

# **APPENDIX – A**

# **DOCUMENT 1-6**

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

GREGORY LAMAR MATHIS, )  
Petitioner, )  
v. ) Case No. 3:18-cv-01330  
KEVIN GENOVESE, Warden, ) Judge Trauger  
Respondent. )

ORDER

Gregory Lamar Mathis, an inmate at the Turney Center Industrial Complex in Only, Tennessee, has filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1.) He has not paid the \$5.00 filing fee, 28 U.S.C. § 1914(a), nor has he filed a proper application for leave to proceed *in forma pauperis* (IFP). However, appended to the petition is a financial affidavit, a certificate showing the petitioner's inmate trust fund account balance, and a copy of his account history for the preceding six months (*Id.* at 51–57.) The court construes the affidavit and certificate together as an application to proceed IFP. *See* Rule 3(a), Rules Gov'g § 2254 Cases.

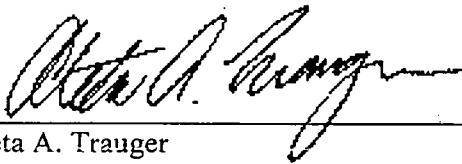
The petitioner's financial affidavit shows that he lacks any earnings, other income, or funds held in cash or traditional accounts. (*Id.* at 51.) However, as of November 15, 2018, a Turney Center official certified that the petitioner's current inmate trust fund account balance was \$70.01, and that his average balance over the preceding six months had been \$424.21. (*Id.* at 52.) Accordingly, the petitioner has demonstrated that he has sufficient funds to pay the \$5.00 filing fee. His application to proceed IFP is therefore **DENIED**.

If the petitioner seeks to have this court consider his petition, he **MUST** submit the \$5.00 filing fee within **30 days** of the date this order is entered on the docket.

The petitioner is cautioned that if he does not comply with this order within the time frame specified, or request an extension of the deadline before it expires, this action will be dismissed for failure to prosecute and for failure to comply with the court's order.

It is so ORDERED.

ENTER this 7<sup>th</sup> day of January 2019.



Aleta A. Trauger  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

GREGORY LAMAR MATHIS, )  
Petitioner, )  
v. ) Case No. 3:18-cv-01330  
KEVIN GENOVESE, Warden, ) Judge Trauger  
Respondent. )

ORDER

Gregory Lamar Mathis, an inmate of the Turney Center Industrial Complex in Only, Tennessee, has filed a *pro se* petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) After filing an application for leave to proceed *in forma pauperis* (IFP) on February 4, 2019 (Doc. No. 7), the petitioner paid the \$5.00 filing fee on February 6, 2019. (Doc. No. 8.) Accordingly, the IFP application (Doc. No. 7) is **DENIED** as moot, and the petition is now before the court for an initial review. *See* Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts (“Habeas Rules”).

Under Habeas Rule 4, the court is required to examine § 2254 petitions to ascertain as a preliminary matter whether “it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” *Id.* According to the petition, the petitioner was convicted in 2010 of one count of aggravated robbery, one count of burglary, and two counts of especially aggravated kidnapping in the Davidson County Criminal Court and was sentenced to 126 years in prison. (Doc. No. 1 at 1, 5.) The petitioner now challenges the legality of his conviction. For purposes of this preliminary review, the court liberally construes the petition as

raising claims which include the insufficiency of the evidence against him and the failure of the trial court to properly instruct the jury. (*Id.* at 7.)<sup>1</sup>

The alleged insufficiency of the evidence to support the petitioner's conviction states a colorable claim for habeas corpus relief, *Peoples v. Lafler*, 734 F.3d 503, 517 (6th Cir. 2013), as does the alleged failure to properly instruct the jury. *Bowling v. Parker*, 344 F.3d 487, 499-500 (6th Cir. 2003). Because it is not now readily apparent from the face of the petition that the petitioner is not entitled to such relief, the respondent is **DIRECTED** to file an answer, plead or otherwise respond to the petition in accordance with Habeas Rule 5 within **30 days** of the entry of this Order. If the respondent takes the position in his submission that the petitioner has failed to exhaust his available state remedies for the claim(s) raised in the petition, the respondent **MUST** clearly identify those remedies, citing any applicable statutes, rules, or regulations, and explain the procedure for their exhaustion.

On that same date, the respondent shall also file the complete state court record relevant to this matter, including the complete trial court record, the complete record on direct appeal, and the complete trial and appellate court record in connection with any state petition for collateral relief including, but not limited to, transcripts for all proceedings and rulings on any state petition. See Habeas Rule 5(c) and (d). The respondent's notice of filing shall include a comprehensive index indicating the precise location of each distinct part of the relevant record (e.g., plea proceedings, pretrial hearing transcripts, voir dire, each portion of trial testimony, trial exhibits, jury instructions, verdict, each party's briefs at each level of appeal, each court's final ruling on appeal and collateral proceedings, etc.). The record shall be organized and appropriately indexed, and

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<sup>1</sup> The petitioner asserts that "both evidence and record clearly demonstrate an absence in consummation of alleged crimes and the trial court's neglect in tendering peremptory instructions which could and would have negated the Petitioner's guilt." (Doc. No. 1 at 7.)

distinct parts of the record should be electronically bookmarked for ease of reference in identifying documents relevant to the state court proceedings.

If the respondent files an answer, the answer must comply with the requirements set forth in Habeas Rule 5. The answer shall address each alleged ground for relief and shall be fully briefed with citations to the state court record and to governing Supreme Court precedent. For each claim, the answer shall, at a minimum: (1) assert any procedural defenses; (2) identify the clearly established Supreme Court precedent governing the claim; (3) state whether the claim was exhausted in state court; (4) cite the state court's ruling for exhausted claims; and (5) respond to the petitioner's argument that he is entitled to habeas relief on the claim with appropriate reasoned legal and factual argument.

Failure to comply with these requirements may result in the respondent being directed to file a new answer in conformance with these requirements.

The petitioner may file a reply to the respondent's answer limited to disputing specific points of fact or law raised by the answer within 30 days of the date the answer is filed. The court will consider the matter ripe for review if the petitioner fails to file a reply, or to seek additional time to file a reply, within 30 days of the date the answer is filed.

If the respondent files a motion, the motion shall comply with the requirements of the Federal Rules of Civil Procedure, *see* Habeas Rule 12, and where relevant, shall address the issues of exhaustion and timeliness.

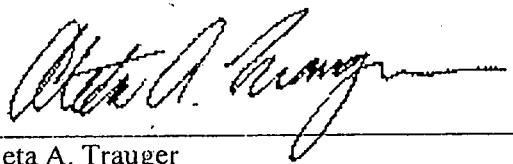
~~The petitioner may file a response to the respondent's motion within 30 days of the date~~  
the motion is filed. If the petitioner fails to respond timely to the respondent's motion, or fails to seek additional time to respond, the court may construe the petitioner's silence as his agreement that the motion has merit and may grant the motion without further briefing. The respondent may

file a reply, or seek additional time to file a reply, within 15 days of the date the petitioner's response to the motion is filed.

The Clerk is **DIRECTED** to serve a copy of the petition and this order by mail on the respondent and the Attorney General of Tennessee. *See* Habeas Rule 4.

It is so **ORDERED**.

ENTER this 4<sup>th</sup> day of March 2019.



Aleta A. Trauger  
United States District Judge

J. J. File

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

**GREGORY L. MATHIS,  
Petitioner**

**Vs.**

**Case no. 3:18-cv-01330  
Judge Trauger**

**KEVIN GENOVESE, Warden  
Respondent**

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**PETITIONER'S REPLY**

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*Come the Petitioner, Gregory L. Mathis, pro se, pursuant to Rule 5(e), governing cases under 28 USC § 2254, to give reply to the Respondent's Motion To Dismiss with Memorandum in support.*

*Therefore, Petitioner now moves this court in "striking" the Respondent's Motion to Dismiss in view and consideration of the Petitioner's attached indicia – hereafter; Supplemental Appendices A & B, which clearly demonstrates both a timely submission of his petition as well as a thorough exhaustion of his issues now being submitted from a [post] conviction point of view, and, in accordance with the "gate-keeping" standards of both Titles 28 USC §§ 2244 & 2254'*

*Further, now requires this Court's scheduling-order for both an Evidentiary Hearing as well as the appointment of counsel, consistent with Rule 8(a)& (b)*

*R-2*

governing cases under §2254 as well as Rule 16 of the F.R.Civ.P. made feasible via **Rule 12** governing cases under § 2254.

### RESPONDENT'S MEMORANDUM

#### Procedural History:

Here, and for the greater part of respondent's historical reflection of record, petitioner will accept and agree with its accuracy; however, as to ---

### ARGUMENT

i.

#### REPLY:

Petitioner must oppose Respondent's assertion that he's restricted to the Habeas Act's statute of limitations, where his records unrefuted showing demonstrates, "first," his appointed counsel's complacency [Apdx.doc.1-7 ], in each prior action, and "secondly," his independent [post] filing attempt to overcome his conviction, see also [Apdx-doc. 5 & 7 ], which and for all intents and purposes, satisfies the gate-keeping standards of both §§2244 & 2254, id.

Consider the court's conclusion held in our U.S. Supreme Court in Rose v. Lundy, 102 S.Ct. 1198,455 U.S. 509; 71 L.Ed.2d.379 (1982) with Sales v. Taylor, 2015 , [WL-4487833;USDC, E.D. Tenn.], at first blush respondent complains of petitioner's tardiness where "it appears" he failed to meet the mailbox-rule, whose representation was majoritively controlled by appointed attorneys; See [Apdx.B, doc.5 ],

Petitioner's documents will further show that, even to be in the position to account for a timely conclusion of his [State] appeals which were submitted through counsel [Apdx, doc.1-3], the timely commencement of a post-conviction action created this "pause" in the initial filing of a Federal Habeas Action; See [Apdx.B,doc.7]with Sales, *supra* at p.2, which had not fully run---and!, in view of a **3-way-option**, which is to also point out, that at the moment of the petitioner's exhaustion of his highest state court review, appellate procedure allows him a choice of filing into either the federal courts (having one year to do so), or the U.S. Supreme Court (which covers a 90-day period, or finally, (as he chose to do) file back into the state court of record (having 1-year to do so)providing this entitlement, and was "encouraged to take this course of action by counsel," [Apdx.B,doc.5].

ARGUMENT

II

REPLY:

In addition to this, petitioner is entitled to equitable tolling where he is able to show---1.] That he was in constant pursuit of his rights [Apdx/ A & B,]<sup>12</sup> as revealed here, 2.] That some extra-ordinary circumstances, e.g. attorneys, prevented a timely filing which put matters beyond his control---"and did." See also [Apdx. A doc.2 & 4 ]; Sales at p.2.

Contrary to the respondent's presumptuous findings, the petitioner's supplemental indicia, *id*, proves otherwise in supporting his entitlement for equitable tolling; also *id*. However and of utmost concern as pointed out in our U.S. Supreme Court in Rose v. Lundy, *supra* at p.8, a clear and simple

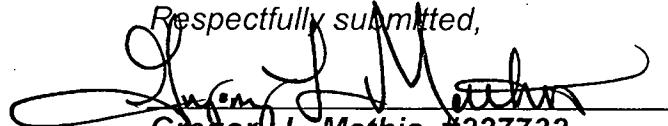
instruction was given to the prospective litigant, and for purposes of utilizing "The Writ," which is to say-----

**"Before you bring any claims to federal court, be sure that you first have taken 'each' one to state court . . . to master this straightforward exhaustion requirement"**  
[emphasis, added].

### CONCLUSION

Therefore, Congressional logic dictates, that nothing in the traditions of habeas corpus requires the federal courts to tolerate needless "piecemeal" litigation, such as eluded to by the respondent, or to entertain collateral proceedings whose only purpose is to vex, harass or delay, in this instance, petitioner's relief, now suggesting a Hearing for further proceedings.

Respectfully submitted,



\_\_\_\_\_  
Gregory L. Mathis, #227732  
Turney Center Industrial Complex  
1499 R.W. Moore Memorial Hwy.  
Only, Tennessee. 37140-4050

**CERTIFICATION**

*This is to certify, that the foregoing Petitioner's Reply was filed on this 14th day of June 2019, via U.S. Postal Service; prepaid to the Clerk of the U.S. District Court, Middle Division, located at the U.S. Courthouse; Room 800, 801 Broadway, Nashville, Tennessee 37203-3816. And to;*

*T.Austin Watkins.  
Asst, Attorney General  
Fed. Habeas Corpus Div.  
B.P.R No. 32425  
P.O. Box 20207  
Nashville, Tennessee. 37202*



*Gregory L. Mathis*  
Gregory L. Mathis, pro se.

*C: file/glm*

IN THE UNITED STATES DISTRICT COURT  
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Respondent. )

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**REPLY TO PETITIONER'S RESPONSE TO MOTION TO DISMISS**

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Comes now Respondent, pursuant to this Court's order (ECF No. 9), and replies to Petitioner's response (ECF No. 17) to Respondent's motion to dismiss the habeas corpus petition as untimely (ECF No. 15). Petitioner argues that the petition is not untimely and that he is entitled to equitable tolling. (See ECF No. 17.) Because both arguments are unpersuasive, the motion to dismiss should be granted.

To support his argument that the petition was filed timely, Petitioner submitted miscellaneous appellate court documents. (See *id.*) However, none of those documents undermine the accuracy of Respondent's timeliness calculation. The documents regarding the Court of Criminal Appeals's rejection of Petitioner's pro se filings during the post-conviction appeal all occurred during the period in which the statute of limitations was statutorily tolled under 28 U.S.C. § 2244(d)(2). (See *id.* at PageID 1608-10.) Likewise, the documents regarding Petitioner's application for permission to appeal to the Tennessee Supreme Court on post-conviction appeal all occurred during the period in which the statute of limitations was statutorily tolled. (See *id.* at 1611-13.) The same is true for the post-conviction court's preliminary order appointing post-

conviction counsel. (*See id.* at 1621.) As can be seen, the habeas corpus petition is untimely, and Petitioner's submissions do not demonstrate otherwise.

To support his argument that he is entitled to equitable tolling of the statute of limitations, Petitioner has submitted letters from his counsel at trial and on direct appeal. (*See id.* at 1615-20.) Petitioner has not explained how the letters from counsel support his bald assertion that counsel's conduct was an extraordinary circumstance to justify equitable tolling. (*See id.* at 1604-05.) At most, those documents suggest that there might have been some delay between the end of the direct appeal proceedings and the transfer of copies of the trial transcripts to petitioner before the filing of his pro se petition for post-conviction relief.<sup>1</sup> (*See id.* at 1620.) However, it is apparent that any delay was neither the cause of Petitioner's untimely filing nor an extraordinary circumstance. Moreover, the Sixth Circuit has held that "the unavailability of or delay in receiving transcripts is not enough to entitle a habeas petitioner to equitable tolling." *Hall v. Warden*, 662 F.3d 745, 750-51 (6th Cir. 2011). Because Petitioner cannot carry his burden of demonstrating that he is entitled to equitable tolling, the untimely habeas corpus petition should be dismissed.

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<sup>1</sup> Respondent notes that this letter from counsel was sent to Petitioner after the denial of the application for permission to appeal to the Tennessee Supreme Court but before time expired for filing a petition for writ of certiorari in the Supreme Court of the United States. As such, nothing affirmatively demonstrates that Petitioner did not receive the transcripts from counsel before the statutory tolling period ended.

Respectfully submitted,

HERBERT H. SLATERY III  
Attorney General and Reporter

/s/ T. Austin Watkins  
T. AUSTIN WATKINS  
Assistant Attorney General  
Federal Habeas Corpus Division  
B.P.R. No. 32425  
P.O. Box 20207  
Nashville, Tennessee 37202  
(615) 532-1119  
Austin.Watkins@ag.tn.gov

**CERTIFICATE OF SERVICE**

I certify that the foregoing Reply was filed electronically on July 2, 2019. A copy of the foregoing will be forwarded on the same day by FedEx to: Gregory Lamar Mathis #227732, Turney Center Industrial Complex, 1499 R.W. Moore Memorial Hwy, Only, TN 37140.

/s/ T. Austin Watkins  
T. AUSTIN WATKINS  
Assistant Attorney General

in opposition to the motion to dismiss (Doc. No. 17), and the respondent filed a reply to the petitioner's response. (Doc. No. 18.)

Having carefully considered these pleadings and the record, it appears that an evidentiary hearing is not needed in this matter. *See Smith v. United States*, 348 F.3d 545, 550 (6th Cir. 2003) (an evidentiary hearing is not required when the record conclusively shows that the petitioner is entitled to no relief). Therefore, the court shall dispose of the petition as the law and justice require. Rule 8, Rules Gov'g § 2254 Cases.

## II. Procedural History

Following the petitioner's 2010 conviction and sentencing, the Tennessee Court of Criminal Appeals (TCCA) affirmed the Davidson County Criminal Court in a decision dated September 5, 2013, and the Tennessee Supreme Court denied discretionary review on December 12, 2013. *State v. Mathis*, No. M2011-01096-CCA-R3-CD, 2013 WL 4774130 (Tenn. Crim. App. Sept. 5, 2013), *perm. app. denied* (Tenn. Dec. 12, 2013). The petitioner did not seek review in the U.S. Supreme Court.

On October 3, 2014, the petitioner filed a pro se petition for post-conviction relief in state court (Doc. No. 14-17 at 36–49), which was submitted to prison authorities for mailing on September 23, 2014. (*Id.* at 48.) The post-conviction trial court appointed counsel, who filed an amended petition. (*Id.* at 68–72.) The trial court ultimately denied the amended petition after holding an evidentiary hearing. (*Id.* at 75–90; Doc. No. 14-18.) The TCCA affirmed the trial court's denial of post-conviction relief in a decision dated November 21, 2017, and the petitioner's application for permission to appeal to the Tennessee Supreme Court was denied on February 14, 2018. *Mathis v. State*, No. M2016-02516-CCA-R3-PC, 2017 WL 5624714 (Tenn. Crim. App. Nov. 21, 2017), *perm. app. denied* (Tenn. Feb. 14, 2018).

The petitioner submitted his undated, pro se Section 2254 petition to prison authorities for mailing no later than November 26, 2018, the date it is postmarked. (Doc. No. 1 at 58.) The petition was received and filed in this court on November 28, 2018.

### III. Analysis

#### A. Timeliness of the Petition

Petitions under Section 2254 are subject to a one-year statute of limitations. 28 U.S.C. § 2244(d)(1); *Holland v. Florida*, 560 U.S. 631, 635 (2010). In most cases, including the case at bar, the limitations period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” *Id.* § 2244(d)(1)(A). Following the Tennessee Supreme Court’s denial of discretionary review on December 12, 2013, the petitioner had ninety days in which to take the final step in the direct appeal process by filing a petition for writ of certiorari in the U.S. Supreme Court. Because he did not file such a petition, his conviction became final at the conclusion of this ninety-day period, on March 12, 2014. *Gonzalez v. Thaler*, 132 S. Ct. 641, 653 (2012); *Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009). The running of the statute of limitations is counted from the following day, March 13, 2014. *See Fed. R. Civ. P. 6(a)(1)(A)* (when computing a time period “stated in days or a longer unit of time . . . exclude the day of the event that triggers the period”); *Brонаugh v. Ohio*, 235 F.3d 280, 284 (6th Cir. 2000) (applying Rule 6(a)’s standards for computing periods of time to habeas filing).

However, “[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2). The petitioner submitted his pro se post-conviction petition to prison authorities for mailing on September 23, 2014 and is deemed to have filed it on that day under the

Tennessee Rules of Post-Conviction Procedure. *See* Tenn. Sup. Ct. R. 28, § 2(G). The period of statutory tolling thus began on September 23, 2014<sup>1</sup> (the 195th day after the statute began to run) and continued until February 14, 2018, when the Tennessee Supreme Court declined to review the post-conviction case. With the conclusion of state post-conviction proceedings, the one-year limitations period resumed running the next day, on February 15, 2018. *Lawrence v. Florida*, 549 U.S. 327, 331–32 (2007). At that point, the petitioner had 171 days (365 minus 194) remaining—or until August 6, 2018—in which to file a timely federal habeas petition.

The petitioner filed his federal habeas petition on November 26, 2018—113 days after the limitations period expired—when he delivered it to prison authorities for mailing to the court. *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008) (recognizing “relaxed filing standard” under which “a pro se prisoner’s complaint is deemed filed when it is handed over to prison officials for mailing to the court”). The parties agree on the operative dates recited above, although the petitioner appears to believe that the application of statutory tolling while he pursued post-conviction remedies should render his habeas petition timely. (*See* Doc. No. 17 at 1–3.) Clearly, however, even with the benefit of statutory tolling and the relaxed filing standard for pro se prisoners, the petitioner’s filing in this court was not timely. The only remaining issue is whether the court should nonetheless reach the merits of the petition because the petitioner is entitled to equitable tolling of the limitations period.

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<sup>1</sup> The petition refers to an earlier filing of a “Motion to Correct or Amend Sentence” on June 11, 2014, based on an alleged error in the application of a sentencing statute. (Doc. No. 1 at 6.) Even if that motion qualifies as a collateral filing for purposes of tolling under Section 2244(d)(2), the petition states that the motion was denied on June 20, 2014, nine days after it was filed, and not further pursued. As will be demonstrated, nine additional days of tolling would not affect the timeliness determination in this case.

### D. Equitable Tolling

The expiration of the statutory limitations period does not act as a jurisdictional bar to habeas relief; thus, the statute may be equitably tolled in appropriate cases. *Holland*, 560 U.S. at 645–49. The doctrine of equitable tolling is used sparingly and is typically applied “only when a litigant’s failure to meet a legally mandated deadline unavoidably arose from circumstances beyond that litigant’s control.” *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003) (citing *Graham-Humphreys v. Memphis Brooks Museum of Art*, 209 F.3d 552, 560–61 (6th Cir. 2000)). It is the petitioner’s burden to show that he is entitled to equitable tolling, *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002), a burden he may carry by showing “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland*, 560 U.S. at 649; *see also Stiltner v. Hart*, 657 F. App’x 513, 520 (6th Cir. 2016).

In his response to the motion to dismiss, the petitioner argues that the extraordinary circumstance that prevented his timely filing was created by “attorneys,” as demonstrated by two letters he has attached to his response. (Doc. No. 17 at 3; Doc. No. 17-1 at 3, 5.) However, these letters demonstrating post-conviction counsel’s refusal to amend his appellate brief (Doc. No. 17-1 at 3) and the Tennessee Attorney General’s decision not to respond to post-conviction counsel’s application for permission to appeal to the Tennessee Supreme Court (*id.* at 5) have nothing to do with the petitioner’s ability to file his habeas petition on time, as the limitations period was tolled during the entirety of the post-conviction process.

Additional correspondence attached to the petitioner’s response suggests some delay in receiving trial transcripts from counsel following the conclusion of his direct appeal (Doc. No. 17-2 at 7), but the petitioner’s pro se post-conviction filing was not unduly delayed as a result of his lack of access to trial transcripts. As noted above, the petitioner still had 171 days after the state

post-conviction process concluded in which to file a timely habeas petition in this court, yet he failed to do so. Moreover, as the respondent points out, the Sixth Circuit has held that “the unavailability of or delay in receiving transcripts is not enough to entitle a habeas petitioner to equitable tolling,” because “trial transcript[s]—although understandably helpful to petitioners—[are] not necessary to file a habeas petition. . . .” *Hall v. Warden*, 662 F.3d 745, 750–51 (6th Cir. 2011). Equitable tolling is only appropriate in circumstances that prevent timely filing and are “both beyond the control of the litigant and unavoidable with reasonable diligence.” *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 462 (6th Cir. 2012). Under the circumstances the petitioner was faced with, it would not have taken more than reasonable diligence for him to file a timely petition in this court, regardless of any delay he may have experienced in filing for post-conviction relief in state court.

In sum, the petitioner has failed to carry his burden of showing that his case warrants equitable tolling.

Finally, the petitioner makes no claim of actual innocence of the charges of conviction, such that the court could reach the merits of his petition despite its untimeliness. See *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (allowing that actual innocence can operate in rare cases as an “equitable exception to § 2244(d)(1),” rather than grounds for tolling). Although the petitioner claims that the evidence against him was insufficient to support his conviction, “‘actual innocence’ means factual innocence, not mere legal insufficiency” of the proof against the petitioner. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). Therefore, this narrow exception to a procedural bar “must be based on reliable evidence not presented at trial.” *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); see *McQuiggan*, 569 U.S. at

398-99 (requiring “new evidence” to invoke actual innocence exception to AEDPA’s statute of limitations). No such claim based on new evidence is made here.

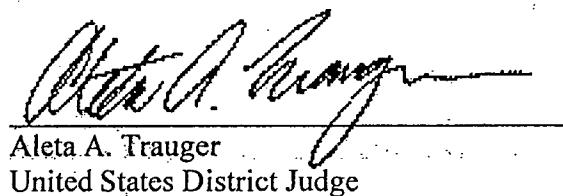
#### **IV. Conclusion**

For the reasons stated above, the respondent’s motion to dismiss (Doc. No. 15) is **GRANTED**. In view of its untimely filing, the petition for writ of habeas corpus (Doc. No. 1) is **DENIED** and this action is **DISMISSED**.

“When a federal district court denies a habeas claim on procedural grounds without addressing the claim’s merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable . . . whether the district court was correct in its procedural ruling.” *Swantak v. Romanowski*, No. 08-CV-10126, 2008 WL 186127, at \*2 (E.D. Mich. Jan. 18, 2008) (citing *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000)). Because reasonable jurists could not find it debatable that the court is correct in its procedural ruling under the circumstances presented here, the court declines to issue a certificate of appealability in this case.

This is the final order in this action. The Clerk **MUST** enter judgment. Fed. R. Civ. P. 58(b)(1).

It is so **ORDERED**.



Aleta A. Traeger  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE, TENNESSEE**

**GREGORY LAMAR MATHIS, )  
Petitioner )  
                          )  
V.                    ) )  
                          )  
KEVIN GENOVESE, ) )  
Respondent        ) )**

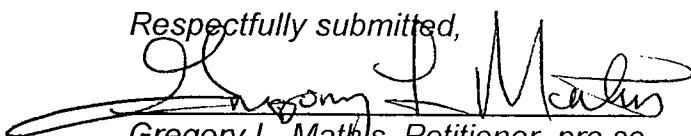
**Case No. 3:18-cv-01330  
Judge Trauger**

**NOTICE OF APPEAL**

*Notice is hereby given, that the Petitioner, Gregory L. Mathis, pro se, pursuant to F.R.A.P. 3(a)(1), (d)(1), appeals to the United States Court of Appeals for the Sixth Circuit at Cincinnati, Ohio an Order and Memorandum, tendered February 21, 2020 denying his Petition for a Writ of Habeas Corpus; 28 USC §2254(b).*

*Further, and for purposes of Appellate Review, F.R.Civ.P. 62(g) (1), said Order will accompany this Notice.*

*Respectfully submitted,*

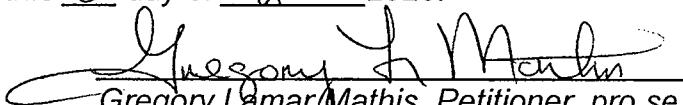


*Gregory L. Mathis, Petitioner, pro se  
Turney Center Industrial Complex  
1499 R.W. Moore Memorial Hwy.  
Only, Tennessee. 37140-444050*

*A-5*

**CERTIFICATION**

*This is to certify, that the foregoing Notice of Appeal has been mail postage prepaid and placed in the U.S. Mail to the Clerk, United States District Court for the Middle District of Tennessee' U.S. Courthouse, Room 800 801 Broadway, located at Nashville, Tennessee 37202. On this 3 day of 2 2020.*



Gregory Lamar Mathis, Petitioner, pro se

C:file/ glm

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

GREGORY LAMAR MATHIS, )  
Petitioner, )  
v. ) Case No. 3:18-cv-01330  
KEVIN GENOVESE, Warden, ) Judge Trauger  
Respondent. )

ORDER

On February 21, 2020, this court entered judgment against the petitioner, dismissing his petition for writ of habeas corpus under 28 U.S.C. § 2254 due to its untimely filing. (Doc. Nos. 19, 20.) On March 6, 2020, the petitioner filed a notice of appeal (Doc. No. 21) without paying the appellate filing fee or seeking leave to proceed as a pauper on appeal. After the Sixth Circuit issued notice of this requirement to the petitioner, he filed a motion seeking leave to proceed as a pauper on appeal. (Doc. No. 23.) That motion was filed on April 3, 2020 and includes a copy of the petitioner's inmate trust fund account history for the preceding six months, as well as the certification of an account custodian of the amounts reflected therein.

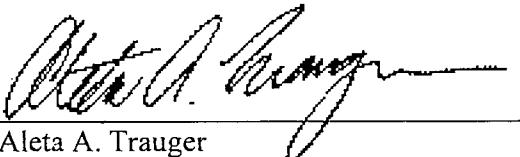
When a habeas petitioner files a notice of appeal, he must either pay the entire \$505 appellate filing fee into the district court or obtain pauper status pursuant to Federal Rule of Appellate Procedure 24(a). *Kincade v. Sparkman*, 117 F.3d 949, 952 (1997). Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit that "(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to

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redress; and (C) states the issues that the party intends to present on appeal.” Fed. R. App. P. 24(a)(1).

The court finds that the petitioner’s filing substantially complies with the requirements of Rule 24(a)(1). His certified financial records reveal that he has not maintained a sufficient inmate account balance to reasonably be able to pay the appellate filing fee, and the judgment he appeals from was solely based on the timeliness of the petition. Accordingly, the petitioner’s motion for leave to proceed in forma pauperis on appeal (Doc. No. 23) is **GRANTED**.

It is so **ORDERED**.



Aleta A. Trauger  
United States District Judge

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED  
Jul 14, 2020  
DEBORAH S. HUNT, Clerk

GREGORY LAMAR MATHIS,

)

Petitioner-Appellant,

)

v.

Q R D E R

KEVIN GENOVESE, Warden,

)

Respondent-Appellant.

)

Before: SUHRHEINRICH, Circuit Judge.

Gregory Lamar Mathis, a pro se Tennessee prisoner, appeals the district court's judgment dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The court construes Mathis's notice of appeal as an application for a certificate of appealability (COA). *See Fed. R. App. P. 22(b)(2).*

In 2010, a jury convicted Mathis of aggravated burglary, aggravated robbery, and two counts of especially aggravated kidnapping. The trial court sentenced Mathis to a total term of 126 years of imprisonment, and the Tennessee Court of Criminal Appeals affirmed. *See State v. Mathis*, No. M2011-01096-CCA-R3-CD, 2013 WL 4774130 (Tenn. Crim. App. Sept. 5, 2013), *perm. app. denied* (Tenn. Dec. 12, 2013). On October 3, 2014, Mathis filed a petition for post-conviction relief in the trial court, raising claims of ineffective assistance of trial counsel and denial of due process. Mathis also claimed that he was entitled to a new trial based on newly discovered evidence. The trial court denied Mathis relief, and the Tennessee Court of Criminal Appeals again affirmed. *See Mathis v. State*, No. M2016-02516-CCA-R3-PC, 2017 WL 5624714 (Tenn. Crim. App. Nov. 21, 2017), *perm. app. denied* (Tenn. Feb. 14, 2018).

On November 26, 2018, Mathis filed a § 2254 petition in the district court, claiming that the State of Tennessee failed to provide him with an adequate post-conviction remedy and that he

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received ineffective assistance of counsel in his post-conviction proceedings. The district court concluded that Mathis's petition was untimely pursuant to the one-year statute of limitations in 28 U.S.C. § 2244(d)(1)(A) and that he was not entitled to equitable tolling. The district court declined to issue a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denies a habeas claim on procedural grounds, the court may issue a COA only if the applicant shows "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).

Pursuant to § 2244(d)(1)(A), a state prisoner must file his habeas petition within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The Tennessee Supreme Court denied Mathis leave to appeal the decision of the Tennessee Court of Criminal Appeals affirming his convictions on December 12, 2013. The § 2244(d)(1)(A) statute of limitations started ninety days later, on March 13, 2014, when Mathis's time to file a petition for a writ of certiorari in the United States Supreme Court expired. *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000).

The statute of limitations ran until September 23, 2014—a period of 194 days—when Mathis tendered his state petition for post-conviction relief to the prison mailing system. *See* 28 U.S.C. § 2244(d)(2). The statute of limitations remained tolled while the petition was pending in the state courts. The limitations period started again on February 15, 2018, the day after the Tennessee Supreme Court denied Mathis permission to appeal the decision of the Tennessee Court of Criminal Appeals affirming the trial court's judgment denying his petition. The statute of limitations expired 171 days later, on August 6, 2018.

Mathis did not file his § 2254 petition in the district court until November 26, 2018, almost four months after the limitations period expired. Reasonable jurists thus could not debate the district court's conclusion that Mathis's petition was untimely under § 2244(d)(1)(A).

The district court also concluded that Mathis was not entitled to equitable tolling. Equitable tolling is available if the petitioner exercised reasonable diligence in pursuing his claims and some extraordinary circumstance prevented him from filing a timely petition. *See Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750 (6th Cir. 2011). Mathis blamed his post-conviction attorney for his late petition, but reasonable jurists could not debate the district court's conclusion that Mathis failed to draw a connection between his attorney's performance in the post-conviction proceedings and his inability to comply with the filing deadline. *Cf. Winkfield v. Bagley*, 66 F. App'x 578, 582–83 (6th Cir. 2003) (holding that for purposes of the § 2244(d)(1)(B) statute of limitations, which applies when the State has impeded a prisoner's ability to file a federal habeas petition, the prisoner must establish a connection between his attorney's ineffectiveness and his inability to file his petition). And reasonable jurists would not debate the district court's conclusion that Mathis failed to demonstrate that he was entitled to equitable tolling based on a credible showing of actual innocence. *See Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005).

Finally, even if the district court's decision on the statute of limitations were debatable, Mathis's petition raised only errors that allegedly occurred in his state post-conviction proceedings, which are not cognizable under § 2254. *See Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017) (per curiam) (holding that when a district court denies a claim on procedural grounds, a COA will not issue unless reasonable jurists could debate whether the prisoner's claim had arguable merit); *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007) ("[T]he Sixth Circuit has consistently held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review.").

Accordingly, the court **DENIES** Mathis's COA application.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

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