APPENDIX:

(a) Eastern District Court Opinion No. 2:10-cv- 11603 (2/ 27/2014)

(b) Eastern District Court Opinion No. 2:10-cv-11603 (5/31/2017)

(c) Eastern District Court Docket (2010-2019)

(d) 6th Circuit Opinion No. 14-1323 (4/12/16)

(e) 6th Circuit Docket No. 14-1323

(f) 6th Circuit Opinion No. 17-2185 (11/26/2018)

(g) 6th Circuit Docket No. 17-2185

(h) Respondents Supplemental Authority (4/4/2016)

(i) Petitioner's Moot objection (4/13/2016)

(j) FRAP Title VII GENERAL PROVISIONS: Rule 27 'Motions'

(k) Holbrook v Curtin 6th Circuit No. 14-1247 833 F3rd 612 (2016)

(l) Michigan Court of Appeals Docket

(m) Petitioner's Motion for Relief from Judgement Rule 60(b)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 18a0586n.06

Case No. 17-2185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 26, 2018
DEBORAH S. HUNT, Clerk

CHARLES QUATRINE, JR.,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
MARY BERGHUIS, Warden,	)	DISTRICT OF MICHIGAN
	)	
Respondent-Appellee.	)	OPINION

BEFORE: CLAY, McKEAGUE, and BUSH, Circuit Judges.

PER CURIAM. Charles Quatrine, Jr., a Michigan prisoner, seeks to continue to litigate his habeas petition because a change in law made his previously untimely petition now timely. Specifically, Quatrine argues that the district court abused its discretion by denying relief from judgment under Federal Rule of Civil Procedure 60(b)(6). Finding no error, we affirm.

I.

In 2006, a state-court jury convicted Quatrine of charges related to his secret recording of a minor in various stages of undress. Following his conviction, Quatrine pursued several avenues of direct and collateral relief in state court. Relevant to this appeal, Quatrine also petitioned for habeas relief in a federal district court. The district court, however, denied the petition because it was time-barred by 28 U.S.C. § 2244(d)(1). On appeal, Quatrine argued that the statute of

limitations was tolled while he could have, but did not,[1] appeal the denial of post-conviction relief in state court. This Court was unpersuaded and affirmed the district court's denial of the petition. Typically, that would end the case. But four months after the affirmance, this Court held in an analogous case that the statute of limitations was tolled. So Quatrine asked the district court for relief from judgment under Rule 60(b). The district court denied that motion and then denied relief again when Quatrine asked for reconsideration. This appeal followed.

II.

We review the denial of a Rule 60(b) motion for an abuse of discretion. *Miller v. Mays*, 879 F.3d 691, 698 (6th Cir. 2018) (citation omitted). We find an abuse of discretion only when we have a definite and firm conviction that the trial court committed a clear error of judgment. *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quotation omitted). When making that assessment, we bear in mind that the trial court's discretion is "especially broad" in the Rule 60(b)(6) context because of the underlying equitable principles involved. *Miller*, 879 F.3d at 698 (quotation omitted).

III.

Before turning to the merits of Quatrine's argument, we pause to consider two preliminary issues. The first is a jurisdictional question. Federal Rule of Appellate Procedure 3(c)(1)(B) requires a party to designate the "judgment, order, or part thereof being appealed." Here, two

[1] At times, Quatrine suggests he did in fact file an appeal. If true, that may mean he could have been entitled to relief under Rule 60(b)(1)—the provision that covers "mistake, inadvertence, surprise, or excusable neglect[.]" But Quatrine is limited to relief under Rule 60(b)(6)—a "catch-all provision"—because he missed the deadline to raise a challenge under Rule 60(b)(1). Rule 60(b)(6) does not provide relief for circumstances covered by Rule 60(b)(1), so we do not consider whether Quatrine actually filed an appeal in state court. *See McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013) (quoting *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007)).

orders addressed the issue now raised on appeal: (1) the denial of Quatrine's motion for relief from judgment (the "original order"); and (2) the denial of Quatrine's motion for reconsideration of the denial of the motion for relief from judgment (the "reconsideration order"). Both parties treat this appeal like a challenge to the original order. But Quatrine's notice of appeal lists only the date of the reconsideration order. "Rule 3's dictates are jurisdictional in nature," so we address, *sua sponte*, whether we can follow the parties' lead and consider the original order. *Smith v. Barry*, 502 U.S. 244, 248 (1992).

We can. Although jurisdiction is always a serious concern, both the Federal Rules of Civil Procedure and the Supreme Court advise that Rule 3's requirements should be construed liberally. *See Smith*, 502 U.S. at 248; Fed. R. App. P. 3(c)(4). For that reason, this Circuit has "long taken the position that, absent a showing of prejudice, technical errors respecting the sufficiency of the notice of appeal will be found harmless." *Westerfield v. United States*, 366 F. App'x 614, 619 (6th Cir. 2010) (citing *McLaurin v. Fischer*, 768 F.2d 98, 102 (6th Cir. 1985)); *see also Ramsey v. Penn Mut. Life Ins. Co.*, 787 F.3d 813, 819 (6th Cir. 2015). Here, the parties and the judicial officer that granted the COA all understood Quatrine to be appealing the issues raised in the original order. So there is no evidence of prejudice. Thus, we will not narrow the appeal based on a technicality.

But even if we were inclined to find that Quatrine's mistake was more than a technicality, the outcome would be the same. The district court treated Quatrine's request like a motion for reconsideration under Eastern District of Michigan Local Rule 7.1(h). A motion for reconsideration under Local Rule 7.1(h) is like a motion to amend judgment under Federal Rule of Civil Procedure 59(e): they both are vehicles for a litigant to ask a court to correct a mistake of law or fact. *Compare Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (articulating the standard for a motion to amend judgment under Civil Rule 59(e)), *with Witzke v.*

Hiller, 972 F. Supp. 426, 427 (E.D. Mich. 1997) (articulating the standard for a motion for reconsideration under Local Rule 7.1(h)). An appeal from a Rule 59(e) decision also brings before us the decision being reconsidered. *Hood v. Hood*, 59 F.3d 40, 43 n.1 (6th Cir. 1995). We see no reason to treat a Local Rule 7.1(h) decision any differently.

Comfortable that we have jurisdiction, we turn to the next preliminary issue: whether Quatrine properly obtained a certificate of appealability. Briefly, a habeas petitioner must obtain a COA before challenging the denial of a Rule 60(b) motion. *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007). To obtain a COA, an applicant has to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Quatrine did not comply with that requirement because his application focused exclusively on whether the statute of limitations to file a habeas petition had tolled. That said, this Court granted a COA anyway. Buried in a footnote, the State alludes to this irregularity. But it does not suggest that we must refrain from hearing the appeal. In fact, the State requests only that we "affirm the district court's decision." The State thus waived any challenge to the COA. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) (holding that we will not flesh out skeletal arguments). And for good reason. Section 2253(c)(2) does not establish a jurisdictional requirement, *see Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012), and here it would be inappropriate to reconsider the COA and wade into a potentially complicated constitutional analysis when a straight-forward procedural question predominates. We thus find that Quatrine can proceed with his current COA.

Turning to the merits of the appeal, the question presented is whether the district court abused its discretion by refusing to set aside judgment under Rule 60(b)(6) because Quatrine's dismissed habeas petition would now be timely after an alleged change in the law. The answer is no. A court may set aside judgment under Rule 60(b)(6) in exceptional or extraordinary

circumstances where principles of equity mandate relief. *Miller*, 879 F.3d at 698. At times, Quatrine suggests that the alleged change in law should be enough to secure relief. Not so. "[A] change in the law which renders a previously dismissed habeas petition timely is not sufficient extraordinary circumstances under Rule 60(b)(6)." *Wogoman v. Abramajtys*, 243 F. App'x 885, 890 (6th Cir. 2007) (citations omitted); *see also McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013) (holding that a change in decisional law is usually not, by itself, an extraordinary circumstance meriting relief from judgment).

Perhaps recognizing the weakness of his argument, Quatrine also points to alleged errors made by a state circuit judge and a clerk at the Michigan Supreme Court during Quatrine's state collateral proceedings. This appeal, however, is about a federal district judge's decision not to set aside judgment based on an alleged change in federal law. Although the quirks of Quatrine's earlier state proceedings may speak to general fairness, they do not speak to the narrow issue at hand. Along similar lines, Quatrine protests that the mandate in his first appeal issued after the alleged change of law he raises in this appeal. Fair enough, but Quatrine sought a rehearing en banc of his first appeal and requested that the mandate be recalled. This Court denied both forms of relief, and we will not re-entertain those arguments now. Nor would it have been appropriate for the district court to question this Court's decision. Quatrine also accuses this Court of overlooking his motion to hold in abeyance his first appeal. Quatrine, however, forgets to mention that he filed the motion after this Court affirmed the denial of his habeas petition. Although the motion may have delayed this Court's decision to deny rehearing en banc, it is irrelevant to this Court's initial decision—and ultimately, final decision—to affirm.

Finally, Quatrine contends that the disposition of his case is unfair because he has maintained his innocence, pursued all grounds for relief, and advanced arguments about the statute

of limitations that were later adopted by this Court. We cannot weigh in on Quatrine's innocence here; the jury has spoken. As to the other arguments, they are not extraordinary enough to find that the district court abused its discretion. *See Bachman v. Wilson*, No. 16-3479, 2018 WL 3995742, at *7–*9 (6th Cir. Aug. 20, 2018) (affirming the denial of a Rule 60(b)(6) motion when a habeas petitioner argued that he diligently pursued relief and that this Court, in a later case, adopted an argument like the argument the petitioner made in his appeal). Quatrine thus is not entitled to relief.

IV.

In sum, Quatrine asks for another bite at the apple because his previously time-barred habeas petition would now be timely after a change in the law. Although we understand why he would make the request, it ultimately is not enough to grant relief from judgment under Rule 60(b)(6). We **AFFIRM**.

No. 17-2185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 27, 2018
DEBORAH S. HUNT, Clerk

CHARLES QUATRINE, JR.,

Petitioner-Appellant,

v.

MARY BERGHUIS, Warden,

Respondent-Appellee.

ORDER

Charles Quatrine, Jr., proceeding through counsel, appeals a district court order denying his Federal Rule of Civil Procedure 60(b) motion for relief from a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Quatrine requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A jury found Quatrine guilty of six counts of making or producing child sexually abusive material, one count of possession of child sexually abusive material, and one count of eavesdropping. He was sentenced to serve between 130 months and twenty years of imprisonment. The Michigan Court of Appeals affirmed Quatrine's convictions and sentences and remanded his case to the trial court to determine whether he could pay for court-appointed counsel. *People v. Quatrine*, No. 272074, 2008 WL 941780 (Mich. Ct. App. Apr. 8, 2008). The Michigan Supreme Court denied leave to appeal on September 9, 2008.

On September 28, 2009, Quatrine filed a post-conviction motion for relief from judgment. The trial court denied the motion as premature on October 2, 2009. Quatrine did not appeal. Quatrine re-filed his post-conviction motion on November 19, 2009. The trial court

denied the re-filed motion on December 30, 2009, and denied reconsideration on February 8, 2010. Quatrine did not appeal.

Quatrine initiated a habeas corpus proceeding on April 14, 2010, when he signed a document construed by the district court as a habeas corpus petition. *See Houston v. Lack*, 487 U.S. 266, 276 (1988); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). The district court granted Quatrine's motion to stay the proceeding and hold it in abeyance while he returned to the state courts to exhaust additional claims.

After unsuccessfully pursuing another state post-conviction motion, Quatrine filed a motion to lift the stay and an amended habeas corpus petition, raising nine grounds for relief. The district court granted the motion and reopened the case. With leave of court, Quatrine amended his habeas corpus petition twice to add seven grounds for relief. The district court denied Quatrine's initial and amended habeas corpus petitions as time-barred and denied a certificate of appealability. This court ultimately affirmed the district court's judgment. *Quatrine v. Berghuis*, No. 14-1323 (6th Cir. Apr. 12, 2016) (unpublished).

Quatrine then filed a Federal Rule of Civil Procedure 60(b) motion in the district court for relief from the judgment denying his habeas corpus petitions. He argued that *Holbrook v. Curtin*, 833 F.3d 612 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 1436 (2017), "created an intervening change of law, warranting relief in the instant case." He argued that *Holbrook* warranted relief from judgment because it "reversed" *Scarber v. Palmer*, 808 F.3d 1093 (6th Cir. 2015), upon which this court relied when affirming the denial of habeas corpus relief, and its facts were "[i]dentical" to those in his case. Quatrine also argued that the district court's judgment was based "on the erroneous conclusion" that he did not appeal the denial of his post-conviction motions "when there is clear and convincing evidence that he did." The district court denied Quatrine's Rule 60(b) motion and denied a certificate of appealability. Quatrine's motion to alter or amend the order was denied.

A certificate of appealability is necessary to appeal the denial of a Rule 60(b) motion filed in a habeas corpus case. *Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010). A certificate

of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Rule 60(b) provides for relief from a final judgment in limited circumstances including mistake, newly discovered evidence, fraud, a void judgment, or a judgment that has been reversed or is no longer equitable. Fed. R. Civ. P. 60(b)(1)–(5). Rule 60(b)(6), a residual clause, permits relief for "any other reason that justifies relief." A motion filed under the first three reasons listed under Rule 60(b) must be brought within one year of the entry date of the challenged judgment. Fed. R. Civ. P. 60(c)(1). Quatrine's Rule 60(b) motion, filed on December 6, 2016, was untimely under Rule 60(b)(1)-(3), because it challenged the district court's February 27, 2014, judgment, but was filed more than one year after that judgment was entered.

A motion filed under the last three reasons listed under Rule 60(b) "must be made within a reasonable time." *Id.* Even assuming that Quatrine made his motion within a reasonable time for purposes of Rule 60(b)(4)-(5), his motion does not otherwise satisfy the requirements of those subsections. Quatrine's motion did not implicate Rule 60(b)(4) because the district court had subject matter jurisdiction over his habeas corpus proceedings, and he was not deprived of due process in those proceedings, as he was provided notice and an opportunity to be heard. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). Quatrine's motion did not implicate Rule 60(b)(5) because he did not demonstrate that the judgment had been satisfied, was based on a vacated judgment, or had become inequitable.

However, reasonable jurists could disagree as to whether Quatrine made his motion within a reasonable time for purposes of Rule 60(b)(6), as well as whether he demonstrated the requisite "extraordinary circumstances," which "rarely occur in the habeas context," to justify relief under Rule 60(b)(6). *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting

Ackermann v. United States, 340 U.S. 193, 199 (1950)). Quatrine relies on *Holbrook* to support his Rule 60(b) motion, which was decided less than four months before he filed his motion. *Holbrook* held that the statute of limitations is tolled for the time during which a habeas corpus petitioner could have appealed from a state appellate court's denial of a state post-conviction motion, even if no appeal was filed. 833 F.3d at 619. "Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)[.]" *Agostini v. Felton*, 521 U.S. 203, 239 (1997). "Instead, courts have relied on an applicable change in decisional law, coupled with some other special circumstance, in order to grant Rule 60(b)(6) relief." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007) (quoting *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001)). The Rule 60(b)(6) inquiry is a case-specific one "that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'" *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007) (quoting *Blue Diamond Coal Co.*, 249 F.3d at 529).

Counsel argues that equitable circumstances, in addition to *Holbrook*, warrant relief. Counsel emphasizes that Quatrine advocated the same position asserted by Holbrook—that he was entitled to tolling for the time during which he could have appealed from the Michigan appellate court's denials of state post-conviction relief. Counsel points out that Quatrine diligently pursued his rights, his case was pending at the same time as *Holbrook*, "*Holbrook* validated his position," and, but for "fortuitous timing," *Holbrook* was not applied to his case. The district court did not consider these relevant, equitable circumstances when denying Quatrine's post-judgment motion. This is not to say that Quatrine's motion satisfies Rule 60(b)(6), but only that his appeal deserves to proceed further. *Wogoman v. Abramajtys*, 243 F. App'x 885, 887, 890 (6th Cir. 2007); *see Miller-El*, 537 U.S. at 327.

Accordingly, the application for a certificate of appealability is **GRANTED**. The clerk's office is directed to issue a briefing schedule requesting the parties to brief whether the district court properly denied Quatrine's Rule 60(b) motion for relief from judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES QUATRINE, Jr.,

Petitioner,

v.

MARY BERGHUIS,

Respondent,
_____/

Civil No. 2:10-CV-11603
HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

OPINION AND ORDER SUMMARILY DENYING THE PETITION FOR WRIT OF HABEAS CORPUS AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY OR LEAVE TO APPEAL IN FORMA PAUPERIS

Charles Quatrine, Jr. ,("Petitioner"), confined at the Brooks Correctional Facility in Muskegon Heights, Michigan, filed a *pro se* petition for writ of habeas corpus and two amended habeas petitions pursuant to 28 U.S.C. § 2254 with this Court, challenging his convictions for installing an eavesdropping device, M.C.L.A. 750.539d; child sexually abusive activity, M.C.L.A. 750.145c(2); and one count of child sexually abusive materials, M.C.L.A. 750.145c(4). Respondent has filed an answer and two supplemental answers to the original and amended petitions for writ of habeas corpus. As part of her two supplemental answers, respondent argues that petitioner's original and amended habeas petitions are barred by the statute of limitations contained within 28 U.S.C. § 2244(d)(1). Petitioner has filed replies to the supplemental answers. For the reasons stated

below, the petition for writ of habeas corpus is SUMMARILY DENIED. The Court will also deny as moot petitioner's motion for immediate consideration and deny the motion for bond.

I. Background

Petitioner was convicted of the above offenses following a jury trial in the Macomb County Circuit Court. Petitioner's conviction was affirmed on appeal, although the case was remanded to the trial court for a determination of petitioner's financial ability to reimburse the county for his court-appointed attorney. *People v. Quatrine,* No. 272074, No. 2008 WL 941780 (Mich.Ct.App. April 8, 2008). On September 9, 2008, the Michigan Supreme Court denied petitioner leave to appeal from the affirmance of his conviction by the Michigan Court of Appeals. *People v. Quatrine,* 482 Mich. 975; 755 N.W. 2d 183 (2008).

Petitioner then filed a motion for reduction of attorney fees, which was denied by the trial court. *People v. Quatrine,* Nos. 2005-1298-FH, 2005-1299-FH (Macomb County Circuit Court, February 29, 2008). Petitioner sought leave to appeal from the denial of his motion for reduction of his attorney fees and costs, which was denied. *People v. Quatrine,* No. 287572 (Mich.Ct.App. February 4, 2009); *lv. den.* 485 Mich. 925; 773 N.W. 2d 679 (2009); *reconsideration den.* 485 Mich. 1072; 777 N.W.2d 150 (2010).

On September 28, 2009, petitioner filed a motion for relief from judgment pursuant to M.C.R. 6.500, *et. seq.* [1] On October 2, 2009, the trial court rejected petitioner's motion pursuant to M.C.R. 6.508(D)(1) on the ground that his appeal regarding the additional attorney fees was pending before the Michigan Supreme Court. *People v. Quatrine,* Nos. 2005-1298-FH, 2005-1299-FH (Macomb County Circuit Court, October 2, 2009). Petitioner did not appeal the denial of this post-conviction motion to the Michigan appellate courts.

On November 19, 2009, petitioner refiled his motion for relief from judgment. [2] The trial court denied the motion on December 30, 2009. *People v. Quatrine,* Nos. 2005-1298-FH, 2005-1299-FH (Macomb County Circuit Court, December 30, 2009). On February 8, 2010, the trial court denied petitioner's motion for reconsideration. *People v. Quatrine,* Nos. 2005-1298-FH, 2005-1299-FH (Macomb County Circuit Court, February 8, 2010). Petitioner never appealed the denial of this motion for relief from judgment to the Michigan appellate courts.

On April 14, 2010, petitioner filed a "motion seeking stay and abeyance to perfect state remedies," in which he asked to file a protective petition and then have the case held in abeyance so he could return to the state courts to exhaust

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[1] *See People v. Quatrine,* No. 2005-1299-FH (Macomb County Circuit Court, Dkt. ## 53-54)[This Court's Dkt. # 31-2].

[2] *See People v. Quatrine,* No. 2005-1299-FH (Macomb County Circuit Court, Dkt. # 45)[This Court's Dkt. # 31-2].

additional claims. [3]

On April 30, 2010, this Court entered an opinion and order granting petitioner's motion to hold his habeas petition in abeyance pending the completion of state post-conviction proceedings by petitioner. The Court also administratively closed the case.

Petitioner returned to the state courts to file a second motion for relief from judgment. The trial court denied the motion as being an improperly filed successive motion for relief from judgment that was barred under M.C.R. 6.502(G). *People v. Quatrine,* Nos. 2005-1298-FH, 2005-1299-FH (Macomb County Circuit Court, July 15, 2010). The Michigan Court of Appeals denied petitioner leave to appeal pursuant to M.C.R. 6.502(G). *People v. Quatrine,* No. 301363 (Mich.Ct.App. January 19, 2011). The Michigan Supreme Court denied petitioner leave to appeal because the court was not persuaded that the questions presented should be reviewed by that court. *People v. Quatrine,* 490 Mich. 967; 806 N.W. 2d 517 (2011).

On March 20, 2012, this Court granted petitioner's motion to reinstate the habeas petition to the active docket, granted his motion to amend the habeas petition, and ordered that the amended petition be served upon respondent. On

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[3] Under the prison mailbox rule, this Court will assume that petitioner actually filed his original habeas petition on April 14, 2010, the date that it was signed and dated, despite the existence of some evidence that it may have been filed later with this Court. *See Neal v. Bock*, 137 F. Supp. 2d 879, 882, n. 1 (E.D. Mich. 2001).

August 13, 2012, respondent filed an answer to the amended petition for writ of habeas corpus.

On August 16, 2012, petitioner filed a motion to amend the petition for writ of habeas corpus, in which he sought to amend his petition to add six additional claims that he raised in his post-conviction motion in the state courts but failed to include in his first amended petition for writ of habeas corpus that he filed with this Court. On January 9, 2013, this Court granted petitioner's motion to amend the habeas petition to add these additional claims and gave respondent time to file a supplemental answer to address these claims. Respondent file their supplemental answer on March 6, 2013. As part of this first supplemental answer, respondent contends that petitioner's original and amended habeas petitions are time barred because both were filed outside of the one year time limit for filing habeas petitions that is contained in 28 U.S.C. § 2244(d)(1).

On August 15, 2013, this Court granted petitioner's motion to file a second amended habeas petition. Respondent filed a supplemental answer to this second amended habeas petition on October 11, 2013. In this second supplemental answer, respondent argued that the claim raised by petitioner in his second amended habeas petition is also time barred pursuant to the statute of limitations contained in 28 U.S.C. § 2244(d)(1).

II. Discussion

The original and amended petitions for writ of habeas corpus must be dismissed because they were not been filed within the one year statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA). [4]

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a one year statute of limitations shall apply to an application for writ of habeas corpus by a person in custody pursuant to a judgment of a state court. The one year statute of limitation shall run 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).

Although not jurisdictional, the AEDPA's one year limitations period "effectively bars relief absent a showing that the petition's untimeliness should be

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[4] Because petitioner's original habeas petition is untimely, any claims in his subsequently amended habeas petitions would also be untimely even if they related back to the original claims. *See Hodge v. U.S.*, No. 2011 WL 3565227, at 5 (M.D. Tenn. August 15, 2011); *Kenney v. Pancake,* No. 2007 WL 3274274, at 1 (E.D. Ky. November 5, 2007).

excused based on equitable tolling and actual innocence." *See Akrawi v. Booker,* 572 F. 3d 252, 260 (6th Cir. 2009). A petition for writ of habeas corpus must be dismissed where it has not been filed within the one year statute of limitations. *See e.g. Williams v. Wilson,* 149 Fed. Appx. 342 (6th Cir. 2005).

Petitioner's direct appeal of his conviction ended when the Michigan Supreme Court denied petitioner leave to appeal on September 9, 2008. Petitioner's conviction would become final, for the purposes of the AEDPA's limitations period, on the date that the 90 day time period for seeking certiorari with the U.S. Supreme Court expired. *See Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). Petitioner's judgment became final on December 9, 2008, when he failed to file a petition for writ of certiorari with the U.S. Supreme Court. *See Holloway v. Jones,* 166 F. Supp. 2d 1185, 1187 (E.D. Mich. 2001). Petitioner therefore had until December 9, 2009 to file a petition for writ of habeas corpus unless the statute of limitations was somehow tolled.

The Court is aware that on petitioner's appeal of right the Michigan Court of Appeals remanded the case to the trial court for a determination of petitioner's ability to reimburse the county for the cost of his court-appointed attorney. The trial judge subsequently denied petitioner's motion to suspend fees and costs. Petitioner appealed the trial court's denial of his request to the Michigan appellate courts. Neither the state trial court's order denying petitioner's motion to suspend his attorney fees or his appeal from the trial court's denial would delay the

commencement of the one year statute or limitations. The Michigan Court of Appeals' order of remand did not order a re-sentencing or otherwise vacate petitioner's conviction, nor did the trial court judge issue a new judgment when denying petitioner's request to suspend the payment of attorney fees. Instead, the remand order was limited to a technical error regarding the trial judge's failure to determine petitioner's financial ability to reimburse the court for the cost of his court-appointed attorney. As such, these proceedings did not delay the commencement of the one year limitations period. *See Eberle v. Warden, Mansfield Correctional Inst.,* 532 Fed. Appx. 605, 610 (6th Cir. 2013)(Ohio appellate court decision vacating the part of trial court's sentencing entry that imposed postrelease control did not amount to a new sentence that restarted the statute of limitations for seeking federal habeas relief; change in petitioner's sentence, which was modified to remedy a technical error, did not pertain to his underlying conviction, nor did it relate to the basis of the plea bargain petitioner struck with the state, and, as a technical error, his sentence was not remanded to the trial court, no resentencing hearing was held, no new sentencing entry was filed, and no new judgment issued).

The Court is also aware that petitioner claims in his second amended habeas petition that he has newly discovered evidence in support of his illegal arrest and search and seizure claims. Petitioner specifically claims that he discovered after the filing of his first amended habeas petition that he was

arrested prior to the issuance of a criminal complaint.

Pursuant to 28 U.S.C.§ 2244(d)(1)(D), the AEDPA's one year limitations period begins to run from the date upon which the factual predicate for a claim could have been discovered through due diligence by the habeas petitioner. *See Ali v. Tennessee Board of Pardon and Paroles,* 431 F. 3d 896, 898 (6th Cir. 2005). The time commences under § 2244(d)(1)(D) when the factual predicate for a habeas petitioner's claim could have been discovered through the exercise of due diligence, not when it was actually discovered by a given petitioner. *Redmond v. Jackson,* 295 F. Supp 2d 767, 771 (E.D. Mich. 2003). The time under the AEDPA's limitations period begins to run pursuant to § 2244(d)(1)(D) when a habeas petitioner knows, or through due diligence, could have discovered, the important facts for his or her claims, not when the petitioner recognizes the facts' legal significance. *Id.* In addition, "§ 2244(d)(1)(D) does not convey a statutory right to an extended delay while a petitioner gathers every possible scrap of evidence that might support his claim." *Redmond,* 295 F. Supp. 2d at 771. "Rather, it is the actual or putative knowledge of the pertinent facts of a claim that starts the clock running on the date on which the factual predicate of the claim could have been discovered through due diligence, and the running of the limitations period does not await the collection of evidence which supports the facts, including supporting affidavits." *Id.* at p. 772. Newly discovered information "that merely supports or strengthens a claim that could have been properly stated

without the discovery ... is not a 'factual predicate' for purposes of triggering the statute of limitations under § 2244(d)(1)(D)." *See Jefferson v. U.S.*, 730 F. 3d 537, 547 (6th Cir. 2013)(quoting *Rivas v. Fischer*, 687 F.3d 514, 535 (2nd Cir. 2012)).

Petitioner acknowledges in his second amended petition that Detective Shutter testified at the preliminary examination that petitioner was arrested before the issuance of any warrants. [5] The commencement of the one year limitations period was not delayed pursuant to § 2244(d)(1)(D) until petitioner's alleged discovery of the factual predicate for his Fourth Amendment claims, in light of the fact that petitioner was aware of the facts underlying his allegedly illegal arrest prior to trial. *See Whalen v. Randle,* 37 Fed. Appx. 113, 119 (6th Cir. 2002).

Petitioner's conviction therefore became final on December 9, 2008, when the Michigan Supreme Court denied petitioner's application for leave to appeal following the affirmance of his conviction by the Michigan Court of Appeals.

Petitioner filed his first motion for relief from judgment with the state trial court on September 28, 2009, after two hundred and ninety three days had elapsed on the one year statute of limitations. 28 U.S.C. § 2244(d)(2) expressly provides that the time during which a properly filed application for state post-conviction relief or other collateral review is pending shall not be counted towards the period of limitations contained in the statute. *Corbin v. Straub,* 156 F. Supp.

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[5] *See* Second Amended Petition for Writ of Habeas Corpus, p. 5.

2d 833, 836 (E.D. Mich. 2001). The trial court denied the motion on October 2, 2009. Petitioner did not appeal the denial of this motion. Instead, some forty eight days later, petitioner re-filed his motion for relief from judgment, which was denied on December 29, 2009. The trial court denied the motion for reconsideration on February 8, 2010. Petitioner did not appeal the denial of this post-conviction motion either.

A post-conviction application is "pending" within the meaning of 28 U.S.C. § 2244(d) (2) during "the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law." *Evans v. Chavis*, 546 U.S. 189, 191 (2006)(citing *Carey v. Saffold*, 536 U.S. 214 (2002))(emphasis in original). Because petitioner never appealed the denial of either of these post-conviction motions, neither of them was pending in the state courts, for purposes of § 2244(d)(2), after the trial court denied each of the post-conviction motions. Although petitioner claims that he sought "clarification" from the Michigan Supreme Court as to whether he could file a motion for relief from judgment while his appeal on the attorney fees was pending before that court, he only filed that pleading with the Michigan Supreme Court as part of his motion for reconsideration following the denial of that appeal. Petitioner did not actually appeal the denial of his first motion for relief from judgment with either the Michigan Court of Appeals or the Michigan Supreme Court. The limitations

period was not tolled for the 48 day period between the denial of his first motion for relief from judgment on October 2, 2009 and the re-filing of his motion for relief from judgment on November 19, 2009.

Petitioner's pending appeal regarding the order for reimbursement of the cost of his court-appointed attorney would not toll the limitations period pursuant to 28 U.S.C. § 2244(d)(2), because it was not used to attack petitioner's conviction. In *Wall v. Kholi*, 131 S. Ct. 1278, 1285 (2011), the Supreme Court held that the term "collateral review," as used in § 2244 (d)(2), refers to a judicial reexamination of a judgment or a claim in a proceeding outside of the direct review process. In so ruling, the Supreme Court quoted with approval the First Circuit's definition in the lower court decision in *Kholi* that "'review' commonly denotes 'a looking over or examination with a view to amendment or improvement.'" *Id.* (internal quotation omitted).

Petitioner's motion for suspension of the costs and fees to reimburse the court for the cost of his court-appointed attorney would not toll the limitations period because, by petitioner's own admission, it was not an attack on his conviction. Where a habeas petitioner is not claiming the right to be released but is challenging the imposition of a fine or other costs, he or she may not bring a petition for writ of habeas corpus. *See United States v. Watroba*, 56 F. 3d 28, 29 (6th Cir. 1995); *See also U.S. v. Mays,* 67 Fed. Appx. 868, 869 (6th Cir. 2003)(district court lacked subject matter jurisdiction over defendant's § 2255

post-judgment motion to reduce or rescind fine levied in criminal judgment; defendant was not in custody, as required in a motion to vacate sentence or a petition for a writ of habeas corpus). Claims involving the allegedly improper assessment of court-appointed attorney's fees cannot be maintained in a habeas petition, because such claims do not challenge the prisoner's confinement. *See Frey v. Palmer,* No. 2:10–CV–10436; 2012 WL 1986324, * 10 (E.D. Mich. June 04, 2012); *Gray v. Perry,* No. 10–CV–13340; 2010 WL 3952848, * 2 (E.D. Mich. October 7, 2010); *Fisher v. Booker*, No. 03-10029-BC; 2006 WL 2420229, * 9 (E.D. Mich. August 22, 2006). Accordingly, the limitations period was not tolled during the pendency of this appeal.

By the time that the trial judge denied petitioner's motion for reconsideration of the denial of his motion for relief from judgment on February 8, 2010, a total of three hundred and forty one days had elapsed under the statute of limitations. Petitioner had only twenty four days remaining under the statute of limitations, which would have been no later than March 4, 2010, to file his habeas petition. Because petitioner did not file his initial petition until April 14, 2010, both his initial and amended habeas petitions are untimely.

In his various replies, petitioner appears to argue that it was somehow improper for the respondent to raise the statute of limitations defense only in her supplemental answers, and not in the original answer.

Supreme Court precedent "establishes that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition." *Wood v. Milyard*, 132 S. Ct. 1826, 1830 (2012). However, a district court "is not at liberty...to bypass, override, or excuse a State's deliberate waiver of a limitations defense." *Id., See also Day v. McDonough,* 547 U.S. 198, 202 (2006). As a general rule in civil litigation, "a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Day,* 547 U.S. at 202 (citing Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a)).

Where a federal court confronts no intelligent waiver on the state's part of the limitations defense, but only a miscalculation of the elapsed time under the statute of limitations, a federal court has the discretion to correct the state's error and to dismiss the petition as untimely under the AEDPA's one-year limitations period. *Day,* 547 U.S. at 202. An inadvertent error on the part of the respondent in failing to raise a limitations defense does not establish that the state "'strategically' withheld the defense or chose to relinquish it." *Id.,* at 211. Giving federal courts the leeway to consider a forfeited timeliness defense in habeas cases is appropriate "because [the] AEDPA's statute of limitations, like the exhaustion doctrine, 'implicat[es] values beyond the concerns of the parties.'" *Wood,* 132 S. Ct. at 1833 (quoting Day, 547 U.S., at 205)(internal quotation omitted).

There is no showing that the respondent deliberately or intelligently waived the statute of limitations defense by failing to argue the defense in her original answer. Mere inadvertence on the part of the respondent in failing to raise the statute of limitations defense at the first opportunity does not establish "bad faith" or undue prejudice to petitioner nor does it establish an intelligent or deliberate waiver of that defense. *See Sudberry v. Warden, Southern Ohio Correctional Facility,* 626 F. Supp. 2d 767, 782 (S.D. Ohio 2009). It is permissible for a state to belatedly raise a statute of limitations defense in an amended answer to the petition for writ of habeas corpus. *See Long v. Wilson*, 393 F.3d 390, 399 (3rd Cir. 2004). Although the respondent in this case did not assert in her original answer that petitioner's original habeas petition was untimely, this Court has the discretion under *Day* to consider the timeliness issue, in light of the fact that respondent did raise the statute of limitations defense in her supplemental answers. *See Sweet v. Secretary, Dept. of Corrections,* 467 F.3d 1311, 1320-22 (11th Cir. 2006)(although state had not claimed habeas petition was untimely in its initial response to show cause order, district court had discretion to address issue of timeliness as raised in State's subsequent motion for summary judgment).

Respondent chose to raise the statute of limitations defense in her supplemental answers. Under Fed. R. Civ. P. 15(a) and 28 U.S.C. § 2243, respondent could have moved to amend her original answer to include a statute of limitations defense. *Day,* 547 U.S. at 209. Because this Court could easily

consider respondent's limitations defense as a constructive amendment to the original answer, there is no difference between explicitly granting respondent the right to amend her original answer and simply entertaining the limitations defense that she raises in her supplemental answers. *Id., Sweet,* 467 F. 3d at 1321-22. Because there is nothing to suggest that the respondent intelligently or strategically waived the statute of limitations defense by failing to raise in it in her first answer, this Court has the discretion to consider the defense, particularly where petitioner has been given notice and a fair opportunity to present his position on the limitations issue. *Day,* 542 U.S. at 210. After reviewing petitioner's numerous pleadings and the respondent's first answer, which addressed the merits of the claims raised in the first petition, and respondent's two supplemental answers, which also addressed in the alternative the merits of the claims raised by petitioner in his amended petitions, this Court is confident that petitioner has not been "significantly prejudiced by the delayed focus on the limitation issue" and that the interests of justice would be better served" by dismissing the petition as time barred. *Id.*

The AEDPA's statute of limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). 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 the timely filing of the habeas petition. *Id.* at 2562

(quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The Sixth Circuit has observed that "the doctrine of equitable tolling is used sparingly by federal courts." *See Robertson v. Simpson*, 624 F. 3d 781, 784 (6th Cir. 2010). The burden is on a habeas petitioner to show that he or she is entitled to the equitable tolling of the one year limitations period. *Id.*

Petitioner claims that any delay should be excused because he was proceeding *pro se* on his first two motions for relief from judgment and he was ignorant of the law. An inmate's lack of legal training, poor education, or even his illiteracy does not give a federal court a reason to toll the AEDPA's limitations period. *Cobas v. Burgess,* 306 F. 3d 441, 444 (6th Cir. 2002). Nor does ignorance of the law justify equitable tolling. *See Allen v. Yukins,* 366 F. 3d 396, 402-03 (6th Cir. 2004).

Petitioner claims that he was lead to believe by the trial judge following the denial of his first motion for relief from judgment that he could not file a post-conviction motion while his appeal on the attorney fee issue was pending in the Michigan Supreme Court. Petitioner would not be entitled to equitable tolling on this basis because he re-filed his motion for relief from judgment while his motion for reconsideration was pending before the Michigan Supreme Court on his appeal on the attorney fee issue.

The one year statute of limitations may be equitably tolled based upon a credible showing of actual innocence under the standard enunciated in *Schup v. Delo,* 513 U.S. 298 (1995). *McQuiggin v. Perkins*, 133 S. Ct. 192, 1928 (2013). The Supreme Court has cautioned that "tenable actual-innocence gateway pleas are rare[.]" *Id.* "[A] petitioner does not meet the threshold requirement unless he persuades 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). For an actual innocence exception to be credible under *Schlup*, such a claim requires a habeas petitioner to support his or her allegations of constitutional error "with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Schlup*, 513 U.S. at 324.

Petitioner's case falls outside of the actual innocence tolling exception, because petitioner has presented no new, reliable evidence to establish that he was actually innocent of the crime charged. *See Ross v. Berghuis,* 417 F. 3d 552, 556 (6th Cir. 2005). Petitioner's sufficiency of evidence claim cannot be considered by this Court in determining whether an actual innocence exception exists for purposes of tolling the statute of limitations period. *See Grayson v. Grayson,* 185 F. Supp. 2d 747, 752 (E.D. Mich. 2002). The Court will therefore summarily dismiss the original and amended habeas petitions.

Petitioner's motion for immediate consideration is moot in light of this Court's adjudication of his habeas petition. *See Juenemann v. Jones,* No. 03-75057; 2005 WL 2347105, * 3 (E.D. Mich. September 23, 2005).

In light of the fact that petitioner has failed to establish that he would prevail on the merits of his claims, he is not entitled to release on bail. *See e.g. Greenup v. Snyder,* 57 Fed. Appx. 620, 621-22 (6th Cir. 2003). The Court denies petitioner's motion for bond.

IV. Conclusion

The Court summarily denies the original and amended habeas petitions as barred by the AEDPA's one year statute of limitations contained in § 2244(d)(1). The Court also denies petitioner a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) and F.R.A.P. 22(b) state that an appeal from the district court's denial of a writ of habeas corpus may not be taken unless a certificate of appealability (COA) is issued either by a circuit court or district court judge. If an appeal is taken by an applicant for a writ of habeas corpus, the district court judge shall either issue a certificate of appealability or state the reasons why a certificate of appealability shall not issue. F.R.A.P. 22(b). To obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. *Id.* "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254. The Court denies petitioner a certificate of appealability, because reasonable jurists would not find it debatable whether this Court was correct in determining that petitioner had filed his habeas petition outside of the one year limitations period. *See Grayson v. Grayson,* 185 F. Supp. 2d at 753. The Court also denies petitioner leave to appeal *in forma pauperis,* because the appeal would be frivolous. *See Dell v. Straub,* 194 F. Supp. 2d 629, 659 (E.D. Mich. 2002).

V. ORDER

Based upon the foregoing, IT IS ORDERED that the original and amended petitions for a writ of habeas corpus are **SUMMARILY DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED that the motion for release on bail [Dkt. #42] is DENIED and the motion for immediate consideration [Dkt. # 43] is DENIED.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED that Petitioner will be **DENIED** leave to appeal *in forma pauperis.*

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: February 27, 2014

I hereby certify that a copy of the foregoing document was served upon counsel of record on February 27, 2014, by electronic and/or ordinary mail.

S/LaShawn R. Saulsberry
Case Manager

Case No. 17-2185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CHARLES QUATRINE, JR.

Petitioner - Appellant

v.

MARY BERGHUIS, Warden

Respondent - Appellee

BEFORE: CLAY, MCKEAGUE, and BUSH, Circuit Judges.

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: January 02, 2019