

No. 17-1899

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THADDEUS WILLIAMS,)
Petitioner-Appellant,)
v.)
CINDI S. CURTIN,)
Respondent-Appellee.)

FILED
Feb 07, 2018
DEBORAH S. HUNT, Clerk

O R D E R

Thaddeus Williams, a pro se Michigan prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus as untimely. The court construes his notice of appeal as an application for a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(2).

In 2007, a jury convicted Williams of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. After the jury trial, the trial court adjudged Williams guilty of violating his probation for a prior conviction of carrying a concealed weapon. The trial court sentenced him to an aggregate term of thirty-two to fifty-two years of imprisonment. Williams's direct appeal was unsuccessful. *People v. Williams*, No. 279713, 2008 WL 4958547 (Mich. Ct. App. Nov. 20, 2008), *appeal denied*, *People v. Williams*, 765 N.W.2d 317 (Mich. 2009) (mem.). So were his state court motions to vacate and for relief from judgment.

In November 2013, Williams, through counsel, filed a § 2254 petition. Thereafter, he filed a pro se petition. The district court declined to combine the petitions but granted Williams's motion to amend. The district court then denied Williams's petition as untimely and

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declined to issue a COA. Williams moved for rehearing or reconsideration, which the district court denied.

A COA may be issued “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “That standard is met when ‘reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,’” *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when “jurists could conclude the issues presented are adequate to deserve encouragement to proceed further,” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied the petition on procedural grounds, 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 . . . would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

A § 2254 petition is subject to a one-year statute of limitations. *See* 28 U.S.C. § 2244(d). The limitations period begins to run on 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 an impediment to filing a federal habeas petition is removed by the state; (c) the date on which a new constitutional right asserted is 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(d)(1)(A)-(D).

Williams’s limitations period began under § 2244(d)(1)(A), as none of the other provisions apply. On August 6, 2009, the Michigan Supreme Court denied his motion for reconsideration, ending his direct appeal in state court. *People v. Williams*, 769 N.W.2d 232 (Mich. 2009) (mem.). Thus, his one-year limitations period started ninety days later, on November 4, 2009, when the time to file a petition for certiorari expired. *See Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009).

A period of limitations is tolled during the pendency of “a properly filed application for State post-conviction or other collateral review.” 28 U.S.C. § 2244(d)(2). Williams filed two

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motions after his direct appeal ended in state court. First, he filed a motion to vacate. He claims that he filed it in July 2009, but the district court held that he filed it on October 5, 2009, as the case record shows. In either case, the motion was filed before the expiration of his direct appeal, and thus it tolled the limitations period until the Michigan Supreme Court's December 20, 2010, order terminating that case. *People v. Williams*, 791 N.W.2d 445 (Mich. 2010) (mem.). In his motion for rehearing, Williams argued that the tolling should have continued for another ninety days, until the time to file a writ of certiorari expired. But, as the district court held, the limitations period is not tolled during the time to file a writ of certiorari for the denial of a state post-conviction motion because “[t]he application for state postconviction review is . . . not ‘pending’ after the state court’s postconviction review is complete.” *Lawrence v. Florida*, 549 U.S. 327, 332 (2007) (quoting 28 U.S.C. § 2244(d)(2)).

On March 8, 2011, seventy-seven days after the Michigan Supreme Court's decision, Williams filed his second post-conviction motion. The State argued that the motion did not toll the limitations period because, since the Michigan Supreme Court denied it under Michigan Court Rule 6.502(G) as an improper second post-conviction motion, it was not “properly filed” under § 2244(d)(2). *See Williams v. Birkett*, 670 F.3d 729, 736 (6th Cir. 2012). But, giving Williams the benefit of the doubt, as the district court did, and allowing that this motion tolled the limitations period, that tolling lasted until the Michigan Supreme Court's order of November 20, 2012, which marked the end of Williams's state post-conviction proceedings. *People v. Williams*, 822 N.W.2d 577 (Mich. 2012) (mem.). Thus, 288 days remained on his limitations period. Without further tolling, then, Williams's § 2254 petition was due by September 9, 2013. But Williams filed no more actions that tolled the limitations period and he did not file his initial, counseled § 2254 petition, until November 7, 2013. Accordingly, even using the most generous calculation for Williams, his petition was untimely under § 2244(d).

A limitations period may be equitably tolled when a petitioner can show: ““(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) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Williams made no argument in support of equitable tolling, and none is apparent. His misunderstanding of the statutory tolling regime under

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§ 2244(d)(2) is not an extraordinary circumstance. *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012).

Finally, a petitioner who presents new evidence and shows that “it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence,” may also escape the procedural bar of the limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). But Williams submitted no new evidence of his actual innocence.

Accordingly, Williams’s COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 17-1899

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THADDEUS WILLIAMS,

Petitioner-Appellant,

v.

CINDI S. CURTIN,

Respondent-Appellee.

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O R D E R

FILED
Apr 18, 2018
DEBORAH S. HUNT, Clerk

Before: NORRIS, ROGERS, and STRANCH, Circuit Judges.

Thaddeus Williams petitions for rehearing en banc of this court's order entered on February 7, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THADDEUS WILLIAMS,

Petitioner,

v.

Case Number 13-14636
Honorable David M. Lawson

CINDI CURTIN,

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before the Court on the petitioner's motion for reconsideration of the Court's opinion dismissing his petition, which was based on the Court's conclusion that the petition was filed more than 60 days after the expiration of the AEDPA one-year limitations period. The petitioner contends that the Court's conclusion was mistaken because his first post-conviction motion was filed in the state trial court in July 2009, not October 2009 as the Court recited in its opinion. However, as the respondent correctly points out, whether the post-conviction motion was filed in July or October has no impact on the assumptions about the extent and tolling of the limitations period that the Court accepted for the purposes of its prior ruling. Because the petitioner has failed to identify any palpable defect in the Court's reasoning in its previous ruling, his motion for reconsideration must be denied.

Motions for reconsideration may be granted pursuant to E.D. Mich. LR 7.1(h)(1) when the moving party shows (1) a "palpable defect," (2) that misled the court and the parties, and (3) that correcting the defect will result in a different disposition of the case. E.D. Mich. LR 7.1(h)(3). A "palpable defect" is a defect which is obvious, clear, unmistakable, manifest, or plain. *Mich. Dep't of Treasury v. Michalec*, 181 F. Supp. 2d 731, 734 (E.D. Mich. 2002) (citations omitted).

“Generally . . . the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court.” E.D. Mich. LR 7.1(h)(3).

In its opinion dismissing the petition as untimely, the Court summarized the procedural history of the petitioner’s case in the state courts as follows:

Following his convictions and sentencing, the petitioner filed a direct appeal in the Michigan Court of Appeals raising claims concerning the reference to his weapons conviction and denial of a mistrial motion, the sufficiency of the evidence, the submission of first-degree and second-degree murder charges to the jury, the conduct of the prosecutor and the trial court, and the jury instructions. The court denied relief on those claims and affirmed his convictions. The petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied in a standard order on May 27, 2009. *People v. Williams*, 483 Mich. 1019, 765 N.W.2d 317 (2009). That court denied reconsideration on August 6, 2009. *People v. Williams*, 484 Mich. 874, 769 N.W.2d 232 (2009).

On October 5, 2009, the petitioner filed a motion to vacate his convictions in the state trial court raising a claim concerning his notice and trial on the first-degree murder charge. The trial court denied relief in a summary order. *People v. Williams*, No. 07-007377-01 (Wayne Co. Cir. Ct. Nov. 24, 2009). The petitioner filed a delayed application for leave to appeal in the Michigan Court of Appeals, which was denied “for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).” In denying the application, the court noted that the petitioner’s convictions were no longer reviewable under the direct appeal rules, Mich. Ct. R. 7.200 or 7.300, and were only reviewable under the post-conviction rules, Mich. Ct. R. 6.500, *et seq.* *People v. Williams*, No. 295546 (Mich. Ct. App. May 24, 2010). The court also denied reconsideration. *People v. Williams*, No. 295546 (Mich. Ct. App. July 1, 2010). The petitioner filed an application for leave to appeal in the Michigan Supreme Court, which was denied in a standard order on September 9, 2010, *People v. Williams*, 488 Mich. 858, 787 N.W.2d 124 (2010), and reconsideration was denied on December 20, 2010. *People v. Williams*, 488 Mich. 998, 791 N.W.2d 445 (2010).

On March 8, 2011, the petitioner filed a motion for relief from judgment in the state trial court raising claims concerning his notice for the first-degree murder charge, his right to a public trial during jury voir dire, the jury instructions, the failure to preserve evidence, and the ineffectiveness of trial and appellate counsel. The court denied relief on those claims citing Michigan Court Rule 6.508(D)(3). *People v. Williams*, No. 07-007377 (Wayne Co. Cir. Ct. June 2, 2011). The petitioner filed an application for leave to appeal in the Michigan Court of Appeals, which was denied “for failure to meet the burden of establishing entitlement to relief under MCR

6.508(D).” *People v. Williams*, No. 306161 (Mich. Ct. App. March 23, 2012). The petitioner filed an application for leave to appeal in the Michigan Supreme Court, which was denied on June 25, 2012 because the motion for relief from judgment was “prohibited by MCR 6.502(G).” *People v. Williams*, 491 Mich. 947, 815 N.W.2d 450 (2012). The court also denied reconsideration on November 20, 2012. *People v. Williams*, 493 Mich. 898, 822 N.W.2d 577 (2012).

Opinion & Order [dkt. #13] at 2-3 (Pg ID 2173-74). The petitioner does not quarrel with that timeline except by his assertion that the 2009 motion to vacate his sentence was filed in the state court in July 2009, not October 2009. It is undisputed that the petitioner filed his habeas petition in this Court on November 7, 2013. The Court concluded, based on the procedural history recited above, that the petitioner’s conviction became final on November 4, 2009, when the 90-day period for filing a petition for a writ of certiorari in the Supreme Court expired:

The state courts completed direct review of the petitioner’s convictions on August 6, 2009, when the Michigan Supreme Court denied reconsideration of its order denying leave to appeal. *The petitioner’s convictions became “final” under the federal habeas statute 90 days later — on November 4, 2009* — when “the time for filing a certiorari petition expire[d].” *Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009); *see Lawrence v. Florida*, 549 U.S. 327, 333 (2007); S. Ct. R. 13(1). Therefore, the petitioner was required to file his federal habeas petition under 28 U.S.C. § 2244(d)(1)(A) by November 4, 2010.

Id. at 4-5 (Pg ID 2175-76). Based on that analysis, the Court concluded that the habeas clock did not start to run until November 4, 2009, and that the petitioner initially was required to file his habeas petition by November 4, 2010.

In his briefing in this case, the petitioner argued that his petition was timely because the running of the one-year limitations period twice was paused due to the pendency of his two post-conviction motions for relief from judgment. Those motions were filed, according to the petitioner, sometime in July 2009 and on March 8, 2011. However, as the Court explained in its opinion, even if it is assumed that the limitations period was tolled by both motions, for the entire time that the

proceedings on each were pending, his petition still was untimely:

After the state courts completed review of the first post-conviction motion, the federal habeas clock restarted on December 21, 2010. By the petitioner's way of thinking, it then ran for 78 days until he filed his second motion for relief from judgment on March 8, 2011. Following that reasoning, it restarted again after November 20, 2012, when the Michigan Supreme Court denied reconsideration of the appeal of the second post-conviction motion. The 287 days then left on the clock took the habeas filing deadline to September 2, 2013. The petitioner did not file his initial federal habeas petition until November 7, 2013 – more than two months later.

Id. at 6 (Pg ID 2177). Although the Court referred to the clock as "restarting," the Court's discussion of that calculation makes clear that the Court did not assume that any time at all had run on the habeas clock in 2009. Instead, the Court assumed that the clock never started to run before November 4, 2009, and that it was paused from then through the conclusion of the petitioner's direct appeal from the denial of his first post-conviction motion, on December 21, 2010.

Thus, whether the post-conviction motion was filed in July or October 2009 is of no consequence, because the Court assumed for the purposes of its tolling analysis — affording the petitioner the benefit of the most generous possible construction of the procedural timeline — that no time at all ran on the AEDPA clock before December 21, 2010. The Court then calculated that 78 of the 365 days of the limitations period ran between December 21, 2010 and March 8, 2011, and that 287 days remained when the Michigan Supreme Court denied the petitioner's motion for reconsideration on the appeal of his section post-conviction motion, on November 20, 2012. Therefore, even if the Court assumes — as it did for the purposes of its previous ruling — that the limitations period was subject to tolling for the full extent of every creditable period claimed by the petitioner, he still was required to file his petition no later than September 2, 2013. His petition was not filed by that date, and it therefore was untimely.

The petitioner asserts that he had 90 days within which to file a petition for a writ of

certiorari after the December 21, 2010 ruling denying reconsideration of the appeal from his first post-conviction motion, which he believes would “cover” the 78 days between then and when he filed his second motion. But that 90-day “grace period” is an allowance that is added only after the last ruling by a state’s highest court at the conclusion of a direct appeal, to determine the day on which a petitioner’s judgment of conviction becomes “final” and the habeas clock first starts to run. *Taylor v. Palmer*, 623 F. App’x 783, 790 (6th Cir. 2015) (“Taylor’s judgment became final for purposes of AEDPA on June 19, 2012, the day on which the ninety-day time period for seeking certiorari with the United States Supreme Court expired, and therefore the AEDPA statutory period began to run on June 20, 2012.”) (emphasis added)) (citing *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009)). No such 90-day allowance is added when calculating any period of tolling due to the pendency of a subsequent collateral attack on the judgment, because that allowance is afforded only when fixing the benchmark date of finality for the judgment of conviction. *See Lawrence v. Florida*, 549 U.S. 327, 332 (2007) (“[An] application for state postconviction review is . . . not ‘pending’ after the state court’s postconviction review is complete, and § 2244(d)(2) does not toll the 1-year limitations period during the pendency of a petition for certiorari.”).

The petitioner has failed to identify any palpable defect in the calculations that the Court relied upon when it concluded that the petition was untimely, and his motion for reconsideration therefore will be denied.

Accordingly, it is **ORDERED** that the petitioner’s motion for reconsideration and motion for rehearing [dkt. #16, 17] are **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: July 10, 2017

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on July 10, 2017.

s/Susan Pinkowski
SUSAN PINKOWSKI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THADDEUS WILLIAMS,

Petitioner,

v.

Case Number 13-14636
Honorable David M. Lawson

CINDI CURTIN,

Respondent.

ORDER DENYING CERTIFICATE OF APPEALABILITY

Petitioner Thaddeus Williams was convicted of second-degree murder and firearms offenses by a Wayne County, Michigan jury and sentenced to lengthy prison sentences. He challenged his convictions and sentences in a *pro se* petition and amended petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petitioner raised 12 claims addressing a variety of alleged constitutional violations, but the Court found that Williams had not complied with the one-year statute of limitations applicable to federal habeas actions, *see* 28 U.S.C. § 2244(d)(1), and the petition was not saved by equitable tolling. The Court therefore dismissed the petition as untimely.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts:

The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts.

A certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). To receive a certificate of appealability, “a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted).

The petition for a writ of habeas corpus was not filed within the time permitted by 28 U.S.C. § 2244(d), and the petitioner failed to establish that he was entitled to statutory or equitable tolling of the one-year limitations period. The Court now finds that reasonable jurists could not debate the correctness of the Court’s conclusions on those points or its ruling dismissing the petition, and the Court therefore will deny a certificate of appealability.

Accordingly, it is **ORDERED** that a certificate of appealability is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: November 29, 2016

<p style="text-align: center;"><u>PROOF OF SERVICE</u></p> <p>The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on November 29, 2016.</p> <p style="text-align: center;"><u>s/Susan Pinkowski</u> SUSAN PINKOWSKI</p>
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THADDEUS WILLIAMS,

Petitioner,

v.

Case Number 13-14636
Honorable David M. Lawson

CINDI CURTIN,

Respondent.

JUDGMENT

In accordance with the opinion and order entered on this date,

It is **ORDERED AND ADJUDGED** that the petition for a writ of habeas corpus is
DISMISSED WITH PREJUDICE.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: November 29, 2016

PROOF OF SERVICE
The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on November 29, 2016.
<u>s/Susan Pinkowski</u> SUSAN PINKOWSKI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THADDEUS WILLIAMS,

Petitioner,

v.

Case Number 13-14636
Honorable David M. Lawson

CINDI CURTIN,

Respondent.

OPINION AND ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Thaddeus Williams was convicted of second-degree murder and firearms offenses by a Wayne County, Michigan jury and sentenced to lengthy prison sentences. He challenges his convictions and sentences in a *pro se* petition and amended petition for a writ of habeas corpus under 28 U.S.C. § 2254. Although he has raised 12 claims addressing a variety of alleged constitutional violations, one issue is fatal to his quest for relief: the untimeliness of his petition. Because Williams did not comply with the one-year statute of limitations applicable to federal habeas actions, *see* 28 U.S.C. § 2244(d)(1), and the petition is not saved by equitable tolling, the Court must dismiss the petition and deny relief.

I.

The petitioner shot Rufus Marshall to death during an argument in an apartment hallway in Detroit, Michigan on March 16, 2007. The Michigan Court of Appeals summarized the relevant facts as follows:

Defendant was convicted of the second-degree murder of Rufus Marshall while he and Marshall were visiting an apartment in Detroit on March 16, 2007. Defendant and Marshall got into an argument about a rivalry between two neighborhoods in Detroit, and also about a debt owed to defendant. Defendant challenged Marshall to “knuckle it up,” and Marshall placed two telephone calls asking someone to bring

him his gun. Both men left the apartment and went into the hallway, where Marshall was fatally shot in the chest. Defendant contended that Marshall produced a gun during the confrontation in the hallway, and that the gun discharged when defendant grabbed Marshall in an attempt to disarm him. The prosecutor maintained that the physical evidence and other circumstances surrounding the shooting refuted defendant's claim of self-defense.

People v. Williams, No. 279974, 2008 WL 4958547, *1 (Mich. Ct. App. Nov. 20, 2008). These facts are presumed to be correct, *see* 28 U.S.C. § 2254(e)(1); *Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009), although they have little bearing on the main issue discussed below.

Following his convictions and sentencing, the petitioner filed a direct appeal in the Michigan Court of Appeals raising claims concerning the reference to his weapons conviction and denial of a mistrial motion, the sufficiency of the evidence, the submission of first-degree and second-degree murder charges to the jury, the conduct of the prosecutor and the trial court, and the jury instructions. The court denied relief on those claims and affirmed his convictions. The petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied in a standard order on May 27, 2009. *People v. Williams*, 483 Mich. 1019, 765 N.W.2d 317 (2009). That court denied reconsideration on August 6, 2009. *People v. Williams*, 484 Mich. 874, 769 N.W.2d 232 (2009).

On October 5, 2009, the petitioner filed a motion to vacate his convictions in the state trial court raising a claim concerning his notice and trial on the first-degree murder charge. The trial court denied relief in a summary order. *People v. Williams*, No. 07-007377-01 (Wayne Co. Cir. Ct. Nov. 24, 2009). The petitioner filed a delayed application for leave to appeal in the Michigan Court of Appeals, which was denied "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." In denying the application, the court noted that the petitioner's convictions were no longer reviewable under the direct appeal rules, Mich. Ct. R. 7.200 or 7.300, and were only

reviewable under the post-conviction rules, Mich. Ct. R. 6.500, *et seq.* *People v. Williams*, No. 295546 (Mich. Ct. App. May 24, 2010). The court also denied reconsideration. *People v. Williams*, No. 295546 (Mich. Ct. App. July 1, 2010). The petitioner filed an application for leave to appeal in the Michigan Supreme Court, which was denied in a standard order on September 9, 2010, *People v. Williams*, 488 Mich. 858, 787 N.W.2d 124 (2010), and reconsideration was denied on December 20, 2010. *People v. Williams*, 488 Mich. 998, 791 N.W.2d 445 (2010).

On March 8, 2011, the petitioner filed a motion for relief from judgment in the state trial court raising claims concerning his notice for the first-degree murder charge, his right to a public trial during jury voir dire, the jury instructions, the failure to preserve evidence, and the ineffectiveness of trial and appellate counsel. The court denied relief on those claims citing Michigan Court Rule 6.508(D)(3). *People v. Williams*, No. 07-007377 (Wayne Co. Cir. Ct. June 2, 2011). The petitioner filed an application for leave to appeal in the Michigan Court of Appeals, which was denied “for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).” *People v. Williams*, No. 306161 (Mich. Ct. App. March 23, 2012). The petitioner filed an application for leave to appeal in the Michigan Supreme Court, which was denied on June 25, 2012 because the motion for relief from judgment was “prohibited by MCR 6.502(G).” *People v. Williams*, 491 Mich. 947, 815 N.W.2d 450 (2012). The court also denied reconsideration on November 20, 2012. *People v. Williams*, 493 Mich. 898, 822 N.W.2d 577 (2012).

The petitioner, through counsel, filed an initial habeas petition in this Court on November 7, 2013. The petitioner, on his own, subsequently filed an amended petition raising the 12 claims that he raised on direct appeal and collateral review in the state courts. The Court accepted the amended petition as the operative petition in this case. The respondent filed an answer to the

amended petition contending that the petition is untimely, that certain claims are barred by procedural default, and that all of the claims lack merit. The petitioner, through counsel, has filed a reply to that answer asserting that his petition is timely.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) became effective on April 24, 1996 and governs the filing date for this action because the petitioner filed his petition after the AEDPA’s effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA amended 28 U.S.C. § 2244 to include a one-year period of limitations for habeas petitions brought by prisoners challenging state court judgments. *Vroman v. Brigano*, 346 F.3d 598, 601 (6th Cir. 2003). The one-year statute of limitations runs 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(d)(1). A habeas petition filed outside the prescribed time period must be dismissed. *See Akrawi v. Booker*, 572 F.3d 252, 260 (6th Cir. 2009); *Wilson v. Birkett*, 192 F. Supp. 2d 763, 765 (E.D. Mich. 2002).

The state courts completed direct review of the petitioner’s convictions on August 6, 2009, when the Michigan Supreme Court denied reconsideration of its order denying leave to appeal. The

petitioner's convictions became "final" under the federal habeas statute 90 days later — on November 4, 2009 — when "the time for filing a certiorari petition expire[d]." *Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009); *see Lawrence v. Florida*, 549 U.S. 327, 333 (2007); S. Ct. R. 13(1). Therefore, the petitioner was required to file his federal habeas petition under 28 U.S.C. § 2244(d)(1)(A) by November 4, 2010.

The petitioner contends that the one-year period must be extended because the Court should not count the time during which his several motions for post-conviction relief were pending in the state courts. Indeed, 28 U.S.C. § 2244(d)(2) says that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation . . ." And the petitioner filed his motion to vacate with the state trial court on October 5, 2009, which was 30 days after his conviction became final. The petitioner is correct that the clock stopped with approximately eleven months left on it, until it restarted on December 20, 2010, when the Michigan Supreme Court denied reconsideration of its order denying leave to appeal from the rejection of those post-conviction claims. *See Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001) (holding that AEDPA's limitations period does not begin to run anew after the completion of state post-conviction proceedings).

The petitioner contends that he stopped the clock again on March 8, 2011, when he filed another post-conviction motion in the trial court. The warden disputes that argument, contending that because Michigan Court Rule 6.502(G) prohibits "successive motions for relief from judgment" (subject to some exceptions not applicable here), the March 8, 2011 motion was not "properly filed" within the meaning of section 2244(d)(2). There may be some merit to the warden's position, *see*

Williams v. Birkett, 670 F.3d 729, 733 (6th Cir. 2012), but the Court need not decide the point, because even with the benefit of a second hiatus, the petition is still late.

After the state courts completed review of the first post-conviction motion, the federal habeas clock restarted on December 21, 2010. By the petitioner's way of thinking, it then ran for 78 days until he filed his second motion for relief from judgment on March 8, 2011. Following that reasoning, it restarted again after November 20, 2012, when the Michigan Supreme Court denied reconsideration of the appeal of the second post-conviction motion. The 287 days then left on the clock took the habeas filing deadline to September 2, 2013. The petitioner did not file his initial federal habeas petition until November 7, 2013 – more than two months later. The petitioner does not contend that he is entitled to a new one-year period because the State created an impediment to a timely filing, that his claims are based upon newly-discovered facts, or that his claims arise from newly-created rights recognized by the United States Supreme Court and made retroactive to cases on collateral review. *See* 28 U.S.C. § 2244(d)(1)(B), (C), (D). His petition, therefore, is untimely.

The one-year statute of limitations is not a jurisdictional bar and is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). The Supreme Court has explained that a habeas 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.” *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *see also Robertson v. Simpson*, 624 F.3d 781, 783-84 (6th Cir. 2010). A petitioner has the burden of demonstrating that he is entitled to equitable tolling. *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). “Typically, equitable tolling applied only when a litigant’s failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant’s control.”

Jurado v. Burt, 337 F.3d 638, 642 (6th Cir. 2003) (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6th Cir. 2000)).

The petitioner makes no such showing. The fact that he is untrained in the law, was proceeding without a lawyer for a period of time, or may have been unaware of the statute of limitations does not warrant tolling. *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012) (holding that *pro se* status is not an extraordinary circumstance); *Allen*, 366 F.3d at 403 (holding that ignorance of the law does not justify tolling); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) (finding that illiteracy is not a basis for equitable tolling). His actual or mistaken notions about the tolling effect of his state court collateral review motions will not help him, because the Court gave him the benefit of the doubt in its calculations of the filing deadline. The petitioner has not shown that he is entitled to equitable tolling under *Holland*.

The Supreme Court and the Sixth Circuit have held that a credible claim of actual innocence may equitably toll the one-year statute of limitations. *McQuiggin v. Perkins*, --- U.S. ---, ---, 133 S. Ct. 1924, 1928 (2013); *Souter v. Jones*, 395 F.3d 577, 588-90 (6th Cir. 2005). To support a claim of actual innocence, a petitioner in a collateral proceeding “must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)); *see also House v. Bell*, 547 U.S. 518, 537-39 (2006). A valid claim of actual innocence requires a petitioner “to support his allegations of constitutional error with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence — that was not presented at trial.” *Schlup*, 513 U.S. at 324. Actual innocence means “factual innocence, not mere legal insufficiency.” *Bousley*, 523 U.S. at 623. In keeping with Supreme Court

authority, the Sixth Circuit has recognized that the actual innocence exception should “remain rare” and “only be applied in the ‘extraordinary case.’” *Souter*, 395 F.3d at 590 (quoting *Schlup*, 513 U.S. at 321). The petitioner makes no such showing. The petitioner has not established that he is entitled to equitable tolling of the one-year period.

III.

The petition for a writ of habeas corpus was not filed within the time permitted by 28 U.S.C. § 2244(d). The petitioner has not shown that he is entitled to statutory or equitable tolling of the one-year limitations period.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus is **DISMISSED WITH PREJUDICE**.

s/**David M. Lawson**
DAVID M. LAWSON
United States District Judge

Dated: November 29, 2016

PROOF OF SERVICE
The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on November 29, 2016.
<u>s/</u> Susan Pinkowski SUSAN PINKOWSKI

**Additional material
from this filing is
available in the
Clerk's Office.**