No. 06-

In the Supreme Court of the United States

RICHARD BARNETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether there is an "actual innocence exception" to the one-year limitations provision of 28 U.S.C. § 2255?

(2) Whether a certificate of appealability should issue to a habeas petitioner whose claims were dismissed as time-barred based on a holding that there is no "actual innocence exception" to the one-year limitations provision of 28 U.S.C. § 2255?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Habeas Proceedings -

The March 1, 2006 opinion of the court of appeals (App. 29a) is unreported. The district court's June 2, 2005 denial of the certificate of appealability (App. 28a) is unreported. The July 2, 2004 judgment of the district court (App. 27a) is unreported. The June 10, 2004 recommendation of the magistrate (App. 18a) in the district court is unreported.

Original Proceedings -

The opinion of this Court denying certiorari following direct appeal is reported at 529 U.S. 1111, 120 S.Ct. 1966. The opinion of the court of appeals on direct appeal is reported at 197 F.3d 138. The original judgment of conviction and sentence in the district court is unreported.

JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 1, 2006. (App. 29a.) This court has jurisdiction to review the instant petition pursuant to 28 U.S.C. § 1254(1). As set forth in the separate proof of service presented to the Clerk, notice of the filing of this petition has been provided to the appropriate United States Attorney and to the Solicitor General.

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 2255 (pertinent excerpts) -

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

*****

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.

U.S. Const. art. I, § 9, cl. 2 -

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. CONST. amend. V -

No person shall be... deprived of life, liberty, or property, without due process of law...

U.S. CONST. amend. VIII -

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

More than one year after his federal conviction and sentence became final, petitioner filed a motion in the district court under 28 U.S.C. § 2255 alleging that he was actually innocent. (App. 1a) The magistrate's recommendation to dismiss said motion as time-barred contains the following summary:

> In the instant case, the Supreme Court denied Barnett's writ of certiorari on May 15, 2000. Thus, Barnett had until May 15, 2001 to file his motion. Because he did not file the motion until November 10, 2003, it appears to be time-barred. Barnett argues, however, that the limitations period should be equitably tolled in this case because he is innocent. Specifically, Barnett contends that, because the conviction of his co-conspirator, Victor [*sic*] Drake, was reversed by the Fifth Circuit upon a finding that there was insufficient evidence to convict him on either the conspiracy or aiding and abetting charges, no conspiracy could have existed and Barnett is entitled to habeas relief.
>
> Implicit in this argument is the fact that a defendant cannot be convicted of a conspiracy if the only co-conspirator is a government agent. In this case, the government asserted that there were four men involved in the conspiracy: Barnett and Drake, along with Rushiel Bevans (a paid government informant) and Michael Chatman (a government employee and agent). Thus, Barnett contends that when Drake's conviction was reversed, the only remaining co-conspirators are government agents. Thus, without

> any non-government agent co-conspirators, Barnett contends that no conspiracy could have existed.
>
> As stated in the body of this ruling, **<u>the merits of this argument need not be addressed</u>**, because the instant motion is time-barred.

(App. 21a). (Emphasis supplied.)

In further explaining the basis for this holding, the magistrate summarized the applicable law in the Fifth Circuit:

> Furthermore, it is well-settled in the Fifth Circuit that an actual innocence claim does not constitute a "rare and exceptional" circumstance warranting tolling of AEDPA's limitations period.

(App. 24a).

The district court adopted the magistrate's holding without modification and summarily dismissed petitioner's claims as time-barred (App. 27a). Petitioner sought a certificate of appealability to address the holdings of other circuits which, unlike the Fifth Circuit, have expressly recognized an actual innocence exception to the statutory limitations periods.

The district court denied the certificate of appealability (App. 28a), and the Fifth Circuit affirmed (App. 29a). The merits of petitioner's actual innocence claims have thus gone unconsidered by any court, and in the absence of a certificate of appealability, petitioner is without appellate rights to review the summary dismissal of his actual innocence claims as time-barred.

REASONS FOR GRANTING THE PETITION

(1) Whether there is an "actual innocence exception" to the one-year limitations provision of 28 U.S.C. § 2255?

The one-year limitations period enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) bars habeas relief and access to federal courts for prisoners whose convictions and sentence have been final for more than one year. 28 U.S.C. § 2255. There is a split among the circuits whether the Constitution requires consideration of otherwise time-barred claims when there are credible allegations of actual innocence. Petitioner asks the court to resolve the split among the circuit courts of appeal on this important constitutional question. Petitioner further submits that the denial of access to federal courts for an inmate whose allegations constitute a credible showing of actual innocence is violation of the Suspension Clause of the Constitution, as well as the Fifth and Eighth Amendments.

The Sixth Circuit addressed this precise issue recently in *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005). The following summary borrows from and synthesizes the Sixth Circuit's overview of the disparate treatment of this issue in the courts of appeal, updated to include decisions handed down after *Souter* and/or not included in *Souter*:

> *David v. Hall*, 318 F.3d 343, 347 (1st Cir.), *cert. denied*, 540 U.S. 815 (2003) (holding that prisoners "who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming").

Whitley v. Senkowski, 317 F.3d 223 (2nd Cir. 2003) (requiring that the district court determine whether there is, in fact, a showing of actual innocence)

Felder v. Johnson, 204 F.3d 168, 171 & n.8 (5th Cir.), *cert. denied*, 531 U.S. 1035 (2000) (finding that a claim of actual innocence "does not constitute a rare and exceptional circumstance" warranting equitable tolling, but suggesting that "a *showing* of actual innocence" might; *see also United States v. Riggs*, 314 F.3d 796 (5th Cir. 2002) (holding that "a petitioner's claims of actual innocence are [not] relevant to the timeliness of his petition.")

Souter v. Jones, 395 F.3d 577 (6th Cir. 2005) (holding that "equitable tolling of the one- year limitations period based on a credible showing of actual innocence is appropriate.")

Gildon v. Bowen, 384 F.3d 883, 887 (7th Cir. 2004) (adopting the Eighth Circuit's approach set forth below in *Flanders*); *see also Escamilla v. Jungwirth*, 426 F.3d 868 (7th Cir. 2005) (holding that "[p]risoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action."); *and see Araujo v. Chandler*, 435 F.3d 678 (7th Cir. 2005) (noting that the contention that actual innocence is a freestanding exception to the AEDPA's limitations period is "an argument which has caused the courts a good deal of consternation.")

Flanders v. Graves, 299 F.3d 974, 978 (8th Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003) (requiring that equitable tolling based on a claim of actual

> innocence be accompanied by "some action or inaction on the part of the respondent that prevented [the petitioner] from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations").
>
> *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (holding that equitable tolling is appropriate "when a prisoner is actually innocent" and "diligently pursue[s] his federal habeas claims").

Thus, the Sixth, Seventh, Eight and Tenth circuits have adopted either a full or restricted actual innocence exception to the limitations period which allows access to courts for federal prisoners with credible claims of actual innocence. Courts which have restricted the exception require that either the prisoner diligently pursue his claims and/or that there be some action on the part of the respondent to have prevented diligent pursuit of the claims.

The most recent pronouncements of the First, Fifth and Seventh circuits, however, either reject or hold as irrelevant any claim of actual innocence in consideration of whether a habeas petition is time-barred. Thus, in at least three circuit courts of appeal, an inmate who can demonstrate actual innocence is restricted from access to the courts based solely on a statute of limitations.

Petitioner asks this court to grant the instant petition and resolve the split among the circuits. Such a resolution will of course turn on the existence of a constitutional right to have claims of actual innocence heard by a federal court

notwithstanding the existence of a congressional statute of limitations.

The doctrine of “actual innocence” as a constitutional exception to procedural bars is not new, although this Court has never addressed whether such an exception applies directly to the AEDPA’s limitations periods. This Court has, however, applied the doctrine to other types of procedural bars and, as noted by the Sixth Circuit, “two distinct categories of actual innocence grew out of habeas corpus cases, permitting a court to reach the merits of otherwise defaulted, successive or abusive habeas claims.” *Ross v. Berghuis*, 417 F.3d 552 (6th Cir. 2005).

In a line of cases consistent with *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), the petitioner must demonstrate that "new reliable evidence" proves that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." If such a standard is met, the inmate’s otherwise barred claims may be considered by the courts on habeas relief notwithstanding the existence of procedural bars.

In a separate line of cases consistent with *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), this Court held that habeas courts may reach the merits of defaulted, successive, or abusive habeas claims when a capital petitioner is "innocent of death" even if not innocent of the underlying offense. The standard of innocence is higher where the inmate argues not factual innocence but rather innocence of the penalty, requiring that a petitioner show “by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.”

These cases, and others like them, demonstrate a consistent approach mandating judicial review of actual innocence claims even in the face of procedural impediments. The Sixth Circuit's decision in *Souter* references the varied constitutional concerns that dictate such an approach:

> Several courts have recognized that denying federal habeas relief from one who is actually innocent would be constitutionally problematic. *See Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1218 (11th Cir. 2000) (noting that barring a habeas petitioner who can demonstrate actual innocence "raises concerns because of the inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person's innocence" (footnotes omitted)); *Triestman v. United States*, 124 F.3d 361, 378-79 (2d Cir. 1997) (finding serious Eighth Amendment and due process concerns if AEDPA's procedural limitations barred a habeas petitioner claiming actual innocence from collateral review); *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997) ("Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent . . . we would be faced with a thorny constitutional issue."); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.), *cert. denied*, 525 U.S. 891 (1998) (noting that where a petitioner claims actual innocence, the limitations period "raises serious constitutional questions" which "possibly renders the habeas remedy inadequate and ineffective"); *Holloway v. Jones*, 166 F. Supp. 2d 1185, 1190 (ED Mich. 2001) (holding that the use of AEDPA's one-year limitations period "to preclude a petitioner who can demonstrate that he or she is factually innocent

> of the crimes that he or she was convicted of would violate the Suspension Clause . . . as well as the Eighth Amendment's ban on cruel and unusual punishment"). "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected . . . in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Schlup*, 513 U.S. at 325 (quoting *In re Winship*, 397 U.S. 358, 372 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring)). In light of these grave constitutional concerns, we believe equitable tolling of the statute of limitations based on a credible showing of actual innocence is appropriate.

Souter, *supra*.

As the decisions cited above in *Souter* make clear, and as set forth in this Court's own jurisprudence culminating in *Schlup* and *Sawyer*, the constitution prohibits utilizing procedural impediments to summarily prohibit access to the courts for prisoners with cognizable actual innocence claims. However, that is precisely the current state of the law in the First, Fifth and Seventh circuits, where petitioners claiming actual innocence are being denied a constitutionally protected right of access to the courts solely on the basis of a statute of limitations.

Specifically, and as set forth in the various decisions cited above in *Souter*, the denial of judicial review of claims of actual innocence violates the Suspension Clause. U.S. Const. art. I, § 9, cl. 2. The fundamental purpose of the writ is to provide judicial review to those wrongfully deprived of

liberty, and there can be no greater example of such a wrongful deprivation than denying all judicial review of the conviction of one who is innocent of the charges against him.

The use of a statute of limitations to deny judicial review of actual innocence claims also violates the Fifth Amendment's due process clause, which this court has recognized as protecting notions of fundamental fairness designed to prevent a miscarriage of justice. U.S. CONST. amend. V; *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

And lastly, the outright dismissal of claims of actual innocence as time-barred violates the Eighth Amendment's ban on cruel and unusual punishments. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

Petitioner respectfully asks this Court to grant the instant petition to resolve the split among the circuits whether there is an actual innocence exception to the one-year limitations period on habeas petitions enacted by the AEDPA. Petitioner further requests that the Court adopt the reasoning of the Sixth Circuit in *Souter*, holding that credible allegations of actual innocence must be given access to habeas review even if brought after the statute of limitations has expired.

(2) Whether a certificate of appealability should issue to a habeas petitioner whose claims were dismissed as time-barred based on a holding that there is no "actual innocence exception" to the one-year limitations provision of 28 U.S.C. § 2255?

A certificate of appealability shall issue where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253. A petitioner makes a substantial showing if he "demonstrates the issues raised are debatable among jurists of reason, the appellate court could resolve the issues in a different manner, or the issues are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

As set forth above, petitioner's habeas claims of actual innocence were summarily dismissed by the district court based solely on the Fifth Circuit's "well-settled" jurisprudence that claims of actual innocence have no effect on the AEDPA's one-year limitations period. (App. 24a). When petitioner sought to appeal that holding in light of the disparate treatment of the issue in numerous other jurisdictions, the district court denied a COA and the Fifth Circuit affirmed. (App. 28a-30a).

Thus, petitioner is in the unenviable position in the Fifth Circuit of having no access to the courts for consideration of the merits of his claims of actual innocence and no right to appeal the denial of access other than the instant petition for certiorari. This Court has jurisdiction to reverse the court of appeal and grant the COA. *Hohn v. United States*, which would remand the matter to the Fifth Circuit for further proceedings and allow the Fifth Circuit to address the viability of an actual innocence to the AEDPA's limitations periods.

Accordingly, petitioner respectfully requests that the instant petition be granted, that the Fifth Circuit's denial of a COA be reversed, and that this matter be remanded to the Fifth

Circuit for an appeal of the district court's summary dismissal of petitioner's actual innocence claims.

CONCLUSION

Petitioner in the instant case has been denied access to the courts despite having presented a cognizable habeas claim of actual innocence. Further, petitioner has been improperly denied an appeal of the summary dismissal in the Fifth Circuit even though the issue presented is an important constitutional question on which jurists of reason have in fact reached differing opinions.

Petitioner respectfully requests that the instant petition be granted and that this court resolve the split among the circuit courts of appeal by holding that there is an actual innocence exception to the one-year deadline implemented by the AEDPA. To the extent that this court would require a more complete record, petitioner alternatively requests that the court grant the instant petition and issue a certificate of appealability so that the merits of petitioner's actual innocence claims can be considered prior to summary dismissal.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA - LAFAYETTE DIVISION
NO. 03-2090-LO

Filed Nov 10 2003	Stamped Sec P
Robert H. Shemwell, Clerk	Judge Melancon
	Magistrate Methvin

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IN RE UNITED STATES OF AMERICA V. RICHARD G. BARNETT,
NO. 97-600339

***

RICHARD BARNETT, MOVANT
USM NO. 76207-079 AT FCI-TEXARKANA
****

<u>MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE</u>
<u>UNDER 28 U.S.C. § 2255</u>

NOW INTO COURT, through undersigned counsel, comes RICHARD BARNETT, defendant in the above-captioned proceeding, who files this Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, on the grounds and for the reasons set forth in the attached Memorandum, which is incorporated here fully by reference as if set forth <u>in extenso</u>.

WHEREFORE, RICHARD BARNETT respectfully requests that the Court vacate, set aside or correct the sentence imposed in the above-captioned proceeding pursuant to the authority granted under 28 U.S.C. § 2255, or

take such other measures as the Court deems appropriate.

Respectfully submitted,

S/

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA - LAFAYETTE DIVISION
NO. 03-2090-LO

Filed Nov 10 2003	Stamped Sec P
Robert H. Shemwell, Clerk	Judge Melancon
	Magistrate Methvin

***

IN RE UNITED STATES OF AMERICA V. RICHARD G. BARNETT,
NO. 97-600339

***

RICHARD BARNETT, MOVANT
USM NO. 76207-079 AT FCI-TEXARKANA

****

MEMORANDUM IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

NOW INTO COURT, through undersigned counsel, comes RICHARD BARNETT, defendant in the above-captioned proceeding, who files this memorandum in support of the foregoing motion and respectfully represents:

I. GENERAL OVERVIEW OF RELIEF REQUESTED[1]

Richard Barnett and Virgil Drake were tried jointly before a

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[1] As an aide to the Court, this overview is provided as a brief summary of the relief requested. Full citations and supporting documentation are provided in the body of this Memorandum and the accompanying exhibits.

jury in this court in late 1997 on two charges. Count One charged both men with conspiracy to commit murder for hire in violation of 18 U.S.C. §§ 371 and 1958. Count Two charged Barnett with using interstate commerce facilities in the commission of murder for hire and charged Drake with aiding and abetting Barnett on the same offense under 18 U.S.C. §§ 1958 and 2. Following trial, both men were convicted of all charges.

On appeal, the Fifth Circuit acquitted Virgil Drake, holding that the record was "devoid of evidence" to support the jury's finding that Mr. Drake intended his actions to result in murder. Barnett's convictions were upheld.

On May 15, 2000, Barnett's petition for certiorari to the United States Supreme Court was denied, thus rendering his conviction and sentence final. As the Court is aware, 28 U.S.C. § 2255 generally requires that any motion to vacate or set aside a sentence be filed within one year from the expiration of direct appellate rights. Therefore, on its face, the instant Motion would appear untimely.

As the Court may also be aware, however, several circuits and a number of district courts have recognized an exception to the one-year limitations period where a colorable showing of actual innocence is made. The instant motion for relief is based on actual innocence.

Specifically, the Fifth Circuit's appellate acquittal of Virgil Drake as to count one's charge of conspiracy to commit murder for hire mandates a habeas finding of actual innocence for Mr. Barnett. There is a United States Supreme Court decision on point and, as the Fifth Circuit's opinion makes clear, the record is "devoid" of evidence that Drake and Barnett entered into a conspiracy to commit murder for

hire. Accordingly, Barnett respectfully requests that his conspiracy conviction be set aside.

II. FACTS

A. Procedural History

As the court's record of this matter will show, on August 6, 1997, a criminal complaint was filed against Richard D. Barnett and Virgil R. Drake. Both men were arrested the same day.

On August 15, 1997, Drake and Barnett were each indicted in United States District Court for the Western District of Louisiana (Lafayette Division) for "conspiracy to commit murder for hire in violation of 18 U.S.C. §§ 371 and 1958, and for aiding and abetting each other in attempted murder for hire in violation of 18 U.S.C. §§ 1958 and 2." (Quotation from 5th Circuit Opinion, Exhibit B to this Memorandum, Page 1.)

Trial began on December 15, 1997. Following closing arguments, the jury returned guilty verdicts against Barnett and Drake as to all counts on December 21, 1997. On March 24, 1998, Barnett was sentenced to 60 months on Count One and 120 months on Count Two, with the sentences to run consecutively.[2]

Drake and Barnett both lodged appeals with the United States Court of Appeals for the Fifth Circuit. On November 22, 1999, the Fifth Circuit (Judge Politz) issued an opinion upholding the convictions of Barnett but reversing the

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[2] A copy of the Judgment is attached to this Memorandum as Exhibit A.

convictions of Drake.[3]

On December 13, 1999, Barnett filed a petition for rehearing and a motion to remand and resentence with the Fifth Circuit. On December 29, 1999, the Fifth Circuit denied Barnett's petition for rehearing without opinion.

Mr. Barnett filed a petition for certiorari with the United States Supreme Court on March 28, 2000, which alleged a single issue: that the government's payment of $7,500.00 to Rushiel Bevans for his trial testimony was improper. On May 15, 2000, the Supreme Court denied review and Mr. Barnett's conviction and sentence became final. The instant motion for leave is the first pleading filed in this matter since that date.

B. Substantive Facts

A recitation of the general facts underlying this criminal proceeding is set forth in the Fifth Circuit's opinion on appeal. The Fifth Circuit opinion is attached to this memorandum as Exhibit B, and the relevant factual recitation is contained at pages 2-3.

III. ARGUMENT

A. Actual Innocence

The primary argument in this motion may be made succinctly. The government asserted that there were four men involved in the alleged conspiracy: Barnett and Drake (the defendants), together with Rushiel Bevans (a paid

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[3] A copy of the Opinion is attached to this Memorandum as Exhibit B.

government informant) and Michael Chatman (a government employee and agent).

At the conclusion of evidence, the trial court instructed the jury as follows:

> In this case the defendants, Richard D. Barnett and Virgil R. Drake, are charged by a two-count indictment. Count one alleges the defendants committed the crime of conspiracy, specifically, conspiracy to commit the murder for hire, in violation of Title 18, United States Code, Section 371. Count two alleges the defendants used interstate commerce facilities with the intent that the murder for hire of Ernie Parker and Logan Nichols be committed in violation of Title 18, United States Code, Sections 158 and 2.
>
> Title 18, United States Code, Section 371 makes it a crime for anyone to conspire <u>with someone else</u> to commit an offense against the laws of the United States. The defendants are charged with conspiring to hire hit men to kill Ernest Parker and Logan Nichols.
>
> A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of <u>partnership</u> in crime in which each member becomes the agent of every other member. For you to find the defendants guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:
>
> First: That the defendant <u>and at least one other person</u> made an agreement to commit the crime of

> murder for hire as charged in the indictment.
>
> Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully. That is, with the intent to further the unlawful purpose.
>
> And third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment in order to accomplish the object or purpose of the conspiracy ...
>
> A defendant cannot be convicted of conspiracy if the only conspirator is a Government agent. Therefore, in order to convict the defendants of conspiracy, you must find that they entered into an agreement to violate Title 18, United States Code, Section 1958 with someone other than a government agent. You are instructed that, for the purpose of this case, Rushiel Bevans and Michael Chatman were agents of the government ...
> Count two charges defendant, Richard D. Barnett, with murder for hire in violation of Title 18, Unites States Code, Section 1958 and defendant Virgil R. Drake with aiding and abetting and facilitating the murder for hire in violation of Title 18, United States Code, Section 1958 and Title 18, United States Code, Section 2.[4]

The jury then mistakenly found that Drake and Barnett conspired with one another and convicted both men. On

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[4] Excerpt of Official Transcript, pp. 70-76. (Emphasis added.)

appeal, the Fifth Circuit partially corrected the jury's mistake and acquitted Drake of both counts against him, as set forth in the penultimate paragraph of its opinion:

> Because the record is devoid of evidence that Drake intended to conspire in or aid and abet the commission of murder for hire, we must reverse Drake's convictions on both counts. (5th Circuit Opinion, Exhibit B, page 8. Emphasis added.)

This appellate holding is equivalent to a specific judicial finding that no conspiracy existed, because Drake was the only possible co-conspirator. Accordingly, Barnett is entitled to a habeas finding of actual innocence as to the count one conspiracy charges.

As a disclosure to the court, it should be noted that this argument has been made a number of times in connection with inconsistent jury verdicts, especially where only a single defendant is convicted in an alleged conspiracy. The convicted defendant typically argues that the verdicts were inconsistent and that the jury's acquittal of all of the other alleged co-conspirators is an implicit recognition that no conspiracy existed.

The courts have rejected this argument, however, based on a rule first set forth in *Dunn v. United States*, 284 U.S. 390, 393-394 (1932). The *Dunn* rule, which provides that inconsistency in a verdict is not a sufficient reason for setting it aside, is based on the recognition that a jury's acquittal of one defendant on conspiracy charges and the conviction of another on the same charges may result, not from a failure of proof, but from "mistake, compromise or lenity" by the jury. See *Harris v. Rivera*, 454 U.S. 339, 345 (1981). The Supreme Court confirmed this approach more recently in

United States v. Powell, 469 U.S. 57, 66 (1984), when the Court stated it would be "pure speculation" to assume that the jury's acquittal of a defendant's alleged co-conspirators signifies a conclusion that no conspiracy existed.

This line of jurisprudence rejecting the rule of consistency has developed even further in the circuits. Until fairly recently, the Eleventh Circuit was one of the few jurisdictions to require consistent verdicts in conspiracy cases. In 1988, however, the full court reversed course and held that "[c]onsistent verdicts are unrequired in joint trials for conspiracy: where all but one of the charged conspirator are acquitted, the verdict against the one can stand." *United States v. Andrews*, 850 F.2d 1557 (11th Cir.1988) (*en banc*), *cert. denied*, 488 U.S. 1032, 109 S.Ct. 842, 102 L.Ed.2d 974 (1989).

The Eleventh Circuit went even further in 1995 in *United States v. Wright*, 63 F.3d 1067 (11th Cir. 1995), holding that even where a trial court judge acquits all but a single defendant in a conspiracy trial, the inconsistency of that fact alone does not mandate an acquittal. The stated basis for this holding was that even a judge "may grant a judgment of acquittal for reasons having nothing to do with guilt or innocence–for example, based on a mistake of law or lenity–just as juries may." *Id*.

The instant case is different, however, because it does not involve inconsistent verdicts or trial court judgments, but rather a specific acquittal on legal grounds by a United States Court of Appeal. This distinction is most noticeable in the United States Supreme Court's decision in *Hartzel v. United States*, 322 U.S. 680 (1944).

In *Hartzel*, as in the instant case, the jury returned guilty

verdicts against a number of alleged co-conspirators, including Hartzel. On appeal, the circuit court set aside the convictions of Hartzel's co-defendants on grounds of insufficient evidence, just as the Fifth Circuit did with Virgil Drake. The court of appeal allowed Hartzel's conviction to stand, however, just as the Fifth Circuit did with Barnett. Hartzel then applied to the Supreme Court for review, and the Supreme Court overturned his conspiracy conviction based on the express finding by courts below that there was insufficient evidence to convict any of the co-conspirators. Id. At 682, n. 3.

Hartzel is directly on point with the facts of the instant case. Barnett, like Hartzel, was convicted along with a co-conspirator who was subsequently acquitted on appeal. In light of the Supreme Court's decision in *Hartzel*, which remains law, and in light of the Fifth Circuit's specific holding that the record is "devoid" of evidence on count one's conspiracy to commit murder for hire, Barnett's conspiracy convictions should now be reversed.

B. Additional Arguments in Support of Actual Innocence

Richard Barnett testified at trial and maintained his innocence in connection with the charged offenses. As noted by the Fifth Circuit, Barnett sought to explain his alleged inculpatory actions as consisting of, among other things, an attempt to extricate himself from situations with Bevans and Chatman in which he felt he and his family were in danger. Barnett also requested, but did not receive, an entrapment instruction. (Fifth Circuit Opinion, Exhibit B, Page 3).

Barnett does not waiver in his assertion of innocence here. He acknowledges that he placed himself in a compromising

position by conversing with Bevans about the alleged murders for hire. However, Barnett's testimony at trial was that he notified Bevans the next day that he did not want to actually proceed and that, upon hearing of Barnett's decision, Bevans became forceful and refused to allow Barnett to withdraw. Barnett specifically testified that from this point forward it was Bevans who continued pushing the scheme, and Bevans acknowledged as much on the stand.

The motive for Bevans' desire to coerce Barnett into following through with the [SLAP] murder for hire plan was also adequately set forth in the record. Bevans was a former convict who had been deported from the United States and had since been unable to see his wife, who continued to live here. Bevans sought cooperation and leniency from the government as a means of getting back in the country. In order to obtain that cooperation from the government, he could not allow Barnett to withdraw from the plot because Barnett was the only leverage Bevans had.[5]

Bevans' motive to trade on Barnett's anger and obtain something for himself, combined with the fact that it was Bevans pushing the scheme toward fruition, was the basis for the entrapment charge sought by Barnett at trial. Both the trial court and the Fifth Circuit rejected this argument, however, finding that Bevans was not a government agent at the time the initial conversations were held and therefore could not have technically "entrapped" Barnett.

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[5] Ultimately, Bevans did receive government cooperation and was in fact paid $7,500.00 by the government for his testimony against Barnett, in addition to being allowed to travel here on at least two occasions. Bevans' subsequent travel to the United States after the trial, if any, is unknown.

There are a number of other issues related to the trial in this matter and Barnett's' innocence in connection with the charged offenses, including but not limited to the government's cash payment to Bevans for his testimony, the perjured testimony of Bevans at trial, the government's late delivery of Bevans' criminal file to Barnett's trial counsel on the eve of trial, and the trial court's denial of a motion for continuance that would have allowed Barnett to investigate Bevans' background in light of the new material received from the government. These issues are not raised here, however, because the statutory one-year period has passed and because Barnett is clearly entitled to actual innocence relief of the conspiracy charges based on the *Hartzel* decision.

C. Timeliness

The Supreme Court has not expressly recognized that there is an equitable actual innocence exception to the strict time limitations of 22 U.S.C. § 2255, nor has the Supreme Court expressly rejected such a position. Accordingly, Barnett respectfully urges the court to find that where, as here, a convicted defendant makes a colorable showing of actual innocence as to a charged offense, the strict time limitations of 22 U.S.C. § 2255 do not operate to bar the court from granting equitable relief.

This issue has been addressed several times in both circuit and district courts, most recently by the Hon. Arthur Tarnow of the United States District Court for the Eastern District of Michigan in *Holloway v. Jones*, 00-CV-73864 (E.D.Mich. 9/28/01).[6] In *Holloway*, the court considered whether there was an actual innocence exception to the time limitations of

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[6] Copy of opinion attached as Exhibit D.

the AEDPA, and in so doing reviewed the existing jurisprudence prior to reaching his conclusion:

> Some circuit courts have indicated that equitable tolling of the limitations period would be appropriate when a petitioner was actually innocent. See *Gibson v. Klinger*, 232F. 3d 799, 808 (10thCir. 2000). Other circuit courts have ruled that a claim of actual innocence would not constitute a "rare and exceptional" circumstance which would justify the equitable tolling of the limitations period, given that most prisoners maintain that they are innocent. *Felder v. Johnson*, 204 F. 3d 168, 171 (5thCir. 2000). The Sixth Circuit has appeared to suggest in the dicta of one of their recent decisions that, if a prisoner purposefully or by inadvertence let the time run under which he could have filed his habeas petition, he cannot file a petition beyond the statutory time, even if he claims actual innocence. See *Workman v. Bell*, 227 F. 3d 331, 342 (6thCir. 2000); cert. den. 121 S. Ct.1194 (2001) (Per Opinion of Siler, J., joined by six judges, voting to deny petition for rehearing en banc).
>
> Several district courts have addressed the issue of actual innocence as a ground to excuse the late filing of a habeas petition or motion to vacate sentence brought under 28 U.S.C. § 2255. One judge has noted that if there is a "core function" of habeas corpus, "it would be to free the innocent person unconstitutionally incarcerated." *Alexander v. Keane*, 991 F. Supp. 329, 338 (S.D.N.Y. 1998). Another district court judge has noted that the U.S. Constitution may require that when a claim of actual innocence is involved, habeas review should remain

open until a habeas petitioner has had at least one "meaningful opportunity for review." *United States v. Zuno-Arce*, 25 F. Supp. 2d 1087, 1100 (C.D. Cal. 1998); aff'd 245 F. 3d 1108 (9thCir. 2001). The court reasoned that to foreclose habeas review where a claim of actual innocence was made might violate either the Eighth Amendment ban on cruel and unusual punishment or the Suspension Clause of the United States Constitution. Id. The court in *Zuno-Arce* went on to hold that to foreclose a claim of a constitutional violation where there has been a colorable showing of factual innocence would constitute a due process violation or an improper suspension of habeas corpus relief. *United States v. Zuno-Arce*, 25 F. Supp. 2d at 1102.

At least two judges in [the Eastern District of Michigan] have suggested in unpublished opinions that there might be an "actual innocence" exception to the limitations period. See *Washington v. Elo*, 2000 WL 356353, * 7 (E.D. Mich. February 29,2000) (A claim of probable actual innocence supported by credible evidence may provide a basis for equitable tolling of the statute of limitations); *Rockwell v. Jones*, 2000 WL973675, * 4 (E.D. Mich. June 30, 2000) (When a petitioner has diligently pursued federal habeas relief, a credible claim of actual innocence is sufficient to toll the one year statute of limitations). A third judge in this district has indicated that assuming that actual innocence might be grounds for equitable tolling of the limitations period, prisoners must diligently pursue their claims to avail themselves of equitable tolling on this basis. *Green v. Smith*, 2000 WL 1279165, * 4 (E.D. Mich. August 15, 2000).

> This Court concludes that to utilize the one year statute of limitations contained in the AEDPA to preclude a petitioner who can demonstrate that he or she is factually innocent of the crimes that he or she was convicted of would violate the Suspension Clause contained in U.S. Const. Art. I, § 9 cl. 2, as well as the Eighth Amendment's ban on cruel and unusual punishment. The Court therefore holds that an actual innocence exception exists to the statute of limitations contained within § 2244(d)(1).

For the reasons set forth in the foregoing opinion, Barnett respectfully requests that the court reach a similar conclusion in the instant case and find an equitable exception to the one-year limitations period where, as here, a convicted defendant can show actual innocence of a charged offense. It is Barnett's position, as adopted by the court above, that the equitable power of this court to issue a writ of habeas corpus to an innocent prisoner has not been statutorily abridged.

IV. CONCLUSION

Richard D. Barnett is actually innocent of count one against him, namely conspiring with Virgil Drake to commit murder for hire. It has been judicially determined by the Fifth Circuit that the record was devoid of evidence that the only possible co-conspirator, Virgil Drake, conspired or aided or abetted anyone in

the commission of murder for hire. As such, the record is likewise **devoid of evidence** that such a conspiracy ever existed.

Further, because Mr. Barnett is actually innocent, the instant

motion for relief is timely under the equitable authority of this court to issue a writ of habeas corpus. Richard Barnett respectfully requests that the court exercise its equitable authority and grant the relief requested herein.

WHEREFORE, in light of the foregoing, Richard Barnett respectfully requests that, following due proceedings, the instant Motion to Vacate, Correct or Set Aside Sentence under 28 U.S.C. §2255 be granted and that Richard Barnett's conviction for conspiracy to commit murder for hire be set aside, or that the Court take such other measures as it deems appropriate.

Respectfully submitted,

S/

_____

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Attorney for Petitioner

UNITED STATES DISTRICT COURT

June 10, 2004, Clerk

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

RICHARD BARNETT **CRIMINAL NO. 97-60033-01**

CIVIL ACTION NO. 03-2090

VS. **JUDGE MELANCON**

UNITED STATES **MAGISTRATE METHVIN**

REPORT AND RECOMMENDATION ON MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 2255

(Rec. Doc. 228)

On November 10, 2003, petitioner Richard Barnett filed a Motion to Vacate, Set Aside or Correct Sentence Pursuant to Title 28 U.S.C. 2255. The United States filed an answer and memorandum, and Barnett filed a reply to the government's opposition brief. For the following reasons, **IT IS RECOMMENDED** that Barnett's motion be **DENIED AND DISMISSED WITH PREJUDICE**.

Factual and Procedural Background

On August 15, 1997, Barnett and a co-conspirator, Virgil D. Drake, were each indicted on one count of conspiracy to commit murder for hire in violation of 18 U.S.C. 371 and 1958, and one count of aiding and abetting each other in the attempted murder for hire in violation of 18 U.S.C. 1958 and 2. The government contended that Barnett and Drake

conspired to hire a Belize native, Rushiel Bevans, to kill Lafayette attorney Ernest L. Parker in 1997.

On December 21, 1997, a jury found Barnett and Drake guilty on both counts. During the trial, Barnett filed a motion for judgment of acquittal, which was denied. After trial, he filed another motion for judgment of acquittal, along with a motion for new trial, both of which were denied. On March 24, 1998, Barnett was sentenced to 60 months' imprisonment on Count One (conspiracy) and 120 months imprisonment on Count Two (aiding and abetting), for a total of 180 months imprisonment, said sentences to be served consecutively. On November 22, 1999, the United States Court of Appeals for the Fifth Circuit affirmed Barnett's conviction but reversed Drake's conviction on grounds of insufficient evidence. *United States v. Barnett, et al*, 197 F.3d 138 (5th Cir. 1999), *cert. denied*, 529 U.S. 1111, 120 S.Ct. 1966, 146 L.Ed.2d 797 (May 15, 2000). A copy of the Supreme Court's denial of Barnett's writ of certiorari was filed into the record of the appellate court on May 22, 2000 and into the record of the district court on May 24, 2000.

Issues Presented

Barnett raises one ground for relief, namely, that he is actually innocent of the crimes for which he was convicted.

Scope of 2255 Review

The scope of relief afforded under 2255 is extremely narrow. It is "reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992); *United States v. Acklen*, 47 F.3d

739, 741 (5th Cir. 1995). "We apply this rigorous standard in order to ensure that final judgments command respect and that their binding effect does not last only until "the next in a series of endless post-conviction collateral attacks." *United States v. Shaid*, 937 F.2d 228, 231-232 (5th Cir. 1991), cert. denied, 112 S.Ct. 978 (1992).

Section 2255 provides four grounds for relief:

1. that the sentence violates the Constitution or other federal law;

2. that the court lacked jurisdiction;

3. that the sentence exceeded the maximum allowed by law; or

4. that the sentence is otherwise "subject to collateral attack."

Title 28 U.S.C. 2255.

Law and Analysis

The government contends that Barnett's claims are time-barred, inasmuch as they were filed more that one year after the statutory limitations period expired. Title 28 U.S.C. 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides a one-year limitation period for filing 2255 motions. It is well-established in the Fifth Circuit that when a defendant seeks a writ of certiorari from the Supreme Court, the defendant's conviction becomes final immediately upon the Supreme Court's denial of defendant's petition for writ of certiorari. *United States v. Thompson*, 203 F.3d 350 (5th Cir. 2000).

Accord Giesberg v. Cockrell, 288 F.3d 268 (5th Cir. 2002) (state prisoner's conviction was final on date certiorari was denied; court noted that one-year limitation provision in 28 U.S.C. 2254 is "virtually identical" to the provision applicable to a federal prisoner's 2255 motion for relief, and that the key to both provisions is the finality of the underlying judgment).

In the instant case, the Supreme Court denied Barnett's writ of certiorari on May 15, 2000. Thus, Barnett had until May 15, 2001 to file his motion. Because he did not file the motion until November 10, 2003, it appears to be time-barred. Barnett argues, however, that the limitations period should be equitably tolled in this case because he is innocent. Specifically, Barnett contends that, because the conviction of his co-conspirator, Victor Drake, was reversed by the Fifth Circuit upon a finding that there was insufficient evidence to convict him on either the conspiracy or aiding and abetting charges, no conspiracy could have existed, and Barnett is entitled to habeas relief.

Although AEDPA's limitations provision, like any statute of limitations, may by equitably tolled, *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998), the decision to invoke equitable tolling is left to the discretion of the district court, and courts of appeal review such decisions only for abuse of discretion. *Cousin v. Lensing*, 310 F.3d 843, 848 (5th Cir. 2002), *citing Fierro v. Cockrell*, 294 F.3d 674, 679 (5th Cir. 2002). It is well-settled that equitable tolling is permitted only "in rare and exceptional circumstances." *Cousin*, 310 F.3d at 848, *citing Davis*, 158 F.3d at 811. As the court noted in *Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002), a case involving a petition for a writ of habeas corpus under 28 U.S.C. 2254:

> We have recognized that the one-year limitations period for filing habeas petitions established in 2244(d)(1) is not a jurisdictional bar and is therefore subject to equitable tolling. *See Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Although equitable tolling is a "discretionary doctrine that turns on the facts and circumstances of a particular case," we ordinarily "draw on general principles to guide when equitable tolling is appropriate." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). As a general rule, equitable tolling operates only in "rare and exceptional circumstances" where it is necessary to "preserve a plaintiff's claims when strict application of the statute of limitations would be inequitable." Davis, 158 F.3d at 810-11 (citation and internal quotation marks omitted). Equitable tolling thus applies "principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.'" *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (citation omitted). As a consequence, neither "excusable neglect" nor ignorance of the law is sufficient to justify equitable tolling. Id.

See also United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2002) (no discretion made by courts between petition for a writ of habeas corpus under 28 U.S.C. 2254 and motion for collateral review under 2255, where AEDPA added similar one-year statutes of limitations to both sections, which are interpreted similarly for purposes of application of equitable tolling doctrine), *citing Davis v. Johnson*, 158 F.3d 806, 810 n.5 (5th Cir. 1998).

"A claim of 'actual innocence' is not itself a constitutional

claim, but instead a gateway though which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Neuendorf v. Graves*, 110 F.Supp.2d 1144, 1157-59 (N.D. Iowa 2000), *citing Mansfield v. Dormire*, 202 F.3d 1018, 1024 (8th Cir. 2000). *See also Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999); *Johnson v. Norris*, 170 F.3d 816, 817 (8th Cir. 1999); *Pritchett v. Meyers*, 2003 WL 22880841 (E.D.Pa. 2003). "Claims of 'actual innocence' are extremely rare and are based on 'factual innocence not mere legal insufficiency.'" *United States v. Lurie*, 207 F.3d 1075, 1077 n.4 (8th Cir. 2000). *See also United States v. Jones*, 172 F.3d 381, 384 (5th Cir. 1999), *quoting Bousley v. United States*, 523 614, 623-24, 118 S.Ct. 1604, 1611, 140 L.Ed.2d 828 (1998) ("actual innocence" means factual innocence, not mere legal insufficiency); *United States v. Torres*, 163 F.3d 909, 912 (5th Cir. 1999). As the court stated in *Pritchett*:

> Moreover, petitioner's many allegations of bias and abuse that he uses to buttress his claim of actual innocence are irrelevant. Actual innocence means "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611, 140 L.Ed.2d 828 (1998); *Sweger*, 294 F.3d at 523. *If petitioner's allegations are truthful, this merely proves the legal insufficiency of the trial, not his factual innocence*. *See Sweger*, 294 F.3d at 523 (holding that arguments "that prejudicial and inadmissible evidence impeded the jury's ability to reach a fair verdict... at best allege the *legal* insufficiency of [petitioner's] conviction, rather than establish his *factual* innocence on the basis of new evidence"). Ultimately, petitioner has failed to submit any facts that call into question the trial

> court's opinion and that justify a finding of actual innocence.

2003 WL 22880841, *4 (emphasis added).

In the instant case, Barnett does not argue that he is factually innocent of the crimes at issue, only that a legal technicality now makes him innocent. As in *Pritchett*, even if Barnett's allegations are truthful, such allegations merely prove the legal insufficiency of the conviction, not his factual innocence. Such allegations do not, therefore, establish that he is factually innocent of the crimes for which he was convicted and, accordingly, do not warrant the relief requested in the instant motion.

Furthermore, it is well-settled in the Fifth Circuit that an actual innocence claim does not constitute a "rare and exceptional" circumstance warranting tolling of AEDPA's limitations period. *See, e.g., United States v. Riggs*, 314 F.3d 796 (5th Cir. 2002) ("a petitioner's claims of actual innocence are [not] relevant to the timeliness of his petition."), *citing Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) ("Felder's actual innocence claim does not constitute a "rare and exceptional" circumstance, given that many prisoners maintain that they are innocent.") *See also Cousin v. Lensing*, 310 F3d. 843 (5th Cir. 2002) (court held that petitioner's claims of innocence did not preclude dismissal of his 2254 petition as untimely).

In his reply brief, Barnett argues that the Riggs, Felder and Cousin cases are distinguishable, because the petitioners in those cases did not make a *colorable showing* of actual innocence, whereas Barnett does. Barnett acknowledges that there are no cases in the Fifth Circuit supporting his argument that "colorable" showings of actual innocence

warrant equitable tolling of the limitations period - as opposed to mere allegations of innocence - contending only that the issue is an "open" one in this circuit. He does, however, point to the following language in the *Felder* decision, which he alleges suggests that the Fifth Circuit has considered a possible distinction: "Felder's actual innocence claim does not constitute a 'rare and exceptional' circumstance, *given that many prisoners maintain that they are innocent*." 204 F.3d at 171 (emphasis added). And in footnote 8, the court stated, "Felder has not made a *showing* of actual innocence, as the district court noted." *Id*, at 171, n. 8 (emphasis in original).

In rejecting Barnett's argument, the undersigned notes the following: (1) This is not case in which Barnett's motion was filed several days, or even several weeks, after the Supreme Court denied his writ of certiorari; rather, Barnett's motion was filed more than *two years* after the limitations period had expired; (2) Barnett offers *no reason* for his failure to timely file his motion. Drake's conviction was reversed on November 22, 1999, yet Barnett provides no reason for his delay in bringing the instant motion. As the case make clear, mistake and/or error on the part of a petitioner, or a petitioner's counsel, do not constitute a rare and exceptional circumstance warranting tolling of the limitations period. *See, e.g.*, *United States v. Patterson*, 211 F.3d 927, 931-32 (5th Cir. 2000); (3) Finally, in both the *Riggs* and *Cousin* decisions - both of which followed the *Felder* decision - the Fifth Circuit consistently rejected the notion that an actual innocence claim constitutes a "rare and exceptional" circumstance warranting equitable tolling of the limitations period. The court did so without making a distinction between "colorable showings" of actual innocence and mere claims of innocence. Considering the foregoing, the undersigned concludes that Barnett is not entitled to

equitable tolling of his claims, which are, therefore, time-barred. Consequently, the court need not consider the merits of his actual innocence claim.

Conclusion

For the foregoing reasons, the undersigned recommends that Barnett's 2255 motion be DENIED AND DISMISSED WITH PREJUDICE as time-barred.

[ADDITIONAL INFORMATION TO THE PARTIES REGARDING OBJECTIONS TO THE RECOMMENDATION OMITTED.]

Signed at Lafayette, Louisiana on June 10, 2004.

S/

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Mildred E. Methvin
U.S. Magistrate Judge
800 Lafayette St., Suite 3500
Lafayette, Louisiana 70501

6-10-04

Copy Sent: 6-15-04

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Richard Barnett	Criminal Action No. 6:97-CR-60033-01 Civil Action No. 6:03-CV-2090
versus	Judge Tucker L. Melancon
United States of America	Magistrate Mildred E. Methvyn

JUDGMENT

This matter was referred to United States Magistrate Judge Mildred E. Methvin for her Report and Recommendation. After an independent review of the entire record, including the objection filed by petitioner Richard Barnett [Rec. Doc. 237], this Court concludes that the Report and Recommendation of the magistrate judge are correct and this Court adopts the conclusions set forth therein.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Richard Barnett's 2255 Motion is DENIED AND DISMISSED WITH PREJUDICE as time-barred.

Thus done and signed, this 30th day of March, 2005 at Lafayette, Louisiana.

S/

_____

Tucker L. Melancon
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Received Jun 3 2005, Clerk

UNITED STATES

CRIMINAL NO.: 6:97CR60033-01

VERSUS

JUDGE MELANCON

RICHARD BARNETT **MAGISTRATE METHVYN**

CERTIFICATE OF APPEALABILITY

A final order having been filed in the above-captioned case, the court, considering the record in this case and the requirements of 28 U.S.C. 2253, hereby finds that:

X The certificate of appealability is DENIED because the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right.

___ The certificate of appealability is GRANTED for the below reasons:

The applicant has made a substantial showing that the following issues constitute a denial of a constitutional right:

Signed at Lafayette, Louisiana, this 2nd day of June, 2005.

S/

_____

Copy Sent
6-3-05

TUCKER L. MELANCON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed Mar 1, 2006

No. 05-30582
USDC Nos. 6:03-CV-2090
& 6:97-CR-60033-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

RICHARD D. BARNETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

ORDER:

Richard D. Barnett, a federal prisoner (# 76207-079), moves for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. 2255 motion to vacate as barred by the one-year limitations provision. In his 2255 motion, filed in November 2003, Barnett contended that he was "actually innocent" of his 1997 jury-trial conviction of conspiracy to commit murder for hire, for the reason that the conspiracy conviction of his codefendant Virgil R. Drake was reversed on direct appeal for insufficient evidence. Barnett has argued that his "credible showing" of "actual innocence" warrants equitable tolling of the limitations period in his case.

When a federal postconviction application is dismissed on procedural grounds, the COA applicant is required to show "that jurists of reason 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, 529 U.S. 473, 484 (2000); see also 28 U.S.C. 2253Z(c) (2). Because Barnett has not made the requisite showing, his COA motion is denied.

S/

_____

Patrick E. Higginbotham
United States Circuit Judge