. Numerous other notes mention his anxious and depressed mood, his difficulties getting along with others, and his hearing voices. (Doc. 16, p. 22-24, Doc. 19 pp. 15-45; 50-52, 56-6-, 65, 71-81, 84, 107).

In short, the District Court unreasonably interprets Appellant's occasional success in seeking help to act on his legal rights as an indication he was consistently capable of doing so, but chose not to. This inference is unreasonable and the court's finding clearly erroneous, in light of Appellant's well-documented difficulties communicating, comprehending, and relating to others. The only reasonable inference from Appellant's only occasional success is that his difficulties prevented him from successfully finding help sooner or more often. Appellant could ask for help all he wanted, but he could not do anything to improve his communication skills, because of his cognitive difficulties with regard to language documented by both Neu and Fields, and also because of his speech impediment, which made him difficult to understand, and the target of mockery. He could do nothing to improve the effects of his personality disorder.

Similarly, Appellant had no control over the personalities and patience level of prison staff and the individuals with whom he was incarcerated; it was simply a matter of luck that, in 2016, he happened to have a cell mate, someone he did not have to seek out, who was sufficiently patient to take the time to try to communicate with him, and who was sufficiently

sympathetic to draft his 2254 petition for him for free. This chance event is not probative of Appellant's ability to find legal assistance when he needs it.

Appellant notes that in *Davis v. Humphreys*, 747 F.3d 497 (7th Cir. 2014), this Court found incompetence may justify tolling, but left open the question, "what sort of mental limitations justify tolling," suggesting that an individuals who are unable to understand their charges and assist in their defense may justify tolling, but other circumstances may justify tolling as well. *Id*. at 500. More recently, in *Mayberry v. Dittmann*, 2018 WL 4376884 (7th Cir. 2018), this Court explained, "We have recognized that mental illness may toll a statute of limitations, but 'only if the illness *in fact* prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them.'" *Id.* at *3 (citations omitted). This Court further confirmed that the cumulative effect of a defendant's "entire hand," may be sufficiently extraordinary to prevent him from timely filing his petition. *Id*. This approach is consistent with the Supreme Court's directive that the application of equitable tolling be made case by case basis. *Holland*, 560 U.S. at 650.

Appellant's case presents a unique set of extraordinary circumstances which warrants tolling under this flexible approach. Appellant's intellectual deficiencies, mental illness, and illiteracy, were lifelong conditions that prevented him from pursuing his legal rights on his own, and his communication difficulties, both cognitive and physical (from his speech impediment), along with his personality disorder, prevented him from effectively and reliably convincing others to help him. This situation is distinct from the "garden variety" impediment of being unable to cope with the legal system.

The District Court's finding of insufficient diligence was also clearly erroneous, as it was premised on the unreasonable inference that Appellant was capable of finding legal assistance

when he wanted to. As explained above, Appellant's impediments preventing him from obtaining help were substantial and well-documented; it would make little sense if diligence demanded Appellant repeatedly make efforts that have repeatedly proved futile in the past.

Conclusion

Appellant's circumstances are far from garden variety. His cognitive limitations were well-documented, as were his communication difficulties and difficulties relating to others. The expert opinions, using the correct competency standard, establish that, at the time of his competency hearing, he was not capable of consulting with and assisting his attorney in a meaningful way, based, in significant part, on permanent conditions. Thus, Appellant has a substantial ineffective assistance claim based on his attorney's failure to argue the correct competency standard to the trial court. Also, Appellant's various impairments in fact prevented him from filing his § 2254 petition on his own, and successfully finding assistance, until he happened to be assigned the right cell mate willing to help him, despite his impediments. Appellant's unique set of extraordinary circumstances warrants equitable tolling.

Respectfully Submitted,

s/ Todd M. Schultz
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ATTORNEY'S CERTIFICATE PURSUANT TO CIRCUIT RULE 30(d)

I have included all material required by Circuit Rule 30(a) and (b) in the Brief Appendix.

Respectfully submitted,

s/ Todd M. Schultz
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants who are registered CM/ECF users will be served by the CM/ECF system.

s/ Todd M. Schultz
TODD M. SCHULTZ

APPENDIX

Document **Page**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BILL CONWAY,

Petitioner,

-vs- **No. 16-cv-00338-DRH**

KAREN JAIMET, WARDEN,

Respondent.

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This matter is before the Court on Respondent's Motion to Dismiss Petitioner's § 2254 Petition (Doc. 25).

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order entered by this Court on December 8, 2017 (Doc. 26), the motion to dismiss is **GRANTED**. This cause of action is **DISMISSED with prejudice**. Judgment is entered in favor of Respondent and against Petitioner.

JUSTINE FLANAGAN,
ACTING CLERK OF COURT

BY: **s/*Alex Francis***
Deputy Clerk

APPROVED:

David R Herndon

Judge Herndon
2017.12.12
13:14:17 -06'00'

U.S. DISTRICT JUDGE
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BILL CONWAY,
Petitioner,

vs.

Civil No. 16-cv-00338-DRH

KAREN JAIMET, WARDEN,

Respondent.

MEMORANDUM and ORDER

HERNDON, District Judge:

On March 28, 2016, Bill Conway (Petitioner) filed a petition under 28 U.S.C. § 2254 in this Court, conceding the filing was untimely. (Doc. 1). The Court dismissed it without prejudice for failure to name the proper respondent and appointed the Federal Public Defender to represent Petitioner. (Doc. 4). Petitioner timely filed an Amended Petition, asserting (1) his trial counsel was ineffective for failing to investigate his mental condition and (2) his guilty plea was not knowing or voluntary. (Doc. 16). Respondent filed a Motion to Dismiss Petitioner's § 2254 as untimely, (Doc. 24), and Petitioner responded, arguing he is entitled to equitable tolling, (Doc. 25). For the following reasons, Respondent's Motion to Dismiss is granted.

Relevant Facts and Procedural History

In July 2004, Petitioner was indicted in the Circuit Court of Cook County, Illinois on two counts of solicitation of murder, two counts of solicitation of murder for hire, and one count of attempted first-degree murder. In November

2004, a second indictment charged Petitioner with three counts of solicitation of murder, three counts of solicitation of murder for hire, and three counts of attempted first-degree murder. (Doc. 16, p. 1).

After holding two competency hearings, the court found Petitioner fit to stand trial. On May 8, 2007, Petitioner entered into a negotiated plea of guilty and was convicted of three counts of solicitation of murder for hire and one count of attempted first-degree murder. The remaining counts were dismissed. Petitioner received twenty-year sentences for each solicitation count, to run concurrently, and a ten-year sentence for the attempted murder count, to run consecutive to the solicitation sentences. (Doc. 16, p. 2).

Petitioner did not file a direct appeal, but filed a post-conviction petition under Illinois' Post Conviction Hearing Act, 725 ILCS 5/122-2 (West 2008), on May 21, 2009. The Illinois State Court dismissed the petition, and Petitioner appealed to the Illinois Appellate Court, which affirmed the dismissal. Petitioner did not appeal to the Supreme Court of Illinois. Petitioner also filed unsuccessful post-conviction motions in 2014, including a Petition for Relief from a Void Judgment and a House Bill Sentence Reduction Motion. (Doc. 16, pp. 2-5). Petitioner filed his § 2254 Petition *pro se* in March 2016, (Doc. 1), and filed the instant Amended Petition in July 2017, (Doc. 16).

Timeliness of Petition

28 U.S.C. § 2254 permits persons in custody pursuant to a state court judgment to bring a petition for a writ of habeas corpus "on the ground that he is

in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petitioner must file a § 2254 within one year 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.

28 U.S.C. § 2244.

Respondent asserts that (A) is the only applicable subsection to Petitioner's claim. Petitioner entered his guilty plea and was sentenced on May 8, 2007, and had thirty days to file a direct appeal. IL. SUP. CT. R. 604(d). His conviction became final on June 7, 2007, which is the last date he could have appealed his sentence or moved to withdraw his guilty plea. *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (A judgment becomes final for purposes of § 2244 at the expiration of the time for seeking direct review in state court.). Therefore, the limitations period for filing a § 2254 Petition expired one year later on June 7, 2008.

Petitioner suggests, on the other hand, that (D) may also be applicable, (Doc. 16, p. 30), but admits the argument "is not central to or necessary for Petitioner's assertion of cause or equitable tolling," He admits that the petition was late even if (D) applied. (Doc. 25, p. 4). Thus, the Court will adopt the limitations period Respondent sets forth.

Petitioner ultimately concedes his § 2254 is untimely, (Doc. 16, pp. 14, 30), but asserts he is entitled to equitable tolling because his mental limitations prevented him from understanding and acting upon his legal rights.

Petitioner's Mental Health Records

Petitioner attests he is illiterate, he could not afford to pay anyone to assist in filing his claim, the prison library was not helpful, and his medications for mental and emotional problems hindered his ability to timely file. (Doc. 16, Ex. 6). Petitioner's medical records include diagnoses of depressive disorder, schizoaffective disorder,[1] adjustment disorder,[2] and borderline intellectual functioning.[3]

Court-Ordered Evaluations

[1] The National Institute of Mental Health defined schizoaffective disorder as "[a] mental health condition that causes both a loss of contact with reality (psychosis) and mood problems (depression or mania)." *Glossary*, NATIONAL INSTITUTE OF HEALTH, https://www.nimh.nih.gov/health/topics/schizophrenia/raise/glossary.shtml (last visited Dec. 6, 2017).

[2] "Adjustment disorder is a group of symptoms, such as stress, feeling sad or hopeless, and physical symptoms that can occur after you go through a stressful life event." *Medical Encyclopedia*, MEDLINEPLUS, https://medlineplus.gov/ency/article/000932.htm (last visited Dec. 6, 2017).

[3] Borderline intellectual functioning is defined as an IQ between 71 and 84. For reference, mental retardation is defined as an IQ of 70 or below. J.E. Schmidt, M.D., ATTORNEYS' DICTIONARY OF MEDICINE, (Matthew Bender 2017).

Several psychologists evaluated Petitioner to opine whether he was fit to stand trial. In December 2004, Dr. Erick Neu conducted an assessment of Petitioner, pursuant to a court order. He stated Petitioner appeared to be malingering both psychotic symptoms and cognitive impairment. According to Dr. Neu, Petitioner was likely to behave in an oppositional manner towards defense counsel due to maladaptive personality traits and not a mental illness or defect, but was capable of collaborating with his counsel. Dr. Neu was unable to perform a complete IQ test because Petitioner indicated trouble seeing without his glasses. Dr. Neu used the verbal subtests of the Wechsler Adult Intelligence Scale – III and Petitioner scored an IQ of 59, which falls in the Extremely Low Range. However, the doctor determine this was likely a "significant underestimate" of Petitioner's IQ due to suspected malingering and verbal subtests being most difficult for Petitioner. Dr. Neu determined Petitioner was fit to stand trial and legally sane. (Doc. Ex. pp. 1-2).

In June and January of 2005, Dr. Roni Seltzberg also evaluated Petitioner pursuant to a court order. Dr. Seltzberg opined on both occasions that Petitioner was fit to stand trial and was legally sane. *Id.* at pp. 5-6.

Dr. Neu evaluated Petitioner again in March 2006. He noted Petitioner was malingering, but nonetheless had legitimate cognitive problems. *Id.* at pp. 3-4.

Defense Expert Testimony

Dr. Michael Fields, a licensed clinical psychologist, testified at Petitioner's competency hearing in January 2006. Dr. Fields evaluated Petitioner on multiple

occasions and opined Petitioner was not fit for trial. Dr. Fields explained that Petitioner had significant problems processing verbal information effectively and performed very poorly on the MacArthur Test, which assesses a person's understanding of what happens in a courtroom setting. Dr. Fields stated Petitioner had a "significant sub-average intellectual competence" and an IQ of 63. He diagnosed Petitioner with major depressive disorder, recurrent; cocaine dependence; alcohol dependence; rule-out schizoaffective disorder, depressive type; mild mental retardation; and personality disorder not otherwise specified. (Doc. 17, pp. 3-41).

Illinois Department of Corrections Mental Health Records

During the one-year limitations period, Petitioner received mental health services through the Illinois Department of Corrections. On May 15, 2007, he underwent a mental health evaluation upon intake. He was cooperative, alert and oriented, and demonstrated an appropriate mood and affect. He was diagnosed with depressive disorder and referred to a psychiatrist. (Doc. 19, p. 110).

Petitioner thereafter attended regular monthly sessions with a psychiatrist. He appeared alert and oriented at each session and demonstrated logical and coherent thoughts, along with fair insight and judgment. He repeatedly denied any side effects from his medications. *Id.* at pp. 80, 82, 83, 85, 86, 88, 91, 94, 96, 99, 101, 103, 104, 106, 107.

In October 2007, Petitioner stated the devil had been talking to him for twenty-two years. His psychiatrist diagnosed him with schizoaffective disorder,

depressed type, and started him on Risperdal[4] and Celexa.[5] *Id.* at 107. Later that month, Petitioner reported feeling better and stated the devil did not talk to him anymore. His medications were reportedly helping. *Id.* at 106.

In November and December of 2007, Petitioner reported he heard voices once or twice per week. His psychiatrist diagnosed him with adjustment disorder with depressed mood and borderline intellectual functioning. *Id.* at pp. 103-05.

In January 2007, Petitioner reported he was nervous and paranoid. He was still hearing voices. Petitioner's psychiatrist discontinued the Celexa and started Petitioner on Remeron.[6] *Id.* at 101.

In February 2008, Petitioner reported auditory hallucinations of a voice telling him to kill himself. He last attempted suicide five months before. He presented no signs of delusions or mania. *Id.* at 100.

In March 2008, Petitioner stated he was doing okay but sometimes heard voices. *Id.* at p. 97.

Throughout the next nine months, Petitioner demonstrated logical, coherent, and goal-directed thought processes. He denied any auditory or visual hallucinations or delusions. His insight and judgment were fair, and he was alert and oriented. He continued to take Risperdal and Remeron. *Id.* at pp. 79, 80, 82, 84, 85, 86, 88, 91, 94.

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[4] Risperdal is an antipsychotic medicine used to treat schizophrenia. DRUGS.COM, https://www.drugs.com/risperdal.html (last visited Dec. 6, 2017).
[5] Celexa is an antidepressant used to treat depression. DRUGS.COM, https://www.drugs.com/search.php?searchterm=celexa (last visited Dec. 6, 2017).
[6] Remeron is an antidepressant used to treat major depressive disorder. DRUGS.COM, https://www.drugs.com/search.php?searchterm=remeron (last visited Dec. 6, 2017).

Analysis

"Equitable tolling is an extraordinary remedy" that courts "rarely" grant. *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." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotations omitted).

The Seventh Circuit has held that mental incompetence may constitute an extraordinary circumstance to justify equitable tolling. *Davis v. Humphreys*, 747 F.3d 497, 499 (7th Cir. 2014). However, a person is not entitled to tolling just because his shortcomings played a causal role in the delayed filing. *Id.* A low IQ, illiteracy, a lack of educability, and the inability to cope with legal subjects does not *per se* entitle someone to tolling. *Id.* at 500. Rather, the person's mental condition must "*in fact*" prevent him "from understanding his legal rights and acting upon them." *Carpenter v. Douma*, 840 F.3d 867, 872 (7th Cir. 2016).

Petitioner, here, has not shown he was incapable of understanding or acting upon his legal rights. To the contrary, the facts weigh strongly in favor of the opposite conclusion. Petitioner filed a post-conviction petition, a request for appointment of counsel, and an appeal of the petition's denial in 2009. He also filed a Petition for Relief from a Void Judgment, a House Bill Sentence Reduction Motion, a Motion to Proceed in Forma Pauperis, and a Motion for Appointment of

Counsel, in 2014. Finally, Petitioner filed a § 2254 petition *pro se* in March 2016. (Doc. 16, pp. 2-5).

Despite initiating all of these proceedings, Petitioner posits he was unable to pursue his § 2254 during the limitations period. Petitioner maintains he was mentally incompetent since as early as 2007 and does not assert his condition was worse during the limitations period. He states he cannot recall how he was able to pursue the aforementioned legal filings, but insists he was only able to do so with the assistance of other inmates. (Doc. 16, p. 18). However, the inquiry is not whether Petitioner was competent enough to prepare the legal documents himself. As the Seventh Circuit explained, "Many persons of normal intellect are unable to cope with the legal system." *Davis v. Humphreys*, 747 F.3d 497, 499 (7th Cir. 2014). Instead, this Court examines whether Petitioner was capable of understanding and acting upon his legal rights. Clearly he was; Petitioner acknowledges he sought out assistance from other inmates and visited the law library in pursuit of his § 2254.

In addition, Petitioner's mental health records from IDOC do not indicate Petitioner's conditions rose to the level of extraordinary circumstances. Throughout the majority of the limitations period, Petitioner demonstrated logical and coherent thought processes, he was alert and oriented, and his psychiatrist opined his judgment and insight were fair.

In sum, Petitioner was cognizant of his right to file the instant motion and even took steps toward doing so. He cannot show his mental conditions in fact

caused his untimely filing and he therefore fails to show extraordinary circumstances impeded his ability to timely file his claim.

Petitioner also fails to show he diligently pursued his claim throughout the required period. Petitioner bears the burden of establishing he was "reasonably diligent in pursuing his rights *throughout the limitations period and until he finally filed his untimely habeas petition*." *Id.* at 870 (emphasis added). In the case at bar, this period encompasses eight years. Petitioner makes a vague reference to visiting the law library and asking other inmates for assistance, which is insufficient to show diligence for such a lengthy period.

Petitioner has not shown he is entitled to equitable tolling. His mental incompetency does not constitute an extraordinary circumstance; he was able to understand and act upon his legal rights. Moreover, he does not set forth evidence he was reasonably diligent in pursuing his claim throughout the entirety of the limitations period and up until he filed his § 2254.

Lastly, the Court considered whether Petitioner meets the fundamental miscarriage of justice standard of *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). *McQuiggin* holds that "a credible showing of actual innocence" may overcome the bar of the one-year statute of limitations for filing a habeas petition under 28 U.S.C. § 2254. *Id.* at 1931. The Supreme Court reaffirmed the *Schlup* standard for a credible showing of actual innocence, cautioning that "tenable actual-innocence gateway pleas are rare" and describing the *Schlup* standard as "demanding" and "seldom met." *Id.* at 1928.

A credible claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The *Schlup* standard permits habeas review of defaulted claims only in the "extraordinary case" where the petitioner has demonstrated that "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006). Here, petitioner does not assert his innocence, present any new evidence, or otherwise make an argument under *McQuiggin*. As such, he cannot meet *McQuiggin's* fundamental miscarriage of justice standard.

Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing § 2254 Cases in the United States District Courts, this Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate should be issued only where the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Where a habeas petition is dismissed on procedural grounds without reaching the underlying constitutional issue, the petitioner must show that reasonable jurists would "find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it

debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 120 S. Ct. 1595, 1604 (2000). Both components must be established for a COA to issue.

Here, it is clear that Petitioner's petition is time-barred and he has not advanced a credible claim of actual innocence within the meaning of *McQuiggin* and *Schlup*. No reasonable jurist would find the issue debatable. Accordingly, the Court denies a certificate of appealability.

Conclusion

Respondent's Motion to Dismiss Petitioner's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Doc. 24) is **GRANTED**.

Bill Conway's Amended Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (Doc. 16) is **DISMISSED WITH PREJUDICE**.

The Clerk of Court shall enter judgment in favor of respondent.

IT IS SO ORDERED.

David R. Herndon

Judge Herndon
2017.12.08
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United States District Judge

Notice

If petitioner wishes to appeal the denial of his petition, he may file a notice of appeal with this court within thirty days of the entry of judgment. Fed. R. App. P. 4(a)(1)(B). A motion for leave to appeal in forma pauperis should set forth the issues petitioner plans to present on appeal. See Fed. R. App. P. 24(a)(1)(C). Petitioner is further advised that a motion to alter or amend the judgment filed pursuant to Fed. R. Civ. P. 59(e) must be filed no later than twenty-eight days after the entry of the judgment—a deadline that cannot be extended. A proper and timely Rule 59(e) motion may toll the thirty-day appeal deadline. Other motions, including a Rule 60 motion for relief from a final judgment, order, or proceeding, do not toll the deadline for an appeal.