

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Harry Eugene Briscoe - PETITIONER

VS.

LaShann Eppinger- Warden - RESPONDENT(S)

ON A PETITION FOR A WRIT OF CERTIORARI TO

THE 6th. CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR A WRIT OF CERTIORARI

Harry Eugene Briscoe  
(Your Name)

2500 S. Avon-Belden Rd  
(Address)

Grafton, OH 44044  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

## QUESTION(S) PRESENTED

1.

Whether this U.S.S. Ct. will certify the conflict of the 6th Circuit Court of Appeals, not only with itself concerning its ruling that subject-matter jurisdiction may be raised at any time, (U.S. V Adesida 129 f.3d 846 6th. Circuit 1997) but with all other federal courts of appeals, and this U.S.S. Ct. decision in **Glover V Gary McCaugtry 2010 U.S. Briefs 1114; 2011 U.S.S. Ct. Briefs Lexis 3133.**

2.

Whether this U.S.S. Ct. will provide pro se petitioner Harry Eugene Briscoe the due process and equal protection rights of all case law incorporated herein concerning the scheme to a subject-matter jurisdiction claim it provided in **Glover V Gary McCoughtry, Warden- respondent (no. 10114) Supreme Court of The United States. 2010 U.S. Briefs 1114; 2011 U.S.S. Ct. Briefs Lexis 3133.**

3.

Whether the doctrine of stare decisis apply to petitioner Harry Eugene Briscoe seeking relief from a void conviction under Constitutional mandates already established by the U.S.S. Ct. in **Glover V McCaugtry, Warden- respondent.**

4.

Whether this present petition should be liberally construe as an original request for a writ of habeas corpus by this court, because extraordinary circumstances exists for his immediate release from a void judgement.

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	5
CONCLUSION.....	6

## INDEX TO APPENDICES

APPENDIX A Order and opinion denying informa pauperis and Certificate of Appealability. Case No. 18-3041 May 31, 2018

APPENDIX B Order and report adopting recommendation to time bar petitioner. December 18, 2017 Case No. 1:17 CV 1329

APPENDIX C Order and opinion denying rehearing en banc petition. No. 18-3041 August 15, 2018

APPENDIX D Order dismissing habeas corpus petition. May 31, 2017 Case No. 2017-0454. No merit review.

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
State of Ohio V Green N.E. 2d p.334	
State of Ohio V J-Ro Sharp- 2009 Ohio 1854; 2009 Ohio App. Lexis 1561	
U.S. V Adesida- 129 f.3d 846- 6th Circuit 1997	
Glover V Gary McCaughtry; Warden- respondent	
Supreme Court of the United States 2010 U.S. Briefs 1114; 2011 U.S.S. Ct. Briefs 3133	

STATUTES AND RULES

Statute/R.C. 1901.31(E)	Rule- Ohio R.Crim. P(3)
Statute/R.C. 2937.02(A)(1)	Rule- Ohio R.Crim. P4(A)
	Rule- Ohio R.Crim. P5(A)

OTHER

U.S. V Sanders S. Ct. 1068

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at 18-3041; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at 1:17 CV-1329; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 31<sup>st</sup> 2018.

[ ] No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 15<sup>th</sup> 2018, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix D.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under the **fourth and fifth amendment**, petitioner had the right to be secure in his person, house, papers, and effects, against unreasonable and illegal searches and seizures, and no warrant should have been issued where there was no visual endorsement of an "**oath**" authorization securing the petitioners Constitutional right ~~not~~ to be taken into an illegal servitude (see Exhibits A & B), depriving him of life and liberty without due process of law. The municipal court, trial court, nor the District Court of Appeals had been previously **ascertained by law** when it "knowingly continued to proceed on an illegal and hypothetical jurisdiction over the subject matter, and me as a person. My **6th amendment** was therefore violated also.

This whole process of prior knowledge of an illegal servitude by pro se petitioner's lawyers, municipal court, trial court, and all courts of Appeal, State and federal, has blatantly stood in opposition of petitioners **Eighth Amendment** right of opposing cruel and unusual punishment. Pro se petitioner Harry Eugene Briscoe has **never been duly convicted** under the **13th Amendment** of the U.S. Constitution, when no formal accusatory instrument (complaint or warrant) has ever been duly sworn to by someone authorized to administer oaths.

The 6th Circuit Court of Appeals is in direct conflict with its own ruling in U.S. V Adesida 129 f.3d 846, by not allowing pro se petitioner Harry Eugene Briscoe his **14th Amendment** right to secure equal protection of laws beyond an erroneous time limitation. The 6th Circuit already ruled that lack of subject-matter jurisdiction may be raised at any time in Adesida.

Statute R.C. 1901.31(E)

Statute R.C. 2937.02(A)(1)

Rule- Ohio R.Crim. P(3)

Rule- Ohio R.Crim. P4(A)

Rule- Ohio R.Crim. P5(A)

## STATEMENT OF THE CASE

Pro se petitioner Harry Eugene Briscoe has provided actual evidence in the first filing of his 2254 petition establishing the facts (see Exhibits A & B). The charging officer (Maurice Clark), alongside the umbrella of the trial court, used their badges of color to deprive, intimidate, and disregard petitioner's 4th, 5th, 6th, 8th, 13th and 14th amendments. And there is no action over time that can change a void judgement. **J-Ro Sharp** (2009 Ohio 1854; 2009 Ohio App. Lexis 1561). **U.S. V Adesida** 129 f.3d 846 (6th Cir. 1997) **United States Supreme Court** 2010 U.S. Briefs 1114; 2011 U.S.S. Ct. Briefs Lexis 3133.

The reason the pseudo complaint and warrant are "juratless" and unconstitutional, is because the charging officer (Maurice Clark) could not persuade anyone legally authorized to administer oaths to support his illegal, and unconstitutional method of probable cause to pursue my innocence. No one authorized to administer oaths supported him with their endorsements. **NO ONE!!** Exhibits A & B are completely in opposition to **State V Green** 548 N.E. 2d p.334, Ohio R.Crim. P3, 4(A) and 5(A). And the 6th Circuit Court of Appeals is in direct conflict with not only its own decision concerning Adesida, but its also in conflict with the **Ohio Supreme Court decision J-Ro Sharp**, where the court ruled that the question of subject-matter jurisdiction is so basic that it can be raised at any time before the trial court, or any appellant court, or even collaterally in subsequent and separate proceedings.

**The Supreme Court** has already established in **Glover** "that despite the fact that subject-matter jurisdiction is a fundamental and threshold matter that it is not limited by statutory requirements for re-opening the appeal, "laches" does not apply even if a party had been dilatory or lackadasical in their efforts to overturn a void judgement, or a void judgement cannot be validated by consent, ratification, waiver, or estoppel. In so concluding, the **Sixth Circuit Court of Appeals** explicitly rejected the approach of other federal courts of appeal and courts, which have recalled their mandates and vacated their decisions. The **Sixth Circuit Court of Appeals** also explicitly rejected the ruling of this "**United States Supreme Court decision in Glover**" to at least give pro se petitioner Harry Eugene Briscoe a statutory interpretation on the fundamental and threshold principles of subject-matter jurisdictional law.

REASONS FOR GRANTING THE PETITION

**"This case presents fundamental and threshold importance."**

The 6th Circuit Court of Appeals is in **direct conflict** with the Ohio Supreme Court decision in **J-Ro Sharp**, concerning subject-matter jurisdiction claims and erroneous time limitiations. [@))( Ohio 1854; 2009 Ohio App. Lexis 1561]

The 6th Circuit Court of Appeals is in **direct conflict** with its own ruling in **U.S. V Adesida** where it ruled subject-matter jurisdiction can be raised at any time. [129 f.3d 846 6th Circuit 1997]

And the 6th Circuit Court of Appeals is in **direct conflict** with this" **United States Supreme Court's** decision in **Glover V Gary McCaugtry** concerning the rule to provide pro se petitioner with the statutory interpretation of subject-matter jurisdictional law in his original 28 U.S.C. 2254 appeal regarding my subject-matter jurisdiction claim. [Supreme Court of the United States 2010 U.S. Briefs 1114; 2011 U.S.S. Ct. Briefs Lexis 3133]

Pro se petitioner Harry Eugene Briscoe prays that the United States Supreme Court certify the conflict of the Sixth Circuit Court of Appeals which stands in conflict with itself, and this" U.S. Supreme Court's decision in *Glover V Gary McCaugtry*, Warden- respondent (No. 10114), Supreme Court of the United States 2010 U.S. Briefs 1114; U.S.S. Ct. Briefs Lexis 3133. Petitioner also prays that, since extraordinary circumstances exist concerning his unlawful and illegal servitude, this court mandate the order releasing him from a void judgement.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Harry Eugene Briscoe

Date: 9/6/18

# Document Cover Sheet

Briscoe, Harry Eugene v. Eppinger, Warden

Appendix

SCUS|90403|42



No. 18-3041

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

HARRY EUGENE BRISCOE,

)

Petitioner-Appellant,

)

v.

)

LASHANN EPPINGER, WARDEN,

)

Respondent-Appellee.

)

)

)

FILED

Jul 31, 2018

DEBORAH S. HUNT, Clerk

O R D E R

Before: ROGERS, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Harry Eugene Briscoe, a pro se Ohio prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 18-3041

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**

May 31, 2018

DEBORAH S. HUNT, Clerk

HARRY EUGENE BRISCOE,

)

Petitioner-Appellant,

)

v.

)

LASHANN EPPINGER, Warden,

)

Respondent-Appellee.

)

)

)

O R D E R

Harry Eugene Briscoe, a pro se Ohio prisoner, appeals the judgment of the district court dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The court construes Briscoe's notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2). Briscoe also moves to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

In 2007, Briscoe was convicted of murder and two counts of aggravated robbery. He was sentenced to a prison term of 28 years to life. The Ohio Court of Appeals affirmed Briscoe's convictions for murder and one count of aggravated robbery but reversed the second robbery conviction due to a defective indictment. *State v. Briscoe*, No. 89979, 2008 WL 5084720 (Ohio Ct. App. Dec. 4, 2008). The Ohio Supreme Court affirmed. *State v. Briscoe*, 919 N.E.2d 735 (Ohio 2009). On May 14, 2010, the trial court issued a revised verdict and sentencing journal entries to reflect the appellate court's decision. On August 6, 2010, the trial court again revised the verdict and sentencing journal entries to correct a clerical error in the previous entries. Briscoe did not appeal.

In December 2011, Briscoe filed a § 2254 petition for a writ of habeas corpus which the district court dismissed without prejudice in February 2012. Later that month, Briscoe filed a motion for a new trial. The trial court denied the motion. The Ohio Court of Appeals affirmed. *State v. Briscoe*, No. 98414, 2012 WL 5292912 (Ohio Ct. App. Oct. 25, 2012). Two and one-half years later, Briscoe filed a motion for a delayed appeal. The Ohio Court of Appeals denied his motion on August 4, 2015. Briscoe did not appeal.

In April 2017, Briscoe filed a state petition for a writ of habeas corpus in the Ohio Supreme Court arguing that the state court lacked jurisdiction over him because there was never a “valid complaint” filed against him. The Ohio Supreme Court dismissed the petition sua sponte on May 31, 2017.

Briscoe filed this habeas petition on June 23, 2017. Briscoe alleged violations of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights, claiming in particular that the defendants conspired to unlawfully imprison him through the “falsification of pseudo complaints and arrest warrants.” Briscoe claimed that these false documents resulted in the trial court lacking subject-matter jurisdiction over his case. The warden filed a motion to dismiss, arguing that Briscoe’s claims were matters of state law that were not cognizable on federal habeas review and that his petition was time barred. Briscoe filed a response, asserting that a challenge to subject-matter jurisdiction has no time limits.

The magistrate judge concluded that Briscoe’s petition was untimely, none of Briscoe’s post-conviction motions tolled this limitations period, and he was not entitled to equitable tolling. Accordingly, the magistrate judge recommended dismissing Briscoe’s petition.

Briscoe filed objections to the magistrate judge’s report, arguing again that a challenge to subject-matter jurisdiction may be made at any time. The district court did not find Briscoe’s objections meritorious, however, and adopted the magistrate judge’s report, dismissed the petition, and declined to issue a COA.

To obtain a COA, a petitioner must show that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Miller-El v. Cockrell*, 537

U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where the district court denies a petition on procedural grounds without evaluating the merits of the underlying constitutional claims, this court should grant a COA only if two requirements are satisfied: first, the court must determine that reasonable jurists would find the district court's procedural assessment debatable or wrong; and, second, the court must determine that reasonable jurists would find it debatable that the petitioner states a valid underlying constitutional claim on the merits. *See Slack*, 529 U.S. at 484-85.

Actions arising under § 2254 have a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). That period of limitations 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”; the date on which an impediment to filing a federal habeas petition is removed by the State; 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). Briscoe has not argued that a newly recognized constitutional right or newly discovered facts apply to his case, and he does not claim that a state-created impediment prevented him from filing his habeas petition. Accordingly, the limitations period began to run when his conviction became final.

As the magistrate judge explained, the last revised judgment by the trial court was entered on August 6, 2010. Under Ohio law, a defendant has thirty days from the date of a judgment entry to file a direct appeal. *See* Ohio R. App. P. 4(A). Because Briscoe did not appeal the last revised judgment, his conviction became final on September 6, 2010, when the time expired to file a timely appeal. The habeas limitations period began to run the next day and expired one year later on September 7, 2011. Briscoe’s petition, filed in 2017, was untimely.

A petitioner who otherwise fails to file an action within the limitations period may still file an action under the doctrine of equitable tolling. A petitioner is entitled to equitable tolling where “he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some

No. 18-3041

- 4 -

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)). Briscoe made no argument directly in support of equitable tolling. Rather, he claimed that he could raise a challenge to subject-matter jurisdiction at any time, thereby negating any time limits on the filing of his petition. The fact that Briscoe raises a jurisdictional challenge to his conviction does not exempt him from the habeas statute of limitations, however. Prisoners seeking relief in federal court under § 2254 must bring their claim within the statute of limitations provided by § 2244(d). *See Jones v. McQuiggin*, No. 2:10-cv-10043, 2010 WL 5575076, at \*5 (E.D. Mich. Nov. 16, 2010) ("[T]he courts that have considered the issue uniformly have held that a jurisdictional claim, like any other claim cognizable in a federal habeas petition pursuant to § 2254, must first be raised in state court and then presented to [a federal] court within the time limit set forth in § 2244(d)(1)."); *see also Frazier v. Moore*, 252 F. App'x 1, 5-6 (6th Cir. 2007) (holding that a petitioner "in custody pursuant to a judgment of the [state] courts, even if that judgment may not be valid under state law," would still be "subject to 28 U.S.C. § 2244(d)'s one year statute of limitations in filing his federal habeas petition"). "There is no exception under the A[nti-Terrorism and] E[ffective] D[eath] P[enalty] A[ct] for subject matter jurisdiction claims." *Umbarger v. Burt*, No. 1:08-cv-637, 2008 WL 3911988, at \*1 (W.D. Mich. Aug. 19, 2008) (quoting *Griffin v. Padula*, 518 F. Supp. 2d 671, 677 (D.S.C. 2007)). Reasonable jurists would not therefore debate that Briscoe was not entitled to equitable tolling.

Briscoe's application for a COA is **DENIED**. His motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

HARRY EUGENE BRISCOE,	)	CASE NO. 1:17CV1329
	)	
Petitioner,	)	JUDGE DONALD C. NUGENT
	)	
vs.	)	
	)	
LASHANN EPPINGER, Warden,	)	
	)	<u>ORDER ADOPTING REPORT AND</u>
Respondent.	)	<u>RECOMMENDATION</u>

This matter comes before the Court upon the Report and Recommendation of Magistrate Judge Jonathan D. Greenberg, which was issued on October 30, 2017 (ECF #9). For the following reasons, the Report and Recommendation, is hereby ADOPTED.

On June 23, 2017, Petitioner Harry Eugene Briscoe filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254,<sup>1</sup> challenging the constitutionality of his convictions and 28-year sentence for one count of murder with firearm specifications and two counts of aggravated burglary, entered by the Cuyahoga Court of Common Pleas. (ECF #1). Petitioner raises the following as grounds for relief:

1. I'm being held unlawfully in opposition to my 4th, 5th, 6th, 8th and 14<sup>th</sup> Amendment rights to the U. S. Constitution. All parties representing the State of Ohio concerning case #CR 487410 have knowingly conspired to unlawfully detain and convict me through the falsification of pseudo complaints and arrest warrants.

Supporting Facts: Attached sua sponte journal entry and dismissal of Ohio Supreme Justice, Maureen O'Connor. Attached petition for the great writ of habeas corpus – Ohio Supreme Court case #2017-0454. Documents contain

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<sup>1</sup> The Antiterrorism and Effective Death Penalty Act of 1992 (hereafter "AEDPA").

the blatant disregard of Due Process and reveal the milicious [sic] intentions of the charging officer (Maurice Clark) and the support of state officials, who allowed the officer to present a paper writing of no legal effect, and pass it off as a legal document to secure his unlawful process to seize my person. Badges of color were used above my prior comprehension, and before my first initial apperance [sic], to deprive me of my life and liberty. This illegal process continued throughout the want "of acquiring jurisdiction over the criminal subject-matter, and my physical person by the trial court."

2. Supporting Facts: It is imperative that this court know that this is not a 2<sup>nd</sup>, nor successive petition for the Writ of Habeas Corpus. Please see the contents of case no. 1:11-CV-02815-DCN. Petitioner ask that the court see Sanders vs. US 83. S. ct. 1068/111 Sct 1454 v. Zant.

Petitioner's previous petition to the Northern Federal District, filed Dec. 2011 did not contain the sufficient grounds to support his conviction being in violation of the Constitution. Nor did it refer to subject matter jurisdiction and the pseudo complaint and arrest packet being presented here and now. (Emphasis added)

3. The full review and procedure concerning the mandated interpretation regarding the scheme to my subject-matter jurisdictional claim has been completely disregarded by the Ohio Supreme Court.

Supporting Facts: The Ohio Supreme Court made no statutory interpretation "on the fundamental threshold principles of subject-matter jurisdictional law concerning my petition for the writ of Habeas Corpus filed April 3rd, 2017. The Ohio Supreme Court has gone against every other appellant [sic] court, Federal and State; when it dismissed my petition which claims trial court lacked Subject-matter jurisdiction" when no valid complaint exist or existed ab-initio.

4. Supporting Facts: Per newly discovered evidence (see attached pseudo complaint and arrest packet). The fact that no court had acquired jurisdiction over the criminal/subject-matter, nor my physical/person is overwhelming. The 28 U.S.C. 2254 that's being presented is regarding the fundamental and threshold principles of subject-matter jurisdictional law as interpreted by other federal courts of appeal[], state courts[,] and the U. S. Supreme Court. I, Harry Briscoe, stand[] alone as a pro se petitioner in not receiving relief and dismissal of my convictions because the state court that entered the judgment of conviction against me lacked subject-matter jurisdiction to do

so. I am being held unlawfully and illegally, absent a sufficient formal accusatory instrument supported by Oath or Affirmation!!!

Respondent filed a Motion to Dismiss the petition on August 29, 2017, arguing that Petitioner's claims were not cognizable in a federal habeas corpus action, and that they are time-barred. (ECF #7). Petitioner filed a traverse in response. (ECF #8).

Magistrate Judge Greenberg found that Petitioner's writ is time-barred under Section 2244(d)(1)(A) of the AEDPA, and recommends that such petition be DISMISSED.<sup>2</sup> The Court adopts the Magistrate Judge's recommendations for the reasons set forth below.

I. Standard of Review for a Magistrate Judge's Report and Recommendation

The applicable district court standard of review for a magistrate judge's report and recommendation depends upon whether objections were made to that report. When objections are made to a report and recommendation of a magistrate judge, the district court reviews the case *de novo*. Fed. R. Civ. P. 72(b) provides this standard of review. It states, in pertinent part, the following:

The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

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<sup>2</sup> Having deemed the claims to be time-barred, the issue of whether Petitioner's claims were cognizable on federal habeas review were not addressed in the report and recommendation.

Accordingly, this Court will review the Report and Recommendation, to which timely objections have been filed, *de novo*. See *Dacas Nursing Support Sys., Inc., v. NLRB*, 7 F.3d 511 (6<sup>th</sup> Cir. 1993).

II. Legal Analysis

As Magistrate Judge Greenberg outlined, the AEDPA requires a state prisoner seeking a writ of habeas corpus to file his petition within one year after his state conviction becomes final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). Magistrate Judge Greenberg reviewed and outlined the procedural history in this matter, and found that Petitioner was required to file his habeas petition on or before September 7, 2011. However, Petitioner filed this habeas action on June 23, 2017, more than five years after the statute of limitations period. (See ECF #9, p. 13). Therefore, Petitioner's habeas corpus petition is time-barred under § 2244(d)(1)(A) of the AEDPA.

Magistrate Judge Greenberg noted that statutory tolling exists under the AEDPA, which under proper circumstances, extends the one-year statute of limitations. Under § 2244(d)(2), the time during which a properly filed application for post-conviction or other collateral relief is pending is not counted against the AEDPA's one-year filing limitation. However, Magistrate Judge Greenberg found that none of Petitioner's post-conviction filings served to extend the statute of limitations.

Magistrate Judge Greenberg also indicated that the statute of limitations under the AEDPA is subject to equitable tolling in appropriate circumstances. See *Holland v. Florida*, 560 U.S. 631 (2010). A petitioner bears the ultimate burden of persuading the court that he or she is entitled to equitable tolling by showing that the failure to meet a legally-mandated deadline unavoidably

arose from circumstances beyond that litigant's control. *See Robertson v. Simpson*, 624 F.3d 781, 783 (6<sup>th</sup> Cir. 2010); *Ata v. Scutt*, 662 F.3d 736, 741 (6<sup>th</sup> Cir. 2011). Magistrate Judge Greenberg found that Petitioner did not meet this burden, and therefore, is not entitled to equitable tolling of the AEDPA statute of limitations. Furthermore, Magistrate Judge Greenberg found that the "actual innocence" exception to the AEDPA statute of limitations does not apply in this case, as Petitioner has not offered any new evidence to show he is innocent of the crimes for which he was convicted. (ECF #9, pp. 16-17).

For these reasons, Magistrate Judge Greenberg found that Petitioner's habeas corpus action is time-barred under § 2244(d)(1)(A) of the AEDPA. Petitioner's Objection to the Report and Recommendation does not raise any meritorious or valid legal arguments to excuse Petitioner from the timely filing requirements set forth in the AEDPA.

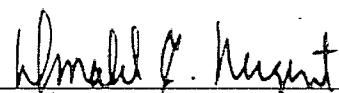
### III. Conclusion

This Court has reviewed the Report and Recommendation of this case *de novo*, *see Massey v. City of Ferndale*, 7 F.3d 506 (6<sup>th</sup> Cir. 1993), and has considered all of the pleadings, affidavits, motions, and filings of the parties. The Court finds Magistrate Judge Greenberg's Report and Recommendation to be thorough, well-written, well-supported and correct. After careful evaluation, this Court adopts the findings of fact and conclusions of law of the Magistrate Judge in its entirety.

Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(C); Fed. R. App. P. 22(b).

Therefore, the Report and Recommendation of Magistrate Judge Jonathan D. Greenberg, (ECF #9), is ADOPTED.

IT IS SO ORDERED.

  
DONALD C. NUGENT  
United States District Judge

DATED: December 18, 2017

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

HARRY EUGENE BRISCOE,	)	CASE NO. 1:17 CV 1329
	)	
Petitioner,	)	JUDGE DONALD C. NUGENT
	)	
v.	)	MAGISTRATE JUDGE
	)	JONATHAN D. GREENBERG
LASHANN EPPINGER, Warden,	)	
	)	
Respondent.	)	<b>REPORT AND RECOMMENDATION</b>

**INTRODUCTION**

Petitioner Harry Eugene Briscoe, a prisoner in state custody, has filed in this Court a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his convictions and sentences in *State v. Briscoe*, Case No. CR-487410. (Doc. No. 1.) Respondent Warden LaShann Eppinger<sup>1</sup> has moved to dismiss the petition on the grounds that it asserts claims that are not cognizable on federal habeas corpus review and it is time-barred by the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). (Doc. No. 7.) Petitioner has filed a traverse in response. (Doc. No. 8.)

This matter is before the undersigned by an automatic order of reference under Local Rule 72.2 for preparation of a report and recommendation on Briscoe’s petition or other case-dispositive motions. For the reasons stated below, the Court recommends Briscoe’s petition be DISMISSED.

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<sup>1</sup> LaShann Eppinger is warden of the Grafton Correctional Institution, where Briscoe is incarcerated. (Doc. No. 7 at 1.)

## PROCEDURAL BACKGROUND

### A. Trial Court

On September 14, 2006, a sworn complaint was filed with the Bedford Municipal Court charging Briscoe with the aggravated murder of Ali Th Abu Atiq in violation of Ohio Rev. Code § 2903.01(B). (Doc. No. 7-1, Exh. 1.) Briscoe was arrested and brought before the court for a preliminary hearing. (Doc. No. 7-1, Exh. 2.) He entered a plea of not guilty to the charge, and the court found probable cause and bound him over to the Cuyahoga County Court of Common Pleas. (Doc. No. 7-1, Exh. 2.)

On October 23, 2006, the Cuyahoga County Grand Jury indicted Briscoe on the following five counts: (1) one count of aggravated murder in violation of Ohio Rev. Code § 2903.01(A), which carried a one-year firearm, three-year firearm, felony-murder, notice-of-prior-conviction, and repeat-violent-offender specifications; (2) one count of aggravated murder in violation of Ohio Rev. Code § 2903.01(B), which carried a one-year firearm, three-year firearm, felony-murder, notice-of-prior-conviction, and repeat-violent-offender specifications; (3) one count of aggravated robbery in violation of Ohio Rev. Code § 2911.01(A)(1), which carried a one-year firearm, three-year firearm, felony-murder, notice of prior conviction, and repeat violent offender specifications; (4) one count of aggravated robbery in violation of Ohio Rev. Code § 2911.01(A)(3), which carried a one-year firearm, three-year firearm, notice-of-prior-conviction, and repeat-violent-offender specifications; and (5) one count of obstructing justice in violation of Ohio Rev. Code § 2921.32. (Doc. No. 7-1, Exh. 3.) Briscoe entered pleas of not guilty to all charges. (Doc. No. 7-1, Exh. 4.)

The case proceeded to a jury trial. On May 15, 2007, the jury found Briscoe not guilty of the aggravated-murder charge in Count 2, but guilty of the lesser-included offense of murder in violation of Ohio Rev. Code § 2903.02(B), including the two attached firearm specifications; aggravated robbery in violation of Ohio Rev. Code § 2911.01(A)(1), including the two attached firearm specifications; and aggravated robbery in violation of Ohio Rev. Code § 2911.01(A)(3), including the two attached firearm specifications. The court granted Briscoe's motion for acquittal on the aggravated-murder charge in count one, and Briscoe elected to have the court decide whether he violated the three repeat-violent-defender specifications and three notice-of-prior-conviction specifications. The State dismissed the felony-murder specifications prior to trial. (Doc. No. 7-1, Exh. 6.)

On May 16, 2007, the court imposed the following sentences: fifteen years to life in prison for the murder conviction; ten years' imprisonment for each of the two aggravated-robbery convictions, to be served concurrently with each other but consecutively to the murder charge; and three years' imprisonment for the firearm specifications, which were merged and to be served consecutively to the murder sentence. Briscoe was therefore sentenced to a total of twenty-eight years to life in prison. The court also found Briscoe not guilty of the three repeat-violent-defender specifications, but guilty of the notice-of-prior-conviction specifications. (Doc. No. 7-1, Exh. 7.)

#### **B. Direct Appeal**

On June 11, 2007, Briscoe, through counsel, filed a timely appeal to the Eighth District Court of Appeals. (Doc. No. 7-1, Exh. 45 at 307.) In his appellate brief, he raised the following assignments of error:

1. The trial court erred in convicting Mr. Briscoe based upon a constitutionally defective indictment that failed to state a necessary element of the charged offenses. Section 10, Article I, Ohio Constitution. (May 21, 2007 Judgment Entry).
2. The trial court erred in convicting Mr. Briscoe of murder and firearm specifications based upon a constitutionally defective indictment that failed to state a necessary element of the offenses underlying the count of murder and the firearm specifications. Section 10, Article I, Ohio Constitution. (May 21, 2007 Judgment Entry).

(Doc. No. 7-1, Exh. 8.) The State filed a brief in opposition. (Doc. No. 7-1, Exh. 9.)

On December 4, 2008, the Ohio appellate court affirmed in part and reversed in part the judgment of the trial court. (Doc. No. 7-1, Exh. 10.) It found count four of the indictment, charging Briscoe with aggravated robbery under Ohio Rev. Code § 2911.01(A)(3), was defective because it lacked the requisite mens rea element of recklessness, but affirmed Briscoe's conviction and sentences under count three, charging him with aggravated robbery under Ohio Rev. Code § 2911.01(A)(1). It therefore reversed the conviction on count four and remanded to the trial court for further proceedings. (Doc. No. 7-1, Exh. 10.)

On January 12, 2009, Briscoe, through counsel, filed a timely appeal to the Ohio Supreme Court. (Doc. No. 7-1, Exhs. 11, 45.) In his memorandum in support of jurisdiction, he raised the following propositions of law:

1. An indictment for a count of aggravated robbery under R.C. 2911.01(A)(1) must contain the mens rea of recklessness with regard to the element of either displaying, brandishing, indicating the possession of, or using a deadly weapon.
2. Convictions that are dependent upon other counts in an indictment must be reversed when convictions for those underlying counts are reversed as constitutionally defective.

(Doc. No. 7-1, Exh. 12.)

On May 6, 2009, the Ohio Supreme Court accepted jurisdiction of the appeal on Briscoe's first proposition of law, and stayed the case until it decided *State v. Lester*, Case No. 2008-1725. (Doc. No. 7-1, Exh. 13.) On December 17, 2009, the court affirmed the appellate court's judgment on the authority of *State v. Lester*, 123 Ohio St. 3d 396 (Ohio 2009). (Doc. No. 7-1, Exh. 14.)

### **C. Remand to Trial Court**

On April 26, 2010, Briscoe, acting *pro se*, filed in the trial court a "Motion to Dismiss Indictment for Failure to Charge an Offense Pursuant to Crime R. 12(C)(2). (Doc. No. 7-1, Exh. 15.) The State opposed the motion on May 6, 2010. (Doc. No. 7-1, Exh. 16.) The trial court denied the motion on June 7, 2010. (Doc. No. 7-1, Exh. 17.)

Meanwhile, on May 11, 2010, the trial court resentenced Briscoe. (Doc. No. 7-1, Exh. 45 at 290-91.) On May 14, 2010, it issued "revised" verdict and sentencing journal entries to reflect the appellate court's "decision to reverse defendant's conviction on Counts 3 and 4[,] and vacated count three and four's aggravated-robery convictions. (Doc. No. 7-1, Exh. 45 at 290-91.) On August 6, 2010, the trial court again "revised" the verdict and sentencing journal entries to correct a "clerical error" in the previous entries, in which the trial court stated that the appellate court had reversed Briscoe's convictions on both counts three and four and vacated both convictions. The new journal entries stated the appellate court's judgment and vacated only count four's aggravated-robery conviction under § 2911.01(A)(3). (Doc. No. 7-1, Exh. 45 at 289-90.) Because the ten-year sentences for the two aggravated-robery convictions were to be served concurrently with each other, Briscoe's total sentence of twenty-eight years in prison

remained the same. The trial court also noted that it had “previously advised” Briscoe of his appeal rights and appointed appellate counsel. (Doc. No. 7-1, Exh. 45 at 290.)

On September 28, 2010, Briscoe filed with the trial court a *pro se* motion for new appellate counsel on the ground that appointed counsel had not filed a notice of appeal since the court issued its August 6 journal entry. (Doc. No. 7-1, Exh. 30.) The court denied the motion. (Doc. No. 7-1, Exh. 31.)

Briscoe did not appeal the trial court’s revised judgment. (See Doc. No. 7-1, Exh. 45 at 289.)

#### **D. Post-Conviction Proceedings**

##### **1. Petition for Writ of Mandamus**

Meanwhile, on July 14, 2010, Briscoe, acting *pro se*, filed a petition for writ of mandamus in the state appellate court. (Doc. No. 7-1, Exh. 19.) He sought an order compelling the judge who presided over his trial, Judge David Matia, and the warden of the prison where he was incarcerated, Keith Smith, to transport him to the Cuyahoga County Court of Common Pleas for a resentencing hearing consistent with the appellate court’s judgment. (Doc. No. 7-1, Exh. 19.) Judge Matia moved for summary judgment dismissing the petition, and Warden Smith opposed the petition. (Doc. No. 7-1, Exhs. 20, 21.) The court granted Judge Matia’s summary judgment motion and dismissed the case on September 1, 2010. (Doc. No. 7-1, Exh. 23.) Briscoe filed a motion for reconsideration, which was denied. (Doc. 7-1, Exhs. 23, 24.)

On October 18, 2010, Briscoe appealed the appellate court’s judgment to the Ohio Supreme Court. (Doc. No. 7-1, Exh. 26.) He raised one proposition of law:

Where [s]tructural [e]rror[s] are found that permeate the entire trial proceeding, Criminal Rule 43(A) and Revised Code 2953.12 are the only appropriate remedies at law.

(Doc. No. 7-1, Exh. 27.) Judge Matia moved to strike the appellate brief. (Doc. No. 7-1, Exh. 28.) The Ohio Supreme Court considered the appeal and affirmed the appellate court's judgment on February 23, 2011. (Doc. No. 7-1, Exh. 29.)

## **2. Motion for New Trial**

On February 21, 2012, Briscoe filed a *pro se* motion for leave to file a motion for a new trial. (Doc. No. 7-1, Exh. 32.) The trial court denied the motion on April 30, 2012. (Doc. No. 7-1, Exh. 33.)

Briscoe, still acting *pro se*, appealed the trial court's judgment on May 30, 2012. (Doc. No. 7-1, Exh. 34.) In his appellate brief, he raised the following two assignments of error:

1. Appellant received ineffective assistance of counsel in violation of his rights pursuant to the Sixth Amendment to the United States Constitution and Section 10, Article I[,] of the Ohio Constitution.
2. Appellant's constitutional right to due process [was] violated when prosecuting attorney with held [*sic*] exculpatory evidence which could have effected [*sic*] the outcome of trial.

Doc. No. 7-1, Exh. 35.) The State filed a brief in response. (Doc. No. 7-1, Exh. 36.) The state appellate court affirmed the trial court's judgment on October 25, 2012. (Doc. No. 7-1, Exh. 37.)

On July 29, 2015, Briscoe filed a motion for leave to file a delayed appeal in the court of appeals. (Doc. No. 7-1, Exh. 38.) He stated he "was precluded from being present on remand and did not receive guaranteed instructions regarding his right to appeal the trial court's vacating of conviction and the imposition of sentence and is induced by that lack of vigilance of procedural right to perceive that his conviction(s) and sentence(s) was [*sic*] final and non-

appealable.” (Doc. No. 7-1, Exh. 38 at 249.) The appellate court denied the motion on August 4, 2015. (Doc. No. 7-1, Exh. 39.) Briscoe did not appeal that judgment to the Ohio Supreme Court. (See Doc. No. 7-1, Exh. 50.)

### **3. State Petition for Writ of Habeas Corpus**

Briscoe next filed a *pro se* petition for writ of habeas corpus in the Supreme Court of Ohio on April 3, 2017. (Doc. No. 7-1, Exh. 40.) He alleged there was no “valid complaint” ever filed against him for the charges for which he was convicted because the “charging officer . . . failed to supply a properly attested to, signed and sworn ‘Jurat’” and it lacked a “time-stamped certification,” and the state courts therefore lacked jurisdiction over his case. (Doc. No. 7-1, Exh. 40.) On May 31, 2017, the Ohio Supreme Court *sua sponte* dismissed the case. (Doc. No. 7-1, Exh. 41.)

### **FEDERAL HABEAS CORPUS**

#### **A. First Federal Habeas Corpus Petition**

Briscoe filed a *pro se* petition for writ of habeas corpus in this Court on December 30, 2011 (Case No. 1:11 CV 2815). (Doc. No. 7-1, Exh. 42.) He asserted the following grounds for relief:

1. Because the indictments filed against the petitioner were ruled by the Eighth District Court of Appeals to be structurally erred and failed to include all elements required to be proven beyond a reasonable doubt to obtain a valid finding of guilt as to counts 2, 3, & 4, the Petitioner was denied his liberty interest established by the Ohio Constitution to have a Grand Jury determine probable cause for each and every element of a charged offense in violation of petitioner’s right to due [process] as guaranteed by the Fourteenth Amendment to the United States Constitution.
2. The trial court violated the Petitioner’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution when it

falsified [j]ournal [e]ntries stating that Defendant was present in open court when it re-sentenced the petitioner outside of his presence, violating petitioner's liberty interests created by Criminal Rule 43(A).

(Doc. No. 7-1, Exh. 42 at 275-76.) On February 2, 2012, the Court dismissed the petition without prejudice pursuant to Rule 4 of the Rule Governing Section 2254 cases. (Doc. No. 7-1, Exh. 43.)

#### **B. Second Federal Habeas Corpus Petition**

Briscoe, again acting *pro se*, filed the petition for writ of habeas corpus now before this Court on June 23, 2017. (Doc. No. 1.) He represents that he provided the petition to prison staff for mailing on June 20, 2017. (Doc. No. 1 at 15.) The petition asserts the following four grounds for relief:

1. I'm being held unlawfully in opposition to my 4th, 5th, 6th, 8th and 14th Amendment rights to the U. S. Constitution. All parties representing the State of Ohio concerning case #CR 487410 have knowingly conspired to unlawfully detain and convict me through the falsification of pseudo complaints and arrest warrants.

Supporting Facts: Attached sua sponte journal entry and dismissal of Ohio Supreme Justice, Maureen O'Connor. Attached petition for the great writ of habeas corpus – Ohio Supreme Court case #2017-0454. Documents contain the blatant disregard of Due Process and reveal the milicious [sic] intentions of the charging officer (Maurice Clark) and the support of state officials, who allowed the officer to present a paper writing of no legal effect, and pass it off as a legal document to secure his unlawful process to seize my person. Badges of color were used above my prior comprehension, and before my first initial apperance [sic], to deprive me of my life and liberty. This illegal process continued throughout the want "of acquiring jurisdiction over the criminal subject-matter, and my physical person by the trial court."

2. Supporting Facts: It is imperative that this court know that this is not a 2nd, nor successive petition for the Writ of Habeas Corpus. Please see the contents of case no. 1:11-CV-02815-DCN. Petitioner ask that the court see Sanders vs. US 83. S. ct. 1068/111 Sct 1454 v. Zant.

Petitioner's previous petition to the Northern Federal District, filed Dec. 2011 did not contain the sufficient grounds to support his conviction being in violation of the Constitution. Nor did it refer to subject matter jurisdiction and the pseudo complaint and arrest packet being presented here and now. (Emphasis added)

3. The full review and procedure concerning the mandated interpretation regarding the scheme to my subject-matter jurisdictional claim has been completely disregarded by the Ohio Supreme Court.

Supporting Facts: The Ohio Supreme Court made no statutory interpretation "on the fundamental threshold principles of subject-matter jurisdictional law concerning my petition for the writ of Habeas Corpus filed April 3rd, 2017. The Ohio Supreme Court has gone against every other appellant [sic] court, Federal and State; when it dismissed my petition which claims trial court lacked Subject-matter jurisdiction" when no valid complaint exist or existed ab-initio.

4. Supporting Facts: Per newly discovered evidence (see attached pseudo complaint and arrest packet). The fact that no court had acquired jurisdiction over the criminal/subject-matter, nor my physical/person is overwhelming. The 28 U.S.C. 2254 that's being presented is regarding the fundamental and threshold principles of subject-matter jurisdictional law as interpreted by other federal courts of appeal[], state courts[,] and the U. S. Supreme Court. I, Harry Briscoe, stand[] alone as a pro se petitioner in not receiving relief and dismissal of my convictions because the state court that entered the judgment of conviction against me lacked subject-matter jurisdiction to do so. I am being held unlawfully and illegally, absent a sufficient formal accusatory instrument supported by Oath or Affirmation!!!

(Doc. No. 1 at 5, 7, 8, 10.)

On August 29, 2017, Respondent moved to dismiss the petition on summary judgment, arguing the claims were not cognizable on federal habeas corpus and it was time-barred. (Doc. No. 7.) Briscoe filed a traverse in response. (Doc. No. 8.)

## ANALYSIS

Respondent argues that Briscoe's habeas corpus petition is time-barred by the statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (Doc. No. 8 at 7-16.) The Court agrees.

### A. The AEDPA Statute of Limitations

Under AEDPA, a state prisoner must file a habeas corpus petition within one year from the latest of four circumstances:

- (A) the date on which the [state-court] 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)-(D).

Respondent contends that Briscoe's limitations period was triggered on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . ." under § 2244(d)(1)(A), but he did not file a timely petition within the prescribed one-year period. (Doc. No. 7 at 22-24.) Briscoe's only argument in response is that a "[p]etition challenging the jurisdiction of the trial court adjudicating [*sic*] over a specific subject matter, and the person is a fundamental and threshold matter that is not limited by

statutory requirements or time limitations.” (Doc. No. 1 at 13.) He cites no authority for this proposition, however, and it lacks merit.

The trial court issued its verdict and sentencing entries in Briscoe’s case on May 18, 2007. (Doc. No. 7-1, Exhs. 6, 7.) The state appellate court reversed his convictions on count four, charging him with aggravated robbery under § 2911.01(A)(3) and several specifications, which the Ohio Supreme Court affirmed. (Doc. No. 7-1, Exhs. 10, 14.) The trial court resentenced Briscoe on May 11, 2007, and journalized its “revised” verdict and sentencing entries on May 14, 2010. (Doc. No. 7-1, Exh. 45 at 290-91.) On August 6, 2010, the trial court again issued “revised” verdict and sentencing judgments, this time to correct a “clerical error” in the May 11 entries, in which the court vacated both aggravated-robbery counts, three and four, instead of just count four. (Doc. No. 7-1, Exh. 45 at 369-70.)

Under Ohio law, a defendant has thirty days from the date of the judgment entry within which to file his direct appeal. Ohio R. App. P. 4(A); Ohio R. Crim. P. 32(C); *State v. Baker*, 119 Ohio St. 3d 197, 199 (Ohio 2008) (“Journalization of the judgment of conviction pursuant to Crim. R. 32(C) starts the 30-day appellate clock ticking.”). The Court will assume, as does Respondent, that Briscoe’s time in which to file an appeal was triggered by the trial court’s last journal entries of judgment and sentencing on August 6, 2010, which correctly followed the appellate court’s judgment reversing only count four. *See Crangle v. Kelly*, 838 F.3d 673, 678 (6th Cir. 2016) (“the entry of a new judgment normally resets the statute-of-limitations clock’ under § 2254(d)(1)(A)” ) (quoting *King v. Morgan*, 807 F.3d 154, 156 (6th Cir. 2015)). Briscoe did not file a direct appeal, so his conviction became final on Monday, September 6, 2010. *See*

Ohio R. App. P. 14(A) (the day of the event from which the designated period of time begins to run is not included in computing time prescribed by rules).

Accordingly, pursuant to 28 U.S.C. § 2244(d)(1)(A), the statute of limitations on Briscoe's federal habeas petition began to run the following day, September 7, 2010. *See* Fed. R. Civ. P. 6(a)(1) ("In computing any time period . . . exclude the day of the event that triggers the period."); *Bronaugh v. Ohio*, 235 F.3d 280, 285 (6th Cir. 2000) (applying Rule 6(a) standards to computation of time for § 2244(d) statute of limitations purposes). Absent any tolling events, the AEDPA statute of limitations would have expired one year later, on September 7, 2011 – more than five years before Briscoe filed the habeas petition now before this Court.

#### **B. AEDPA Statutory Tolling**

AEDPA allows for statutory tolling, which, under proper circumstances, will extend the one-year statute of limitations. Under § 2244(d)(2), the time during which a properly filed application for state post-conviction or other collateral relief is pending is not counted against AEDPA's one-year statute of limitations. 28 U.S.C. § 2244(d)(2). But the state-court petitions and applications must be both "pending" and "properly filed" in order to stay the limitations period. *Id.* The proceedings must be pending because the provision "does not . . . 'revive' the limitations period (*i.e.*, restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations." *Winkfield v. Bagley*, 66 Fed. Appx. 578, 581 (6th Cir. 2003). In addition, untimely motions are not "properly filed" and will not stop the one-year clock. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). This is so even where there are exceptions to a state timely-filing requirement, such as Ohio Appellate Rule 26(B)'s "good cause" exception to its filing deadline

for reopening applications. *Pace v. DiGuglielmo*, 544 U.S. 408, 413-14 (2005). Thus, “[w]hen a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for purposes of § 2244(d)(2).” *Id.* at 414 (quoting *Carey v. Saffold*, 536 U.S. 214, 226 (2002)).

Briscoe’s first collateral proceeding in state court was a motion for writ of mandamus seeking an order to compel the trial judge and warden to facilitate his presence at his resentencing. (Doc. No. 7-1, Exh. 19.) Respondent argues that this filing did not toll Briscoe’s AEDPA limitations period because it did not “seek review of the judgment of conviction.” (Doc. No. 7 at 23 (citing cases in which federal courts have refused to extend § 2244(d)(2)’s tolling provision to mandamus petitions seeking to have a state court take action on a matter)). However, even if the Court were to find that the mandamus proceedings tolled the AEDPA limitations period while they were pending, Briscoe’s habeas petition still would be significantly time-barred. Briscoe’s mandamus proceedings ended when the Ohio Supreme Court denied the petition on February 23, 2011. (Doc. No. 7-1, Exh. 29.) Briscoe next filed a motion for leave to file a motion for new trial in the state trial court on February 21, 2012 (Doc. No. 7-1, Exh. 32), but that filing did not toll the limitations period as it was untimely. *Artuz*, 531 U.S. at 8. The AEDPA limitations period, then, expired *at least* one year after Briscoe’s state mandamus proceedings concluded, or on February 24, 2012. Briscoe did not file this petition until more than five years later.<sup>2</sup>

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<sup>2</sup> Briscoe’s first federal habeas petition also did not toll the AEDPA limitations period for this petition. The Supreme Court has held that an “application for federal habeas corpus review is not an ‘application for State post-conviction or other collateral review’ within the meaning of 28 U.S.C. § 2244(d)(2).” *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (citing 28 U.S.C. § 2244(d)(2)).

The Court finds, therefore, that even if it assumes for the sake of argument that Briscoe's state mandamus proceedings tolled the AEDPA limitations period, he still missed AEDPA's deadline by several years.

### **C. Equitable Tolling of the AEDPA Statute of Limitations**

AEDPA's statute of limitations also is subject to equitable tolling in appropriate cases.

*Holland v. Florida*, 560 U.S. 631, 645 (2010). Equitable tolling "allows courts to toll a statute of limitations when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Robertson v. Simpson*, 624 F.3d 781, 783 (6th Cir. 2010) (internal quotation marks omitted). "[A]lthough 'the party asserting statute of limitations as an affirmative defense has the burden of demonstrating that the statute has run,' the petitioner bears the ultimate burden of persuading the court that he or she is entitled to equitable tolling.

*Ata v. Scutt*, 662 F.3d 736, 741 (6th Cir. 2011) (quoting *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002)). To do so, the petitioner must show that (1) "he has been pursuing his rights diligently," and (2) that "some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649.

As Respondent points out, Briscoe has not satisfied his burden. Most significantly, he did not file this petition until more than five years after his AEDPA limitations period had expired, even allowing for tolling while his mandamus proceedings were pending. *See Winkfield v. Bagley*, 66 Fed. Appx. 578, 583 (6th Cir. 2003) ("[I]n order for equitable tolling to apply, the petitioner must diligently pursue habeas relief."). He also did not pursue his state-court remedies in a diligent, timely manner. He did not seek review of the new judgment on direct appeal at all, and his motion for a new trial was untimely.

Nor has Briscoe demonstrated that extraordinary circumstances prevented him from filing his petition on time. As Respondent argues, he cannot claim that his *pro se* status, lack of knowledge, incarceration, or limited access to the library or other assistance are extraordinary circumstances and warrant equitable tolling. *See, e.g., Johnson v. United States*, 544 U.S. 295, 311 (2005) (noting the Court has “never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute’s clear policy calls for promptness . . .”); *Hall v. Warden, Lebanon Corr’l Inst.*, 662 F.3d 745, 752 (6th Cir. 2011) (same); *Harvey v. Jones*, 179 Fed. Appx. 294, 299-300 (6th Cir. 2006).

The Court finds, therefore, that Briscoe is not entitled to equitable tolling of the AEDPA statute of limitations.

**D. Actual Innocence Exception to AEDPA’s Limitations Statute**

Finally, habeas petitioners may be entitled to an equitable exception to the AEDPA statute of limitations under the “actual innocence” or “miscarriage of justice” gateway to federal habeas review set forth in *Schlup v. Delo*, 513 U.S. 298 (1995). *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). “[T]enable actual-innocence gateway pleas are rare,” however, as a petitioner “must persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* (quoting *Schlup*, 513 U.S. at 329). Actual innocence claims require a showing of “new reliable evidence” and factual innocence, not mere legal insufficiency. *See Schlup*, 513 U.S. at 324; *Bousley v. United States*, 523 U.S. 614, 623 (1998).

Briscoe also has not offered any new evidence to show he is “actually innocent” of the crimes for which he was convicted. The actual innocence exception to AEDPA’s limitations statute, therefore, also does not apply here.

Accordingly, this Court finds Briscoe’s habeas corpus petition is time-barred under AEDPA’s § 2244(d)(1)(A).<sup>3</sup>

#### **CONCLUSION AND RECOMMENDATION**

Petitioner Harry Briscoe filed his petition for writ of habeas corpus more than five years after the AEDPA statute of limitations expired. He is not entitled to equitable tolling and has offered no evidence or argument that he is actually innocent. Accordingly, the Court recommends Briscoe’s petition be DISMISSED.

Date: October 30, 2017

s/ Jonathan Greenberg  
Jonathan D. Greenberg  
United States Magistrate Judge

#### **OBJECTIONS**

**Any objections to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days after the party objecting has been served with a copy of this Report and Recommendation. 28 U.S.C. § 636(b)(1). Failure to file objections within the specified time may waive the right to appeal the District Court’s order. See *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985), *reh’g denied*, 474 U.S. 1111 (1986).**

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<sup>3</sup> For that reason, the Court need not reach the issue of whether Briscoe’s claims asserted in the petition are cognizable on federal habeas review.

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