

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

IN RE: JESSIE MCKIM,

PETITIONER,

**v.
JAY CASSADY, WARDEN, JCCC,**

RESPONDENT.

DOCKET NUMBER WD77803

DATE: January 20, 2015

Appeal From:

Adair County Circuit Court
The Honorable Russell E. Steele, Judge

Appellate Judges:

Writ Division: Mark D. Pfeiffer, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt,
Judge

Attorneys:

Jennifer Koboldt Bukowsky, Columbia, MO, for Petitioner.

Michael J. Spillane, Jefferson City, MO, for Respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Before Writ Division: Mark D. Pfeiffer, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Jessie McKim was convicted in 1999 of first degree murder in the death of Wendy Wagon. McKim has filed a petition for writ of habeas corpus requesting the vacation of his conviction and a new trial because newly discovered evidence clearly and convincingly establishes that he is actually innocent (a freestanding actual innocence claim). In the alternative, McKim asks this court to grant him a new trial because the preponderance of the evidence establishes either the gateway of cause and prejudice, or the gateway of manifest injustice in light of new evidence of actual innocence, either of which permits review of procedurally defaulted claims that he was deprived of a fair trial. Finally, McKim requests that his conviction be vacated because his continued servitude violates the Thirteenth Amendment as he has been imprisoned for more than 17 years for a murder he claims never happened.

The foundation for McKim's habeas claims is the testimony of several pathologists who now opine that Wagon's autopsy results suggest that Wagon's cause of death was methamphetamine overdose, and not asphyxiation or suffocation as opined by Dr. Dix at McKim's trial.

HABEAS PETITION DENIED WITH PREJUDICE

Writ Division holds:

1. An appellate court's issuance of an order denying a petition for writ of habeas corpus is without prejudice unless the order otherwise specifies. McKim's current habeas petition is not barred by the operation of Rule 91.22 because orders entered by appellate courts denying McKim's earlier habeas petitions were without prejudice.

2. Even assuming McKim's new expert opinions drawn from evidence available and introduced at the time of trial, and a book written by Dr. Dix before trial, qualify as "new evidence" we may consider in evaluating claims of gateway or freestanding actual innocence, McKim's "new evidence" does not sustain his burden to establish by a preponderance or clearly

and convincingly that no reasonable juror would have convicted him. McKim's freestanding and gateway actual innocence claims are denied.

3. McKim's trial counsel was not impeded to challenge Dr. Dix's cause of death opinion within the time frames required for direct appeal or McKim's Rule 29.15 motion. The autopsy report and the toxicology report were in McKim's possession and were introduced during his trial. McKim's claim that he did not know that there was a basis to challenge Dr. Dix's cause of death opinion until years after his trial is not a function of a cause external to the defense, and does not establish the cause prong for cause and prejudice as to permit review of procedurally defaulted claims.

4. McKim also fails to sustain his burden to establish cause external to the defense through allegations: (i) that Dr. Dix's testimony was perjured; (ii) that the State committed *Brady* violations by failing to disclose the book authored by Dr. Dix and notes from Dr. Dix's file; and (iii) that the State committed a *Brady* violation by failing to disclose McFarland's belief that Wagnon died of an overdose. Dr. Dix's expression of a contrary opinion is not perjury. Dr. Dix's book was available in the public domain. McKim has not established that notes he claims were not disclosed even existed. And McFarland testified at trial that McKim threatened to kill Wagnon by drug overdose.

5. Because no gateway to do so has been established, we are not permitted to address the procedurally defaulted claims of constitutional error raised in McKim's Petition.

6. No authority has recognized a claimed violation of the Thirteenth Amendment violation to be a freestanding basis for securing habeas relief. Even were it, the genesis of McKim's claim is indistinguishable from McKim's freestanding and gateway actual innocence claims which we have already denied. Alternatively, McKim's Thirteenth Amendment claim is a procedurally defaulted claim of constitutional error that cannot be reviewed except through the gateway of actual innocence or cause and prejudice, neither of which is established on this habeas record.

Opinion by Cynthia L. Martin, Judge

January 20, 2015

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