No. 19-1224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERMAINE STEVENSON,

Petitioner-Appellant,

v.

JEFFREY WOODS, Warden,

Respondent-Appellee.

ORDER

Jermaine Stevenson, a pro se Michigan prisoner, appeals the district court's denial of his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. He moves for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b)(2), and to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5).

In 1993, a jury convicted Stevenson of first-degree murder, in violation of Michigan Compiled Laws § 750.316; assault with intent to commit murder, in violation of Michigan Compiled Laws § 750.83; and possessing a firearm in the commission of a felony, in violation of Michigan Compiled Laws § 750.226. Stevenson committed the crimes for which he was convicted when he was eighteen years old. The trial court sentenced him to an effective term of life imprisonment plus two years. His convictions and sentence were affirmed on direct appeal. *See People v. Stevenson*, 552 N.W.2d 176 (Mich. 1996) (table). Stevenson's state motion for relief from judgment was denied. *See People v. Stevenson*, 881 N.W.2d 484 (Mich. 2016) (mem.).

In April 2016, Stevenson filed a § 2254 petition in the United States District Court for the Western District of Michigan. *See Stevenson v. Woods*, No. 2:16-CV-90, 2016 WL 5334601, at

*1 (W.D. Mich. Sept. 23, 2016). The Western District dismissed the first petition as untimely, and this court denied Stevenson a COA. *Stevenson v. Woods*, No. 16-2460 (6th Cir. May 30, 2017) (order). Eleven days before the Western District dismissed the first petition, Stevenson filed another § 2254 petition in the United States District Court for the Eastern District of Michigan, in which he raised claims that (1) he was actually innocent because the trial court lacked jurisdiction over him due to his classification as a juvenile; (2) his due-process rights were violated because he was tried as an adult despite the juvenile court failing to waive its jurisdiction; (3) trial and appellate counsel performed ineffectively by failing to argue that Stevenson was still under the jurisdiction of the juvenile court; and (4) his life sentence was no longer constitutional in light of *Miller v. Alabama*, 567 U.S. 460 (2012). After the district court denied the second petition as duplicative, this court determined that the second petition should have been transferred from the Eastern District to the Western District for consideration as a motion to amend the first petition. *See In re Stevenson*, 889 F.3d 308, 309 (6th Cir. 2018). The second petition was transferred back to this court for consideration as an application to file a second or successive habeas petition, and this court once again remanded for the district court to consider the second petition as a motion to amend the first petition. *Id.*

In addition to the second petition, Stevenson filed a "Brief in Support of Petitioner's Motion for Leave to Amend/Supplement 28 USC § 2254 Habeas Corpus Petition" on May 21, 2018. The district court granted the motion to amend, designating the second petition as the operative amended petition. A magistrate judge recommended denying the amended petition, concluding that it was barred by the one-year statute of limitations contained in 28 U.S.C. § 2244(d)(1). Over Stevenson's objections, the district court adopted the report and recommendation, denied the petition, and declined to issue a COA.

Stevenson now seeks a COA from this court. In his application, he argues that the district court erred by beginning to run the statute of limitations from the date that *Miller* was decided. He claims that the "factual predicate of his claim" did not become discoverable until August 4, 2016, when the trial court notified him that it would not resentence him pursuant to Michigan Compiled

Laws § 769.25a. He argues that his claim is not premised on *Miller*, but is instead based on the trial court's decision not to resentence him under section 769.25a, which he claims violated his equal-protection and due-process rights. He also argues that he was a juvenile at the time of his crime, despite having already turned eighteen years old, and that he is actually innocent because the court of general jurisdiction in Michigan lacked jurisdiction over him.

To obtain a COA, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). If the petition was denied on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations for filing a federal habeas corpus petition. *See* 28 U.S.C. § 2244(d)(1). The limitations period begins to run on the latest of

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which 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.

See 28 U.S.C. § 2244(d)(1). The district court found that Stevenson's claims that the trial court lacked jurisdiction and that counsel performed ineffectively are time-barred because he did not raise them within one year of the conclusion of the time for seeking direct review of his convictions, or by October 28, 1997. Stevenson presents no reason why he could not have raised these claims at that time, and reasonable jurists could not debate that they are barred.

Stevenson's claims based on *Miller* are also time-barred. *Miller* was decided on June 25, 2012, *see* 567 U.S. at 460, but the district court gave Stevenson the benefit of having first

discovered the factual predicate for his claim on November 31, 2012, when the Michigan Department of Corrections issued him a new Basic Information Sheet informing him of the decision in *Miller*. Stevenson therefore had, at the latest, until November 31, 2013, to file a habeas corpus petition based on *Miller* or otherwise toll the statute of limitations. He did not file his motion for relief from judgment until April 2, 2014. Reasonable jurists could not debate that the deadline to raise a federal habeas claim based on *Miller* had already expired. *See also Dodd v. United States*, 545 U.S. 353, 357 (2005) (finding that, under the nearly identical 28 U.S.C. § 2255(f)(3) standard, the statute of limitations begins to run from the date on which the Supreme Court initially recognized the right asserted, and not the date that the right was made retroactively applicable).

Stevenson, however, claims in his COA application that he "never argued that he was denied resentencing pursuant to *Miller*," and contends that his claim is based on Michigan Compiled Laws § 769.25a, which went into effect prior to the Supreme Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (making *Miller*'s holding retroactively applicable on collateral review). That statute provides:

> If the state supreme court or the United States supreme court finds that . . . *Miller* . . . applies retroactively to all defendants who were under the age of 18 at the time of their crimes, . . . the determination of whether a sentence of imprisonment [pursuant to Michigan Compiled Laws § 750.316] shall be imprisonment for life without parole eligibility or a term of years . . . shall be made by the sentencing judge or his or her successor . . . .

Mich. Comp. Laws § 769.25a(2). The statute also lays out a procedure for the resentencing of defendants who would be affected by the retroactive application of *Miller*. Mich. Comp. Laws § 769.25a(4). Stevenson sent a letter to the trial court on July 25, 2016, inquiring about resentencing under the statute. Stevenson argues that the trial court's response informing him that he was not eligible for resentencing because he was eighteen at the time of the offense violated his rights to equal protection and due process. He claims this is so in spite of the fact that he was eighteen at the time of his crime because he was purportedly still under the jurisdiction of the juvenile court and thus classified as a juvenile under Michigan law. *See* Mich. Comp. Laws

§§ 712A.2(b), 712A.2a(1), (3) (1991). Therefore, Stevenson argues that the statute of limitations should have begun to run on August 4, 2016, the date the trial court responded to his letter.

The district court concluded that this argument was an attempt "to sidestep the bar on his constitutional claim arising out of *Miller v. Alabama*." Although Stevenson attempts to couch this claim as a violation of his rights to due process and equal protection, he is essentially arguing that the Michigan courts wrongly interpreted their own statute by concluding that he did not qualify for resentencing under section 769.25a. The interpretation of a Michigan statute by the Michigan courts is a matter of Michigan law, and is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Moreover, section 769.25a merely lays out the procedure for resentencing defendants who would be affected by the retroactive application of *Miller*, and any claim based on *Miller* is time-barred, as previously discussed. This claim does not deserve encouragement to proceed further.

Lastly, Stevenson asserts that the district court erroneously determined that he had not established his actual innocence. The one-year limitation period may be overcome if a petitioner can "demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To show a fundamental miscarriage of justice, the petitioner must make a "convincing showing" of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). This "requires petitioner to support his 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 v. Delo*, 513 U.S. 298, 324 (1995). "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)).

Stevenson argues actual innocence by asserting that the trial court allegedly lacked jurisdiction over him, and its judgment was therefore void. He asserts that this is more than a mere "legal insufficiency" because it affected his constitutional rights, and he presents documents that he claims show that the juvenile court did not waive its jurisdiction over him. But even if

Stevenson is correct that the juvenile court did not waive its jurisdiction, this does not implicate whether or not he factually committed the crime, and is thus "not the sort of claim contemplated by the 'actual innocence' exception as justifying equitable tolling." *Casey v. Tennessee*, 399 F. App'x 47, 48-49 (6th Cir. 2010). Reasonable jurists could not debate the district court's rejection of this argument.

Accordingly, the application for a COA is **DENIED**. The motion to proceed in forma pauperis on appeal is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Jermaine Stevenson, Petitioner,	)	
-v-	)	No. 2:16-cv-90
Jeffrey Woods, Respondent.	)	HONORABLE PAUL L. MALONEY

OPINION

Petitioner Jermaine Stevenson filed a second petition in the Eastern District of Michigan under 28 U.S.C. § 2254 while his original petition was pending before this Court. On September 23, 2016, the Court found that the first petition was time-barred and denied a Certificate of Appealability. Three weeks later, the petition filed in the Eastern District was transferred to this Court. The Court issued an order transferring the subsequent petition as Second or Successive, but the Sixth Circuit remanded, finding that because the second petition was *filed* before the first petition was resolved, the second petition should have been treated as a motion to amend the original petition, ignoring that the Court had issued a judgment prior to obtaining jurisdiction over the second petition.

On July 9, 2018, the magistrate judge issued an R & R recommending that the second petition be dismissed as time-barred. Petitioner filed objections, and then a second set of objections, styled as a motion to amend or supplement his objections. That motion is **GRANTED** and the Court will address the arguments made in both filings (ECF Nos. 25-26.)

Statement of Facts

Petitioner was convicted in Wayne County Circuit Court of first-degree murder and felony firearm. He was sentenced to life without the possibility of parole and two years on the respective counts. His date of birth is August 23, 1973, and the offense occurred on November 15, 1991. He had thus attained 18 years of age at the time he committed first degree murder.

On April 8, 2016, Petitioner filed his original habeas petition, which was found to be time-barred on September 23, 2016. But 11 days before the Court did so, Petitioner filed a second § 2254 Petition, this time in the Eastern District of Michigan. That court dismissed the second petition as duplicative. The Sixth Circuit examined the second petition, found that it raised different claims than the first petition, and vacated the Eastern District's dismissal with instructions to transfer the Petition to the Western District to consider it as a motion to amend. Those amended claims, first presented in the Eastern District, are now before the Court.

Petitioner's Amended Habeas Petition asserted four claims for relief. The magistrate judge's Report and Recommendation focused largely on Petitioner's fourth claim—that the sentence he received was unconstitutional. Ultimately, the magistrate judge found the petition time-barred and concluded that neither equitable tolling or actual innocence applied to overcome the statute of limitations.

Legal Framework

With respect to a dispositive motion, a magistrate judge issues a report and recommendation, rather than an order. After being served with a report and

recommendation (R & R) issued by a magistrate judge, a party has fourteen days to file written objections to the proposed findings and recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). A district court judge reviews de novo the portions of the R & R to which objections have been filed. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Only those objections that are specific are entitled to a de novo review under the statute. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (*per curiam*) (holding the district court need not provide de novo review where the objections are frivolous, conclusive or too general because the burden is on the parties to "pinpoint those portions of the magistrate's report that the district court must specifically consider"). Failure to file an objection results in a waiver of the issue and the issue cannot be appealed. *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005); *see also Thomas v. Arn*, 474 U.S. 140, 155 (upholding the Sixth Circuit's practice). The district court judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Discussion

Petitioner raises four claims for relief in his Amended Petition under § 2254. However, the first three claims (arguing that the state court lacked jurisdiction and that he received ineffective assistance of counsel) are time-barred for the reasons given in the Court's prior opinions addressing Petitioner's first § 2254. (*See* ECF No. 3, 8.) The statute of limitations expired on these claims on October 28, 1997. 28 U.S.C. § 2244(d)(1).

Petitioner's fourth claim implicates a newly-announced retroactively applicable rule of constitutional law, and it is therefore subject to a different statute of limitations. Plaintiff

asserts that his sentence to mandatory life without parole violated his Eighth Amendment right to be free from cruel and unusual punishment because he was a juvenile. The Supreme Court held such sentences unconstitutional in *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller* was decided on June 25, 2012, so Petitioner had one year from that date to file this claim. He did not do so.

Petitioner argues that his failure to do so was excused because he did not become aware of *Miller* until the MDOC issued a Basic Information sheet to all juvenile offenders serving a life sentence without parole in November of 2012. Even giving Plaintiff the benefit of the doubt, Petitioner had until November 30, 2013 to file his petition. Again, he did not do so. The magistrate judge thus concluded that Petitioner's *Miller* claim was time-barred.

The magistrate judge further evaluated whether equitable tolling or actual innocence could excuse Petitioner's failure to timely file his petition. The court first concluded that Petitioner had not raised any grounds that would support equitable tolling. It then concluded that he had not established actual innocence of his crime of his conviction.

Between Petitioner's objections and his supplemental objections, Petitioner raises three principle arguments.

First, he argues that *Miller* was not retroactively applicable until the Supreme Court decided *Montgomery v. Louisiana* on January 25, 2016, so his petition was timely. *See* 136 S. Ct. 718 (2016).

This argument is unavailing. The statute of limitations runs from the day the Supreme Court announces a newly-recognized constitutional right, which occurred when *Miller* was decided. *Montgomery* says as much: "The Court now holds that Miller *announced* a

substantive rule of constitutional law." 136 S. Ct. at 736 (emphasis added). Petitioner is incorrect when he asserts that the right announced in *Miller* was not retroactively applicable until *Montgomery* was decided. Thus, the magistrate judge did not err in concluding that Petitioner's *Miller* claim was time-barred.

Petitioner's second objection relates to actual innocence. The magistrate judge found that Petitioner had not established actual innocence because he offered no evidence that made it more likely than not that no reasonable juror could vote to convict him. Petitioner now argues that the Wayne County Circuit Court lacked jurisdiction over him and therefore his conviction is void.

It is a habeas petitioner's burden to show actual innocence. *Bousley v. United States*, 523 U.S. 614, 621 (1998). However, the Court made clear in *Bousley* that "'actual innocence' means factual innocence, not merely legal insufficiency." *Id.* at 623.

Here, Petitioner's attack on his conviction is one of "legal []sufficiency" alone. "[Petitioner's] attack on the adequacy of the juvenile court proceedings is simply not the sort of claim contemplated by the "actual innocence" exception[.]". *Casey v. Tennessee*, 399 F. App'x 47, 49 (6th Cir. 2010). Accordingly, this objection will be overruled.

Finally, in his supplemental objections, Petitioner offers a new theory for why his petition is timely. For the first time, he asserts that the state courts did not recognize that he was sentenced to life as a juvenile offender. Specifically, he says that the trial judge, "off the record," refused to resentence him and subsequently wrote a letter saying as much. The letter indicates that the state trial judge considered Petitioner to be 18 at the time of the offense, since his birthday was August 23, 1973 and the offense date was November 15, 1991. The

judge thus reasoned that Petitioner was not eligible for re-sentencing under *Miller*.

Petitioner has merely attempted to sidestep the bar on his constitutional claim arising out of *Miller v. Alabama*. Because this claim still relies on a newly announced retroactive constitutional decision, Petitioner's claim is time-barred, regardless of when the state trial judge informed him that he was ineligible for the relief he sought on the merits. Even if the claim were not time-barred, the Court finds that Petitioner was not a juvenile at the time of the offense, and thus he has no claim under *Miller*.

In sum, Petitioner's petition for a writ of habeas corpus lacks merits and will be denied without a certificate of appealability.

ORDER

Petitioner's motion to supplement his objections is **GRANTED,** and the Court has considered the arguments contained within.

For the reasons given in the accompanying opinion, the Court **ADOPTS** the Report and Recommendation of the Magistrate Judge as the opinion of the Court. (ECF No. 23.) Petitioner's objections are **OVERRULED** (ECF Nos. 25, 26) and Petitioner's Amended Habeas Corpus Claim is **DENIED.**

Certificate of Appealability

The Court must determine whether a certificate of appealability should be granted. 28 U.S.C. § 2253(c)(2). A certificate should issue if petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a

reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* at 467. Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467.

Under *Slack*, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484. "A petitioner satisfies this standard by demonstrating 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). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of petitioner's claims. *Id.*

Examining Petitioner's claims under the standard in *Slack*, the Court finds that reasonable jurists would not conclude that this Court's denial of Petitioner's claims is debatable or wrong. The Court thus **DENIES** Petitioner a Certificate of Appealability.

IT IS SO ORDERED.

JUDGMENT TO FOLLOW.

Date: February 5, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Jermaine Stevenson, Petitioner,	)	
-v-	)	No. 2:16-cv-90
Jeffrey Woods, Respondent.	)	HONORABLE PAUL L. MALONEY

JUDGMENT

In accordance with the accompanying Opinion and Order entered on this, and pursuant to Fed. R. Civ. P. 58, **JUDGMENT** hereby enters.

IT IS SO ORDERED.

Date: February 5, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Certified an a True Copy
By D. Kivell
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 2-5-2019

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JERMAINE STEVENSON,

Petitioner,

v.

JEFFREY WOODS,

Respondent.
/

Case No. 2:16-cv-90

Honorable Paul L. Maloney

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing § 2254 Cases; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to "screen out" petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). The Court may *sua sponte* dismiss a habeas action as time-barred under 28 U.S.C. § 2244(d). *Day v. McDonough,* 547 U.S. 198, 209 (2006). After undertaking the review required by Rule 4, I conclude that the petition is barred by the one-year statute of limitations.

Petitioner Jermaine Stevenson is incarcerated with the Michigan Department of Corrections at the Chippewa Correctional Facility (URF) in Kincheloe, Chippewa County, Michigan. Following a jury trial in the Wayne County Circuit Court, Petitioner was convicted of first-degree murder and felony firearm. On January 26, 1993, the court sentenced Petitioner to respective prison terms of life without the possibility of parole and 2 years.

On April 8, 2016, Petitioner initiated this action by filing an application for habeas corpus relief. Under Sixth Circuit precedent, the application is deemed filed when handed to prison authorities for mailing to the federal court. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Petitioner signed his original application on April 4, 2015. (Pet., ECF No. 1, PageID.20.) The petition was received by the Court on April 8, 2016. For purposes of this Report and Recommendation, I have given Petitioner the benefit of the earliest possible filing date. *See Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008) (holding that the date the prisoner signs the document is deemed under Sixth Circuit law to be the date of handing to officials) (citing *Goins v. Saunders*, 206 F. App'x 497, 498 n.1 (6th Cir. 2006)).

Following the filing of this action, the Court reviewed Petitioner's application and determined that his claims were barred by the pertinent statute of limitations. Petitioner's action was dismissed on September 23, 2016. (ECF Nos. 8 and 9.) The Sixth Circuit Court of Appeals subsequently denied Petitioner a certificate of appealability. (ECF No. 16.) Petitioner's subsequent attempts to obtain relief from the federal courts were summarized by the Sixth Circuit on May 4, 2018:

> In April 2016, Stevenson filed a § 2254 petition in the United States District Court for the Western District of Michigan. See Stevenson v. Woods, No. 2:16-CV-90, 2016 WL 5334601, at *1 (W.D. Mich. Sept. 23, 2016). The Western

> District dismissed the first petition as untimely, and we denied Stevenson a certificate of appealability. Eleven days before the Western District dismissed the first petition, Stevenson filed another § 2254 petition in the United States District Court for the Eastern District of Michigan. The Eastern District, upon learning of Stevenson's earlier petition, dismissed the second as "duplicative," finding that it "raise[d] the same claims."
>
> Noting that the second petition sought to raise three grounds not mentioned in the first petition, we granted a certificate of appealability to consider whether the Eastern District should have construed the second petition as a motion to amend the first petition. By order dated September 18, 2017, we determined that the Eastern District abused its discretion by failing to transfer the second petition to the Western District because a subsequent § 2254 petition filed while the petitioner's initial petition is still pending should be construed as a motion to amend the initial petition under Federal Rule of Civil Procedure 15. See In re Deal, No. 15-6023 (6th Cir. May 9, 2016) (citing United States v. Sellner, 773 F.3d 927, 931-32 (8th Cir. 2014)); Woods v. Carey, 525 F.3d 886, 890 (9th Cir. 2008); Whab v. United States, 408 F.3d 116, 119 (2d Cir. 2005)); see also Clark v. United States, 764 F.3d 653, 658 (6th Cir. 2014) ("A motion to amend [pursuant to Rule 15] is not a second or successive [habeas] motion when it is filed before the adjudication of the initial § 2255 motion is complete. . . ."). We thus vacated the Eastern District's dismissal order and remanded the case for transfer to the Western District of Michigan with instructions to consider the second petition as a motion to amend Stevenson's first petition. Stevenson v. Woods, No. 16-2577 (6th Cir. Sept. 18, 2017).
>
> The Eastern District transferred the case to the Western District as directed by our September 18, 2017, order. The Western District did not follow our instructions, however, and instead transferred the case back to this court for consideration as an application to file a second or successive habeas petition pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45, 47 (6th Cir. 1997). Stevenson v. Horton, No. 2:17-CV-177 (W.D. Mich. Jan. 9, 2018). Because we have already determined that the second petition was not second or successive—but instead should be construed as a motion to amend the first petition—the proper disposition is to remand the case to the Western District for consideration in accordance with our September 18, 2017, order.

See Stevenson v. Horton, Case No. 2:17-cv-177, ECF No. 18, PageID.144-145 (W.D. Mich.).

Consequently, the instant case was reopened on May 11, 2018, pursuant to ECF No. 19 filed in Case No. 2:17-cv-177.

Currently before the Court is Petitioner's motion to amend / correct, his amended habeas corpus petition, and his brief in support. (ECF Nos. 17 and 18.)

Petitioner's application is barred by the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1), which became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA). Section 2244(d)(1) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period 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). The running of the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (limiting the tolling provision to only State, and not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining "properly filed").

As noted by the Court in June 3, 2016, Report and Recommendation, as well as in the September 23, 2016, Order Adopting the Report and Recommendation (ECF Nos. 3 and 8),

the Michigan Supreme Court denied his application on July 29, 1996. The one-year limitations period, however, did not begin to run until the ninety-day period in which Petitioner could have sought review in the United States Supreme Court had expired. *See Lawrence v. Florida*, 549 U.S. 327, 332-33 (2007); *Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The ninety-day period expired on October 28, 1996. The Court found that the statute of limitations for Petitioner's claims expired on October 28, 1997.

Petitioner now claims that the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which was decided on June 25, 2012, and held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment provides him with a new basis for challenging his sentence. As noted above, where the right being asserted has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, the statute of limitations shall run from the date on which the constitutional right asserted was initially recognized by the Supreme Court, or 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). Petitioner claims that after *Miller v. Alabama* was decided, the MDOC issued every juvenile offender sentenced to mandatory life without parole a new Basic Information Sheet, and that he received his in November of 2012 with the heading "Juvenile Lifer Review 10-30-12." Giving Petitioner the benefit of the latest date for discovering the factual predicate of this claim, November 31, 2012, Petitioner had one year from that date, or until November 31, 2013, to file a habeas corpus petition or otherwise toll the running of the statute of limitations. As noted above, Petitioner did not file his motion for relief from judgment until April 2, 2014. Therefore, the statute of limitations had already run.

The one-year limitations period applicable to § 2254 is a statute of limitations subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 645 (2010); *Akrawi v. Booker*, 572 F.3d 252, 260 (6th Cir. 2009); *Keenan v. Bagley*, 400 F.3d 417, 420 (6th Cir. 2005). A petitioner bears the burden of showing that he is entitled to equitable tolling. *See Keenan*, 400 F.3d at 420; *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). The Sixth Circuit repeatedly has cautioned that equitable tolling should be applied "sparingly" by this Court. *See, e.g., Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011); *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *Sherwood v. Prelesnik*, 579 F.3d 581, 588 (6th Cir. 2009). A petitioner seeking equitable tolling of the habeas statute of limitations has the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland*, 560 U.S. at 649 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Lawrence v. Florida*, 549 U.S. 327, 335 (2007); *Hall*, 662 F.3d at 750; *Akrawi*, 572 F.3d at 260.

Petitioner has failed to raise equitable tolling or allege any facts or circumstances that would warrant its application in this case. The fact that Petitioner is untrained in the law, was proceeding without a lawyer, or may have been unaware of the statute of limitations for a certain period does not warrant tolling. *See Allen*, 366 F.3d at 403-04; *see also Craig v. White*, 227 F. App'x 480, 482 (6th Cir. 2007); *Harvey v. Jones*, 179 F. App'x 294, 299-300 (6th Cir. 2006); *Martin v. Hurley*, 150 F. App'x 513, 516 (6th Cir. 2005); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) ("[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse [late] filing."). Accordingly, Petitioner is not entitled to equitable tolling of the statute of limitations.

In his amended habeas corpus petition, Petitioner claims that he should be able to proceed with his habeas action because he has new evidence showing actual innocence. In *McQuiggin v. Perkins*, 569 U.S. 383, 391-393 (2013), the Supreme Court held that a habeas petitioner who can show actual innocence under the rigorous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), is excused from the procedural bar of the statute of limitations under the miscarriage-of-justice exception. In order to make a showing of actual innocence under *Schlup*, a Petitioner must present new evidence showing that "'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 329 (addressing actual innocence as an exception to procedural default)). Because actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in determining the credibility of the evidence of actual innocence. *Id.* at 399-400.

In the instant case, Petitioner asserts that he was a juvenile in the custody of the Wayne County Probate Court at the time the crime was committed. As support for his claim of actual innocence, Petitioner claims that the United States Supreme Court decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which was decided on June 25, 2012, held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment. *Id.* at 465. However, the holding in *Miller v. Alabama* does not constitute evidence that makes it more likely than not that no reasonable jury would have convicted him. *Schlup*, 513 U.S. at 329. Therefore, because Petitioner has wholly failed to provide evidence of his actual innocence, he is not excused from the statute of limitations under 28 U.S.C. § 2244(d)(1). His habeas petition therefore is time-barred.

The Supreme Court has directed the District Court to give fair notice and an adequate opportunity to be heard before dismissal of a petition on statute of limitations grounds. *See Day,* 547 U.S. at 210. This report and recommendation shall therefore serve as notice that the District Court may dismiss Petitioner's application for habeas corpus relief as time-barred. The opportunity to file objections to this report and recommendation constitutes Petitioner's opportunity to be heard by the District Judge.

Even though I have concluded that Petitioner's habeas petition should be denied, under 28 U.S.C. § 2253(c)(2), the Court must also determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* at 467.

I have concluded that Petitioner's application is untimely and, thus, barred by the statute of limitations. Under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only "when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Both showings must be made to warrant the grant of a certificate. *Id.*

I find that reasonable jurists could not find it debatable whether Petitioner's application was timely. Therefore, I recommend that a certificate of appealability should be denied.

For the foregoing reasons, I recommend that the habeas corpus petition be denied because it is barred by the one-year statute of limitations. I further recommend that a certificate of appealability be denied.

Dated: July 9, 2018

/s/ Timothy P. Greeley
Timothy P. Greeley
United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within 14 days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

No. 19-1224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 16, 2019
DEBORAH S. HUNT, Clerk

JERMAINE STEVENSON,

Petitioner-Appellant,

v.

JEFFREY WOODS, WARDEN,

Respondent-Appellee.

ORDER

Before: KETHLEDGE, BUSH, and MURPHY, Circuit Judges.

Jermaine Stevenson, a pro se Michigan 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. 19-1224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 31, 2019
DEBORAH S. HUNT, Clerk

JERMAINE STEVENSON,

Petitioner-Appellant,

v.

JEFFREY WOODS, WARDEN,

Respondent-Appellee.

ORDER

Before: KETHLEDGE, BUSH, and MURPHY, Circuit Judges.

Jermaine Stevenson petitions for rehearing en banc of this court's order entered on May 30, 2019, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Larsen recused herself from participation in this ruling.