No. 20-___

In the Supreme Court of the United States

LYNEAL WAINWRIGHT, WARDEN,

Petitioner,

v.

JASON S. SEXTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 19-3370

JASON S. SEXTON,

Petitioner-Appellant,

v.

LYNEAL WAINWRIGHT, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Columbus.

No. 2:18-cv-00424—George C. Smith, District Judge.

Decided and Filed: August 4, 2020

Before: GUY, BOGGS, and WHITE, Circuit Judges.

COUNSEL

ON BRIEF: Jay R. Carson, Aaron A. Hessler, WEGMAN HESSLER, Cleveland, Ohio, for Appellant. Jerri Fosnaught, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

RALPH B. GUY, JR., Circuit Judge. Petitioner Jason Sexton is an Ohio prisoner who wishes to pursue a habeas corpus petition. The district court dismissed his petition as untimely, but he says that was error. We agree, vacate the judgment, and remand the case.

I.

In 1997, Sexton pleaded guilty to aggravated murder and aggravated robbery. And on October 15 of that year, an Ohio state court judge sentenced him to life imprisonment with the possibility of parole. Sexton now says this should not have occurred because Ohio law required a three-judge panel to receive his plea and impose the sentence. *See* Ohio Rev. Code § 2945.06. But he was not aware of this purported error at the time. Nor was he told that he had a right to appeal his sentence, and he did not do so.

He did, however, write a letter to the Office of the Ohio Public Defender sometime within the next 13 months, inquiring about how to file certain claims.[1] The office wrote back on December 3, 1998, telling Sexton that the "appropriate remedy" for his claims was a "petition for post-conviction relief," but the office was not currently taking on those types of claims in cases where the defendant pleaded guilty.

[1] The letter is not part of the record, so its exact date and contents are not known.

So, the office enclosed a form that Sexton could use to pursue the claims pro se. (PageID 178.)

A little over two weeks later, Sexton filed in the trial court a pro se petition to vacate or set aside his sentence. The petition focused almost exclusively on Sexton's co-defendant, who apparently testified against him and received a more lenient sentence. In the memorandum portion of the petition, Sexton asserted that his trial attorney "failed to look at several details in the case, did not file certain motions pertaining to the case, and encouraged [Sexton] not to fight the case," which, according to Sexton, amounted to ineffective assistance of counsel. (PageID 51.) The trial court dismissed the petition the following month, principally because it was time-barred, but also because the petition failed to make out any claims warranting either relief or an evidentiary hearing. (PageID 55-61.)

And that is how things remained for nearly two decades. But Sexton says that in 2017, while researching his case, a fellow inmate informed him that he should have been sentenced by a three-judge panel.[2] The inmate also told Sexton that a direct appeal was the only avenue for redressing that error. (PageID 174.) Rule 5 of Ohio's Rules of Appellate Procedure allows for delayed criminal appeals and places no restriction on how long the delay may be,

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[2] Precisely when in 2017 this occurred is unclear. Sexton filed three affidavits, two signed by him and one signed by the assisting inmate. (PageID 67-68, 174, 176.) One of Sexton's affidavits says that he discovered the error in January, while the other two affidavits say he made the discovery in June.

but the defendant must move in the Court of Appeals for leave to do so. Ohio App. R. 5(A)(2); *Board v. Bradshaw*, 805 F.3d 769, 773 (6th Cir. 2015). So, on July 23, 2017, Sexton filed an application for leave to file a delayed appeal along with a motion for appointed counsel. The filings included the affidavits from Sexton and the other inmate, two letters further evidencing Sexton's recent legal research, and a five-page memorandum. The application explained Sexton's two bases for wishing to appeal: (1) the lack of a three-judge panel and (2) the failure of the judge and Sexton's own attorney to advise him of his right to appeal. (PageID 66-74.) The state filed a memorandum opposing the motion and Sexton filed a reply. (PageID 75-83; 102-106.)

Shortly thereafter, the Ohio Court of Appeals denied Sexton's application for leave in a very short opinion, observing simply, "Sexton has presented no viable reason for the delay in his attempt to appeal." (PageID 107-08.) Sexton appealed the decision to the Ohio Supreme Court, but it declined jurisdiction on January 31, 2018. (PageID 112-13.)

Sexton filed the instant action three months later. The warden who holds Sexton moved to dismiss the petition as untimely and a magistrate judge recommended that the motion be granted. Over Sexton's objections, the district court adopted the magistrate judge's report and dismissed the petition. We then granted Sexton a certificate of appealability on one of his claims and appointed counsel for him.

II.

In this appeal, we are considering only Ground One of Sexton's habeas petition, which reads:

> Mr. Sexton was denied due process and equal protection of the law when the Franklin County Court of Appeals denied his motion for leave to file a direct appeal, and appointment of counsel for that appeal, a violation of the Fourteenth Amendment to the United States Constitution.

(PageID 17.) Specifically, we are considering whether that claim was timely made under 28 U.S.C. § 2244(d).

By way of background, § 2244(d)(1) imposes a one-year period of limitation for a state prisoner to file an application in federal court for a writ of habeas corpus. The limitation period runs from the latest of four dates, but the only date relevant to this appeal is the one in subsection (D), which is "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)(D).

Sexton says that date was September 21, 2017: the date the Ohio Court of Appeals denied his application for leave to file a delayed appeal. If Sexton is correct, then his application was timely, for it was filed less than one year after the denial. But the Warden says Sexton is incorrect because he did not act diligently up until that point. And if Sexton cannot rely on subsection (D), then his petition was untimely.

A.

How we measure diligence in this case is affected by several prior cases, beginning with *Johnson v. United States*, 544 U.S. 295, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005). There, the Supreme Court

considered the very similarly worded provision in 28 U.S.C. § 2255(f), which governs a period of limitation for federal prisoners. It too allows prisoners to rely on the latest of four dates, one of which is "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4). The defendant in that case, Robert Johnson, had received an enhanced sentence for a federal offense because of a prior state-court conviction. Later, though, he succeeded in having the prior state conviction vacated and three months later he filed a motion under § 2255 to vacate or correct his enhanced federal sentence. The question before the Supreme Court was whether such a vacatur constituted a discoverable "fact" as that term is used in § 2255(f)(4).

The Court unanimously concluded that a vacatur did constitute a "fact," but the justices split on a different distinction. Section 2255(f)(4) turns on the date that the fact "could have been discovered through the exercise of due diligence." Johnson had filed his motion within one year of the date that the state court vacated his prior conviction, but he had not begun his attempt to obtain that vacatur until three years after learning he needed it for his § 2255 motion. *Johnson*, 544 U.S. at 311. The majority held that he had therefore not acted "diligently to obtain the state-court order vacating his predicate conviction," and his petition was deemed untimely. *Id*. at 310. The dissent disagreed with this approach and would have measured Johnson's diligence from the date of the entry of the vacatur onward. *Id*. at 314 (Kennedy, J., dissenting) ("[I]f petitioner has

acted diligently in discovering entry of that vacatur, the proper conclusion is that he may bring a § 2255 petition within one year of obtaining the vacatur, or one year of reasonably discovering it.").

Four months later, we decided *DiCenzi v. Rose*, 419 F.3d 493, 500 (6th Cir. 2005), *opinion amended and superseded*, 452 F.3d 465 (6th Cir. 2006). As in Sexton's case, petitioner Alfred DiCenzi pleaded guilty in an Ohio state court and was imprisoned, but the sentencing judge did not inform him of his right to appeal his sentence. 452 F.3d at 466-67. When DiCenzi learned of his right to appeal more than two years later, he "immediately filed a motion for leave to file a delayed appeal of his sentence[.]" *Id.* at 467. After the motion was denied, he filed a multi-claim federal habeas petition, which was dismissed in its entirety as untimely.

We vacated and remanded as to all the claims, but for different reasons. One of the claims was that the Ohio Court of Appeals violated DiCenzi's due process rights by denying his motion for leave to file a delayed appeal. Insofar as that denial was the purported constitutional violation, the one-year clock began to run from that denial and, accordingly, DiCenzi timely filed his petition. *Id.* at 469. The rest of the claims focused on what had purportedly happened years before at the trial court: trial counsel rendered ineffective assistance and the trial court imposed an illegal sentence and failed to mention the right to appeal. *Id.* at 469. We held that, if relying on § 2244(d)(1)(D), the clock for those claims began to run either "(a) when DiCenzi first learned of his right to appeal, [or] (b) when a reasonably diligent person

in DiCenzi's position could be reasonably expected to learn of his appeal rights"—whichever was earlier. *Id.* at 471. We remanded for fact finding on that question.[3] *Id.*

Ten years later, we revisited *DiCenzi* in *Shorter v. Richard*, 659 F. App'x 227 (6th Cir. 2016). The facts were again quite similar to those in Sexton's case: an Ohio guilty plea, a failure to advise of the right to appeal, and a belated discovery leading to a motion for delayed appeal that was ultimately denied. But unlike in *DiCenzi*, the panel in Shorter cited and discussed *Johnson* and its rationale of requiring a petitioner to be diligent in bringing about the court order he claims to have "discovered." *See Shorter*, 659 F. App'x at 230-32. The panel majority relied on *Johnson*'s reasoning to conclude that Charles Shorter had not been diligent in filing his motion for a delayed appeal and therefore could not rely on the denial order as a previously undiscovered fact under § 2244(d)(1)(D). *Id.* at 232.

Whether and how that conclusion reconciled with *DiCenzi* was a question that split the panel. The *DiCenzi* decision did not discuss diligence when assessing the claim about the denial of leave to appeal (which the majority termed an "appeal-based claim"), but it did discuss diligence when assessing

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[3] "On remand, the case was dismissed upon a joint motion by all parties because the petitioner had already completed his sentence. Factual findings as to due diligence regarding the conviction-based claims were never made, and the trial court did not rule on the merits of the appeal-based claims." *McIntosh v. Hudson*, 632 F. Supp. 2d 725, 732 n.3 (N.D. Ohio 2009) (internal citation omitted).

the timeliness of the other claims ("sentencing-based claims"). The majority rejected the idea that an appeal-based claim "entail[s] no diligence inquiry" and instead inferred from a citation in the *DiCenzi* opinion that the panel must have considered this aspect and "been satisfied on the facts of that case" that Alfred DiCenzi was adequately diligent. *Id*. at 231-32. The third member of the panel disagreed with that reading of *DiCenzi* and observed that "Johnson admittedly casts some doubt on the soundness of *DiCenzi*'s categorical holding that the § 2244(d)(1) clock begins to run on delayed-appeal claims upon the denial of the motion for delayed appeal," but concurred in the judgment because the claim failed on the merits anyway. *Id*. at 233 (White, J., concurring in the judgment).

B.

Both parties now before us insist that *DiCenzi* and *Shorter* are irreconcilable, but they disagree about the upshot. Sexton urges us to follow *DiCenzi*, as it is a published opinion and, in his view, the more reasonable application of § 2244(d)(1)(D). The Warden suggests that *Shorter* is the better precedent because *DiCenzi* is inconsistent with *Johnson*, and *Johnson* trumps *DiCenzi*'s published status. The district court agreed with the Warden, reasoning that "*DiCenzi* should be modified in light of *Johnson*," and "that *Shorter* supports that conclusion." *Sexton v. Wainwright*, No. 2:18-CV-424, 2019 U.S. Dist. LEXIS 47993, 2019 WL 1305867, at *5 (S.D. Ohio Mar. 22, 2019). The court's conclusion was "that habeas claims predicated upon court actions, such as vacatur orders and delayed direct

appeals, require federal and state habeas petitioners to diligently pursue such court actions." *Id.* And in the court's view, Sexton had not been diligent in seeking a delayed appeal. We conclude that *DiCenzi* is not inconsistent with *Johnson*, and is thus binding precedent on this panel, but not solely for the reason suggested in *Shorter*.

For one thing, the Supreme Court's holding in *Johnson* regarding § 2255(f) did not necessarily require us to reach the same result in *DiCenzi* when interpreting § 2244(d)(1)(D)'s similar-though-different wording. Although the Supreme Court has sometimes interpreted portions of these sections in the same way, it has not done so reflexively. *See, e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 149, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012); *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 402, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001) (extending a holding about § 2255 to § 2254 because the same concerns at issue in the case were "equally present in the § 2254 context"). We have not been reflexive, either. *See United States v. Asakevich*, 810 F.3d 418, 422-24 (6th Cir. 2016) (emphasizing the similarities between §§ 2255 and 2254 but conceding differences). We are reluctant to deem ostensibly long-binding precedent of *DiCenzi* no longer binding when it post-dated the purportedly conflicting authority of *Johnson* without discussing the statutory differences.

This is especially so given that both the majority and the dissent in *Johnson* recognized that vacaturs make for an odd fit with § 2255(f)(4). *See Johnson*, 544 U.S. at 308 ("Our job here is to find a sensible way to apply paragraph four when the truth is that

with [other relevant precedent] not yet on the books, [the statute's] drafters probably never thought about the situation we face here."); *id.* at 313-14 (observing that the Court "should simply accept" that § 2255(f)(4) "is not a particularly good fit with the vacatur problem") (Kennedy, J., dissenting). If the holding was tailored to the special circumstance of vacaturs, there was no reason the logic had to be extended to cases like DiCenzi's.

Even so, *DiCenzi* did not run afoul of *Johnson*'s logic because it confronted a different situation. Robert Johnson knew in 1995 that relief in federal court would require a vacatur order from the state court. Yet he did not try to obtain that order until 1998. Alfred DiCenzi, on the other hand, acted "immediately" upon learning that he suffered an injury and the route for remedying it. *See DiCenzi*, 452 F.3d at 467. And whereas Johnson received the requested relief from the state court, DiCenzi was rebuffed.

Johnson's success in the state court, as compared to DiCenzi's failure, is the distinguishing difference between the cases. For when Ohio's Court of Appeals denied DiCenzi the opportunity to file a delayed appeal, the denial was a fresh constitutional violation—if it was a violation at all—distinct from what occurred during his trial.[4] Had the trial court

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[4] This further distinguished *DiCenzi* from the analysis in *Johnson*. One of the Supreme Court's concerns in *Johnson* was about reexamining "stale state proceedings." *See Johnson*, 544 U.S. at 303. The state proceeding relevant to DiCenzi's appeal-based claim was the Ohio Court of Appeals' decision, not the trial court proceeding itself, and thus it was far from stale.

properly advised DiCenzi in the first place, perhaps there would have been no need to seek a delayed appeal. There is a difference, however, between the error of denying a motion and the error that precipitated the motion. DiCenzi challenged the Court of Appeals' decision itself as a separate claim distinct from his claims about the trial court and trial counsel. Consequently, we analyzed that appeal-based claim differently than the sentencing-based claims and deemed it timely. *Johnson* involved none of this.

The propriety of distinguishing between appeal- and trial-based claims becomes even clearer if one imagines a different outcome in *DiCenzi*. Suppose the Ohio Court of Appeals had granted DiCenzi's motion for a delayed appeal and permitted him to make his arguments about the trial court and trial counsel. If the Court of Appeals granted him relief—say, in the form of a resentencing—then there would be no need to pursue federal habeas relief. On the other hand, if the Court of Appeals rejected his arguments and affirmed the judgment of the trial court, DiCenzi could seek federal habeas relief by relying on 28 U.S.C. § 2244(d)(1)(A), which starts the one-year clock on "the date on which the judgment became final by the conclusion of direct review[.]" Regardless of what the Court of Appeals decided, though, DiCenzi would have had no appeal-based claim because the Court of Appeals would have given him what he asked for: a delayed appeal. It was when the court denied him leave to appeal that his new, appeal-based claim sprang to life.

C.

The same reasoning applies to Sexton's case. He raised three grounds for relief, two of which were about a proceeding in 1997, and one of which was about a proceeding in 2017.[5] (PageID 1719.) This appeal concerns only Ground One—the one about the 2017 proceeding. Sexton claims that the Court of Appeals denied him due process and equal protection by refusing to let him file his appeal late and that he remains confined because of that decision. The denial order was therefore a "necessary factual predicate" for Ground One, *Smith v. Meko*, 709 F. App'x 341, 346 (6th Cir. 2017), and he filed the instant action within one year of the order's entry. Ground One was therefore a timely made claim under 28 U.S.C. § 2244(d)(1)(D) and the district court erred in dismissing it as untimely. We will remand the case.

It bears noting, however, that Sexton's appeal-based claim is not a permission slip to pursue otherwise untimely trial-based claims. On remand, Sexton will need to show that the Ohio Court of Appeals failed to provide him with due process or equal protection simply because it declined to allow a years-late appeal. That will be a difficult argument to make, for courts of appeals have ample reasons to refuse to hear late appeals, even meritorious ones. The hill is particularly steep given the standard for

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[5] Alfred DiCenzi divided his claims up in a similar way. *See DiCenzi*, 452 F.3d at 468. In contrast, Charles Shorter challenged the trial court's failure to advise him of his appeal rights and the Court of Appeals' refusal to allow a delayed appeal as a single ground for relief. *Shorter*, 659 F. App'x at 229.

granting habeas relief. *See* 28 U.S.C. § 2254(d). But these aspects go to the merits, not timeliness. We granted Alfred DiCenzi a remand so that he could pursue and argue his timely filed claims, and we do the same here.

With that understanding in mind, we believe the Warden's concerns are misplaced. The Warden insists that Sexton should not "get the benefit of a later starting date" for his habeas petition because he waited almost twenty years to seek a delayed appeal. But Sexton is not receiving such a benefit. He is being permitted to argue why a 2017 decision by the Ohio Court of Appeals violated his rights. His diligence (or lack thereof) in moving for the delayed appeal will likely factor into the analysis of that argument, but it has nothing to do with his diligence in asking a federal court to remedy an alleged error made by the Ohio Court of Appeals in 2017.[6] Moreover, even if the district court agrees with Sexton that the Ohio Court of Appeals should have granted him a delayed appeal, the appropriate remedy would likely not be an unconditional writ or even a writ conditioned on resentencing, as it would

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[6] To the extent that the panel in *Shorter* was confronting the same question we are now, we disagree with the majority's reasoning in that case. The majority syllogized diligence in obtaining a vacatur order with diligence in obtaining a denial-of-delayed-appeal order. *See Shorter*, 659 F. App'x at 232 ("it is not at all clear whether [the Court of Appeals'] denial could have come sooner"). Although § 2244(d)(1)(D) always requires diligence—regardless of the type of discovered fact a prisoner relies upon—it does not require diligence in bringing about a *new* constitutional injury. Sexton's case is about the 2017 error, not the 1997 errors, so the 19 years preceding it are irrelevant.

be for his trial-based claims. Rather, the more appropriate course would be a "writ conditioned upon Ohio courts granting a new, direct appeal," which "avoids unnecessarily interfering with Ohio's interest in correcting its own errors." *Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004).

III.

The judgment of the district court is **VACATED**, and the case is **REMANDED** so that the district court may consider Ground One on the merits.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:18-CV-424

Judge George C. Smith

Magistrate Judge Michael R. Merz

JASON S. SEXTON,

Petitioner,

v.

LYNEAL WAINWRIGHT, WARDEN,
MARION CORRECTIONAL INSTITUTION,

Respondent.

OPINION AND ORDER

Respondent has moved to dismiss the petition for federal habeas relief because the three grounds it asserts are time–barred. ("*Motion to Dismiss*"). (ECF No. 5). On September 17, 2018, the Magistrate Judge issued a *Report and Recommendation* ("*First R&R*") recommending that the petition be dismissed because it was untimely. (ECF No. 12). In light of Petitioner's subsequently received *Response in Opposition to the Motion to Dismiss* ("*Response*"), (ECF No. 15), the Magistrate Judge withdrew the *First R&R* (ECF No. 16). Petitioner also filed objections to the *First R&R*. (ECF No. 18). On October 4, 2018, the Magistrate Judge issued a second *Report and Recommendation* ("*Second R&R*") recommending that the *Motion to Dismiss* be granted

in part and denied in part because even though grounds two and three are untimely, ground one is not. (ECF No. 19). Respondent filed objections to the *Second R&R* (ECF No. 20), and the Court recommitted the matter to the Magistrate Judge for further analysis. (ECF No. 21). Petitioner also filed objections to the *Second R&R*. (ECF No. 22).

On October 29, 2018, the Magistrate Judge issued a *Substituted Report and Recommendation* (*"Substituted R&R"*), (ECF No. 23), recommending that the *Motion to Dismiss*, (ECF No. 5), be granted in its entirety because all three grounds in the petition are untimely. Petitioner has objected to the *Substituted R&R*. (ECF No. 24). Pursuant to 28 U.S.C. § 636(b), the Court has conducted a *de novo* review. For the reasons that follow, Petitioner's objections are **OVERRULED**. The *Substituted R&R* is **ADOPTED** and **AFFIRMED** subject to one exception described below. This action is **DISMISSED**.

Pursuant to a plea agreement entered in the Franklin County Court of Common Pleas, Petitioner was convicted and sentenced to serve consecutive terms of 20 years to life for one count of aggravated murder, and ten to twenty–five years for one count of aggravated robbery. (ECF 4, at PAGE ID # 38–43). Petitioner alleges that his case was heard by a single judge. (ECF No. 1, at PAGE ID # 1). Sentence was imposed on October 15, 1997. (ECF No. 4, at PAGE ID # 42–43). Petitioner alleges that counsel failed to consult with him about his right to appeal or to tell him that he was entitled to have his case heard by a three–judge panel, and that both counsel and the

trial court failed to inform Petitioner about his appellate rights, including his right to appointed counsel on direct appeal. (ECF No. 1, at PAGE ID # 18–19). Petitioner alleges that because of those failures, he did not directly appeal his conviction or sentence.

At some point after sentencing, Petitioner wrote to the State Public Defender, as evidenced by a December 3, 1998, letter from the Public Defender's Office addressed to Petitioner. The letter acknowledged Petitioner's correspondence, informed him that he could file a petition for post–conviction relief, and stated that filing forms were enclosed. (ECF No. 14–5). Subsequently, on December 22, 1998, Petitioner filed a *pro se* petition for post–conviction relief under Ohio Rev. Code § 2953.21 and moved for appointed counsel. (ECF No. 4, at PAGE ID #46–54; ECF No. 14–6, at page ID # 180–182). The state appellate court denied the petition for post–conviction relief on January 28, 1999, because it was untimely and lacked merit. (ECF No. 4, at PAGE ID # 55–61). Petitioner did not directly appeal that January 28, 1999, decision either.

Petitioner wrote to the state court's clerk on August 17, 2000, to request a copy of his docket sheet, and then wrote a second letter to the Public Defender's Office sometime prior to January 3, 2017. (ECF No. 4, at PAGE ID # 101, ECF No. 14–6, at PAGE ID # 179). Petitioner alleges that he remained, however, ignorant of his appellate rights until June of 2017, when he spoke to an inmate law clerk about his state court case. After that discussion, Petitioner sought leave in the state courts on July 23, 2017, to

file a delayed appeal of his 1997 conviction pursuant to Rule 5(A) of the Ohio Rules of Appellate Procedure. (ECF No. 4, at PAGE ID # 62–65, 66– 74). On September 21, 2017, the Ohio Court of Appeals denied Petitioner's request for leave to file a delayed appeal because he did not present a "viable reason for the delay in his attempt to appeal." (*Id*., at PAGE ID # 107–108). Petitioner sought an appeal of that determination, but the Ohio Supreme Court declined to exercise jurisdiction over the matter on January 31, 2018. (*Id*., at PAGE ID # 112–129, 130).

Petitioner placed his petition for federal habeas relief in the prison mail system on April 25, 2018. (ECF No. 1, at PAGE ID # 15). In ground one, Petitioner alleges that he was denied his due process and equal protection rights when the Ohio Court of Appeals denied his motion for a delayed appeal on September 21, 2017. (ECF No. 1, at PAGE ID # 17–18). In ground two, Petitioner alleges that he was denied his due process and equal protection rights in 1997, when the trial court and counsel failed to inform him about his appellate rights. (*Id*., at PAGE ID # 18). In ground three, Petitioner alleges that counsel rendered constitutionally ineffective assistance in 1997 by failing to consult with him about his appellate rights; by allowing him to plead guilty to aggravated murder before a single judge instead of a three–judge panel; and by failing to inform Petitioner that a three–judge panel was required to take his guilty plea. (*Id*., at PAGE ID # 19).

The Magistrate Judge correctly concluded that Petitioner's grounds are all time–barred. 28 U.S.C. §

2244(d)(1)(A)[1] provides that the one–year statute of limitations commences running 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 . . ." Petitioner's judgment of conviction became final on November 14, 1997, *i.e.*, thirty days after his October 15, 1997 conviction, and when the time to directly appeal that conviction expired pursuant to Ohio Appellate Rule 4(A). Under § 2244(d)(1)(A), the statute of limitations started running the next day, November 15, 1997, and expired one year later, on November 16, 1998.[2] Petitioner, however, filed his April 25, 2018 petition almost twenty years after that. Accordingly, his

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[1] All possible statute of limitation start dates are set forth in 28 U.S. C. § 2244(d)(1)(A)–(D), which 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.

[2] November 15, 1998, fell on a Sunday. Therefore, the one–year statute of limitations expired one day later.

claims are untimely unless some other provision of § 2244(d)(1) applies.[3]

The Magistrate Judge also correctly concluded that no other provision of § 2244(d)(1)[4] applies to grounds two and three. Specifically, the Magistrate Judge correctly rejected Petitioner's contention that the applicable statute of limitations for grounds two and three is found in § 2244(d)(1)(B), which provides that the statute of limitations starts to run from "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 . . ." In support of that contention, Petitioner alleges that counsel's actions—failing to consult with him about his appellate rights, allowing him to plead guilty to aggravated murder before a

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[3] Petitioner's other collateral filings in the state courts— the December 22, 1998 motion for post-conviction relief and the July 23, 2017 motion for a delayed appeal—do not toll the statute of limitations under 28 U.S.C § 2244(d)(2) because the statute of limitation had already expired before they were filed. State collateral actions filed after the statute of limitations has expired do not toll the running of the statute of limitations under § 2244(d)(2). *Board v. Bradshaw,* 805 F.3d 769 (6th Cir. 2015) (citing cases and explaining that unsuccessful motions for a delayed appeal cannot restart the running of the statute under § 2244(d)(1)(A), but can only toll an unexpired limitations period under § 2244(d)(2)); *see also Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) ("The tolling provision does not . . . 'revive' the limitation period (*i.e.*, restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations").

[4] Petitioner does not invoke § 2244(d)(1)(C).

single judge, failing to inform him about the three–judge panel requirement,[5] and failing to inform him about his appellate rights—and the trial court's failure to advise Petitioner about his appellate rights, all constituted state–created impediments. Petitioner further contends that those state–created impediments were not removed until his June 2017 discussion with an inmate law clerk about his case, and therefore, the statute of limitations for grounds two and three did not start running until then. As the Magistrate Judge explained, however, even if these alleged failures constituted state–created impediments to filing a direct appeal in state court, "a state–created impediment to a direct appeal in the state court does not invoke the limitations period of § 2244(d)(1)(B) because it is not an impediment to filing a timely federal habeas petition." *Oberacker v. Noble*, No. 18–3589, 2018 WL 4620666, *2 (6th Cir. Sept. 24, 2018) (citing cases); *Winkfield v. Bagley*, 66 F. App'x. 578, 582–83 (6th Cir. 2003) (holding that the ineffectiveness of counsel—which caused petitioner to miss the appeal deadline—was not an "impediment" to filing a timely habeas application because "[petitioner] has not alleged that [his attorney] erroneously informed him that he had no

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[5] The Magistrate Judge explained that the applicability of the three–judge panel requirement in cases like Petitioner's, where a defendant pleads guilty to a capital offense but the death penalty is not sought, was not definitively announced by the Ohio Supreme Court until 2002, which is after Petitioner pleaded guilty in 1997. *See State v. Parker*, 95 Ohio St. 3d 524 (2002). Accordingly, any claims related to the three–judge panel requirement would likely be barred on the merits even if they were not untimely.

federal remedies"); *Miller v. Cason*, 49 F. App'x. 495, 497 (6th Cir. 2002) (the failure to give the petitioner notice of his appeal rights and to appoint appellate counsel did not constitute a state–created impediment under § 2244(d)(1)(B) because while such action may have interfered with the petitioner's direct appeal in the state courts, it did not preclude him from timely filing a federal habeas petition). Petitioner does not object to this finding in the *Substituted R&R*. (ECF No. 24).

The Magistrate Judge also correctly rejected Petitioner's contention that the statute of limitations for grounds two and three is governed by 28 U.S.C. § 2244(d)(1)(D). When that subsection applies, the statute of limitations starts running on "the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence." § 2244(d)(1)(D). Petitioner alleges that he did not discover the factual predicate for his claims until he learned about his appellate rights during his June 2017 discussion with an inmate law clerk. As explained by the Magistrate Judge, however, the term "factual predicates" refers to factual evidence and events, not legal conclusions. "The operative question in such an inquiry is when the person was aware of the vital facts for his claim, not when he understood the legal significance of those facts." *Smith v. Meko*, 709 F. App'x. 341, 344 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1034 (2018) (citing cases). *See also Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000) (rejecting a habeas petitioner's argument that the statute of limitations begins to run "when a prisoner *actually understands* what legal theories are available") (emphasis in original).

The vital facts for Petitioner's claims are that counsel allegedly failed to consult with him about his appellate rights; allowed him to plead guilty to aggravated murder before a single judge; failed to inform Petitioner about the three–judge panel requirement; and that counsel and the trial court failed to advise him about his appellate rights. Petitioner became aware of these vital facts when they allegedly occurred in 1997, and his awareness of them triggered the statute of limitations even if he did not appreciate their legal significance. *Webb v. United States*, 679 F. App'x. 443, 448 (6th Cir. Feb. 17, 2017) *cert denied*, 137 S. Ct. 2314, (June 26, 2017) (quoting *Redmond v. Jackson*, 295 F.Supp. 2d 767, 771 (E.D. Mich. 2003) ("Also, under § 2244(d)(1)(D), the time under the limitations period begins to run [ ] when a petitioner knows, or through due diligence, could have discovered, the important facts for his claims, not when the petitioner recognizes the legal significance of the facts."). Petitioner does not object to this finding in the *Substituted R&R*.

The Magistrate Judge also correctly concluded that ground one is untimely. In ground one, Petitioner alleges that he was denied his due process and equal protection rights when the state appellate court denied his motion for leave to file a delayed appeal on September 21, 2017. He also alleges that the statute of limitations for this claim is also governed by § 2244(d)(1)(D)—*i.e.*, it did not start running until the factual predicate of the claim or claims could have been discovered through the exercise of due diligence. Petitioner contends that he could not know the factual predicate for this claim until his motion for delayed appeal was denied. The

Magistrate Judge determined, however, that even if the statute of limitations for this claim is governed by § 2244(d)(1)(D), the claim is untimely because Petitioner failed to exercise diligence.

When reaching that conclusion, the Magistrate Judge considered the Sixth Circuit Court of Appeals holdings in *DiCenzi v. Rose*, 452 F.3d 465 (6th Cir. 2006), and *Shorter v. Richard*, 659 Fed. App'x. 227 (6th Cir. 2016). In *Dicenzi*, counsel and the state trial court failed to inform a petitioner who pleaded guilty about his appellate rights and he failed to file a timely direct appeal. 452 F.3d at 465. Two years later, and after filing motions for judicial release and to merge his convictions, the petitioner contacted a public defender, who informed him about his appellate rights. *Id.* at 467. The petitioner filed a motion for a delayed direct appeal, but that motion was denied by the state appellate court. *Id*. The petitioner sought federal habeas relief and alleged a number of claims, including that his due process rights were violated when the state appellate court denied his motion for a delayed appeal. The Sixth Circuit summarily stated that pursuant to § 2244(d)(1)(D), the statute of limitations for that due process claim started running when the motion for a delayed appeal was denied. *Id.* at 468. It then analyzed whether the petitioner had initiated his federal habeas action within a year of that date, and concluded that because he had done so, his due process claim was timely. *Id*. at 468–69.

In *Shorter*, however, the Sixth Circuit reached a different conclusion. In that case, a state trial court failed to inform a petitioner who pleaded guilty about

his appellate rights and he failed to file a timely direct appeal. 659 Fed. App'x. at 228–229. Five years later, he filed a motion for a delayed appeal, which the state appellate court denied. *Id.* In his subsequent federal habeas action, the petitioner alleged, among other things, that his equal protection and due process rights were violated when the state appellate court denied his motion for a delayed appeal. *Id.* The Sixth Circuit concluded that the *Shorter* petitioner's equal protection and due process claim was untimely because § 2244(d)(1)(D) allows a delayed start date for the statute of limitations when the claims *could* have been discovered through due diligence, not when they are discovered. *Id.* at 232. The *Shorter c*ourt explained that the duty of diligence was triggered when the *Shorter* petitioner was sentenced, but that he did not demonstrate diligence— he waited five years after he was sentenced to file a motion for a delayed appeal, offered no explanation for that five–year delay, and failed to describe what he did during those five years aside from claiming that he learned about the possibility of an appeal after talking to another inmate in 2013. *Id.* at 230, 232. The *Shorter c*ourt reasoned that although Petitioner did not know that his motion for delayed appeal would be denied until it was in fact denied, that denial could have occurred sooner had petitioner exercised diligence in bringing his motion.

The *Shorter* court also discussed the United States Supreme Court's decision in *Johnson v. United States*, 544 U.S. 295 (2005). It noted that in

Johnson, a federal prisoner's habeas claim was untimely under 28 U.S.C. § 2255(f)(4),[6] even though it was brought within one year of the date that a state court vacated a state conviction that had been used to enhance the petitioner's federal sentence. 659 Fed. App'x. at 231 (discussing *Johnson*, 544 U.S. at 295, 302). The Supreme Court explained that the one–year statute of limitations could only start running from the date of the state court's vacatur order "if the petitioner has shown due diligence in seeking the [state court] order." *Id.* (quoting *Johnson*, 544 U.S. at 302). Moreover, the *Shorter* court noted that reading *DiCenzi* for the proposition that a petitioner is not required to diligently seek a delayed direct appeal in cases like the one before it would fail to give full effect to § 2244(d)(1)(D), which states that the statute of limitations starts running when the factual predicate for a claim "'*could have been discovered through the exercise of due diligence*.'" *Id.* at 232 (quoting § 2244(d)(1)(D)).

The Magistrate Judge concluded that although a panel of the Sixth Circuit cannot overrule the published decision of another panel, *DiCenzi* should be modified in light of the Supreme Court's decision in *Johnson* because *DiCenzi* did not consider *Johnson*. 6th Cir. R. 32.1(B); *see also Issa v. Bradshaw*, 904 F.3d 446, 454 n.2 (6th Cir. 2018) (quoting *Salmi v. Secretary of HHS*, 774 F.2d 685,

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[6] Section 2255(f)(4) is the analog to § 2244(d)(1)(D) for federal prisoners. It provides that the statute of limitations begins to run on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.")). Accordingly, the Magistrate Judge found that the statute of limitations for ground one did not start running until the motion for delayed appeal was denied unless Petitioner was diligent in moving for the delayed appeal. The Magistrate determined that Petitioner had failed, however, to demonstrate such diligence. The Court agrees. Even though he was permitted to expand the record (ECF Nos. 14, 15), Petitioner does not explain or demonstrate why he could not have moved for a delayed appeal sooner through the exercise of due diligence. Instead, it appears that Petitioner simply was not diligent. In 1998, Petitioner wrote one letter to the Public Defender's Office and filed an untimely motion for post–conviction relief. Petitioner waited eighteen and a half years before speaking to an inmate law clerk and filing a motion for a delayed appeal. He waited nineteen years to file his federal habeas petition. The record demonstrates that during that lengthy period, Petitioner wrote one letter to the clerk to request his docket sheet and one additional letter to the State Public Defender's Office. Petitioner does not allege that he took any other actions during this lengthy period. Nor does he explain why he could not have done more. Consequently, Petitioner is not entitled to a delayed start date of the statute of limitations for ground one pursuant to § 2244(d)(1)(D). Ground one is, therefore, untimely.

Petitioner objects to the Magistrate Judge's analysis of ground one. Those objections are not well taken. Petitioner asserts that the Magistrate Judge erred by relying on the Sixth Circuit's decision in *Shorter* instead of *DiCenzi* because one panel of the court cannot overrule another panel. As explained above, however, the Magistrate Judge concluded that *DiCenzi* should be modified in light of *Johnson*. The Court agrees and finds that *Shorter* supports that conclusion. In addition, Petitioner asserts that the Magistrate Judge wrongly found that the *Johnson* petitioner's situation precisely paralleled that of the Petitioner in this matter. The Magistrate Judge did not, however, make such a finding but instead found that the Supreme Court's analysis in *Johnson* persuasively demonstrates that habeas claims predicated upon court actions, such as vacatur orders and delayed direct appeals, require federal and state habeas petitioners to diligently pursue such court actions. Petitioner also urges that the Court to rely upon the reasoning in a 2009 decision from the Northern District of Ohio citing *DiCenzi*. The Court nevertheless remains persuaded by the Sixth Circuit's more recent reasoning in *Shorter*.

For all of the foregoing, Petitioner's objections are **OVERRULED**. This action is **DISMISSED**. The *Substituted R&R*, is **ADOPTED** and **AFFIRMED** in part.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court must consider if it will issue a Certificate of Appealability ("COA"). A state prisoner who seeks a writ of habeas corpus in federal court

does not have an automatic right to appeal a district court's adverse decision unless the court issues a COA. 28 U.S.C. § 2253(c). When a claim has been denied on the merits, a COA may be issued only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). When a claim has been denied on procedural grounds, a certificate of appealability may be issued if the petitioner establishes 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. *Id.*

In this case, the Court is not convinced that jurists of reason could debate whether the Court's timeliness analysis is correct. The Court, therefore, **DECLINES** to issue a COA.

The Magistrate Judge also recommended that the Court certify that any appeal would be objectively frivolous. The Court does not adopt that recommendation and does not make that certification.

IT IS SO ORDERED.

s/ George C. Smith

GEORGE C. SMITH, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 2:18-CV-424

District Judge George C. Smith

Magistrate Judge Michael R. Merz

JASON S. SEXTON,

Petitioner,

v.

LYNEAL WAINWRIGHT, Warden, Marion Correctional Institution,

Respondent.

SUBSTITUTED REPORT AND RECOMMENDATIONS

This habeas corpus case is before the Court on Respondent's Objections (ECF No. 20) to the Magistrate Judge's Report and Recommendations ("Report," ECF No. 19) recommending that Respondent's Motion to Dismiss the case as barred by the statute of limitations (ECF No. 5) be granted in part and denied in part. Petitioner has also objected (ECF No. 22) and District Judge Smith has recommitted the case for reconsideration in light of the Objections (ECF No. 21).

The following Report is substituted for the original.

Procedural History

In January 1997 Sexton was indicted by the Franklin County grand jury on three counts of aggravated murder with death penalty specifications, one count of kidnapping, and one count of aggravated robbery (Indictment, State Court Record, ECF No. 4, PageID 28-35). Prior to trial his attorney negotiated a plea agreement pursuant to which he pleaded guilty to one count of aggravated murder with specifications and one count of aggravated robbery with agreed consecutive sentences of twenty years to life for the murder and ten to twenty-five years for the robbery (Entry of Guilty Plea, State Court Record, ECF No. 4, PageID 41.) The prosecutor also agreed not to pursue a rape charge arising at the county jail after arrest. The trial judge then imposed the agreed sentence. *Id.* at PageID 42-43). Sexton took no direct appeal.

On December 22, 1998, Sexton filed a petition for post-conviction relief under Ohio Revised Code § 2953.21 in which he acknowledged that he had not appealed the conviction and sentence (State Court Record, ECF No. 4, PageID 46-49). The trial court denied the petition January 28, 1999, concluding both that it was untimely and that it was without merit. *Id.* at PageID 55-61. Sexton did not appeal from that decision and in fact took no other action in the case until he filed a motion for a delayed appeal August 8, 2017 (State Court Record, ECF No. 4, PageID 62-74). The Tenth District Court of Appeals denied that motion September 21, 2017. *Id.* at PageID 107-108. The Ohio Supreme Court declined to accept jurisdiction of Sexton's appeal on January

31, 2018, and he effectively filed his Petition here on April 26, 2018.[1]

Sexton pleads the following Grounds for Relief:

> **Ground One:** Mr. Sexton was denied due process and equal protection of the law when the Franklin County Court of Appeals denied his motion for leave to file a direct appeal, and appointment of counsel for that appeal, a violation of the Fourteenth Amendment to the United States Constitution.
>
> **Ground Two:** Mr. Sexton was denied due process and equal protection of the law when the trial court and counsel failed to inform him of his appellate rights, and his right to counsel on direct appeal, a violation of the Fourteenth Amendment to the United States Constitution.
>
> **Ground Three:** Mr. Sexton was denied his right to effective assistance of counsel when trial counsel failed to consult with him about his right to appeal, and that his guilty plea to aggravated murder with specifications was not in compliance with O.R.C. 2945.06, a violation of the Sixth Amendment to the United States Constitution.

(Petition, ECF No. 1, PageID 17-19.)

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[1] See ECF No. 1, PageID 15, showing placement in the prison mailing system that date. That therefore is the effective filing date. *Houston v. Lack,* 487 U.S. 266 (1988); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002).

The Motion to Dismiss and the Original Report

Sexton pleaded guilty to aggravated murder and aggravated robbery on October 10, 1997, in the Franklin County Court of Common Pleas and was sentenced on October 15, 1997 (State Court Record, Entry, ECF No. 4, PageID 42-43). Because Sexton took no appeal at that time, Respondent asserts his conviction became final November 14, 1997, when the time for appeal ran, and the statute of limitations expired one year later, November 15, 1998. During that one year, Sexton filed no application for post-conviction review which would have tolled the statute. Therefore, Respondent asserts, the Petition, filed April 26, 2018, was approximately nineteen and one-half years too late (Motion, ECF No. 5, PageID 148-49).

Sexton claims that the trial court and trial attorney's failures to advise him of his right to appeal constitute a "state-created impediment" to filing a habeas petition that was not removed until June 2017 when an inmate law clerk advised him of the possibility of a delayed appeal (Smith Affidavit, ECF No. 14-1, PageID 174; Sexton Affidavit, *id*. at PageID 176). After that "impediment" was removed, he promptly filed for a delayed appeal and appealed from the denial of that request to the Ohio Supreme Court. He then filed here April 26, 2018. He therefore claims a start date for the statute of limitations of June 2017 under 28 U.S.C. § 2244(d)(1)(B), when the "state-created impediment" was removed by his conversation with inmate law clerk Smith.

Sexton also asserts his due process claim in Ground One, based on denial of his delayed appeal, did not accrue until that denial took place on September 21, 2017, and the statute was tolled during his appeal to the Ohio Supreme Court. He claims "he could not have learned about his lack of notification of appellate rights until he spoke to an Inmate Law Clerk in June of 2017, and thus that the statute of limitations on these claims [Grounds Two and Three] should have started running only at that time, under 28 U.S.C. § 2244(d)(1)(D)." (Reply/Opposition Brief, ECF No. 15, PageID 192-93).

The Original Report accepted Sexton position that his First Ground for Relief only accrued when the Tenth District denied his delayed appeal, relying on *DiCenzi v. Rose*, 452 F.3d 465 (6th Cir. 2006)(Report, ECF No. 19, PageID 219). The Report rejected Sexton's position on Grounds Two and Three, concluding he had "offered no evidence of any action that might be deemed due diligence between January 1999 and June 2017." *Id.* Furthermore,

> Sexton knew as soon as it happened in October 1997 that the trial judge had not told him he had a right to appeal and his attorney had not consulted with him about an appeal and possible grounds for appeal. Those are the factual predicates of Grounds Two and Three.

Id. at PageID 220.

Both parties have objected to the Original Report.

Respondent's Objections

Sexton's First Ground for Relief claims he was denied due process and equal protection when the Franklin County Court of Appeals denied his motion for leave to file a delayed appeal (Petition, ECF No. 1, PageID 17). Sexton asserts that claim actually accrued on September 21, 2017, when the Tenth District entered its denial (Reply, ECF No. 15, PageID 192). He thus claims the benefit of the starting date for the statute of limitations provided in 28 U.S.C. § 2244(d)(1)(D): "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Obviously the denial of the delayed appeal motion could not have been discovered before it happened, with or without the exercise of diligence. The Original Report concluded that since the Petition was filed within one year of that denial, it was timely, citing *DiCenzi v. Rose*, 452 F.3d 465 (6th Cir. 2006), for the proposition that a habeas claim arising from denial of a delayed direct appeal accrues when the denial occurs. The precise language from *DiCenzi* reads:

> DiCenzi first claims that the appellate court improperly refused to allow him to file a delayed appeal. This claim accrued when the Court of Appeals for Cuyahoga County denied DiCenzi's motion for delayed appeal, on September 25, 2001. Therefore, under 28 U.S.C. § 2244(d)(1), the AEDPA "clock" began running on September 25, 2001. 1 See 28 U.S.C. § 2244(d)(1)(D) (initiating the one-year AEDPA requirement on the date upon which the factual predicate of the claim or

> claims presented could have been discovered through the exercise of due diligence).

452 F.3d at 468.

To overcome this language from *DiCenzi*, Respondent relies on *Shorter v. Richard,* 659 Fed. Appx. 227 (6th Cir. Aug. 12, 2016), cited at Objections, ECF No. 20, PageID 224. Shorter had pleaded guilty with an agreed sentence and did not seek a delayed appeal until November 2013, five years after he was sentenced. Shorter's relevant ground for relief reads:

> GROUND ONE: Petitioner was denied due process and equal protection of the law, when the trial court did not inform him of his appellate rights and his subsequent application for leave to file a delayed appeal was denied, in violation of the Fourteenth Amendment to the United States Constitution.

Id. at **4.

Petitioner Shorter relied on *DiCenzi* for the same proposition for which the Original Report relied on it. Respondent Warden counters that Shorter could not use the delayed appeal denial date because he had not been diligent in seeking a delayed appeal. *Id.* at **8, relying on *Johnson v. United States,* 544 U.S. 295 (2005). Judge Clay's opinion in *Shorter* found that the *DiCenzi* court had failed to consider *Johnson* which held that

> Where one "discovers" a fact that one has helped to generate, however, whether it be the result of a court proceeding or of some other process begun at the petitioner's behest, it does not strain logic

> to treat required diligence in the "discovery" of that fact as entailing diligence in the steps necessary for the existence of that fact.

Id. at 310. Circuit Judge White concurred in the judgment only, noting that *DiCenzi* was a published decision directly in point which could not be overruled by a subsequent panel.[2]

It is the well-settled law of the Sixth Circuit that a panel of the Court cannot overrule the published decision of another panel. *Hinchman v. Moore,* 312 F.3d 198, 203 (6th Cir. 2002). The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or the Sixth Circuit *en banc* overrules the prior decision. *Issa v. Bradshaw*, F.3d___, 2018 U.S. App. LEXIS 27131 n.2 (6th Cir. 2018) *United States v. Verwiebe,* 874 F.3d 258, 262 (6th Cir. 2017); *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014); *Darrah v. City of Oak Park,* 255 F.3d 301, 309 (6th Cir. 2001); *Salmi v. Secretary of HHS*, 774 F.2d 685, 689 (6th Cir. 1985); *accord* 6th Cir. R. 206(c).

Although the Original Report did not discuss *Shorter*, the Magistrate Judge concludes the rule in *DiCenzi* must be modified in light of *Johnson*. *Johnson* relied on the discovered predicate start date in 28 U.S.C. § 2255 that parallels 28 U.S.C. §

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[2] Judge White concurred in the judgment because she found Shorter's claim had no merit. That question is not before this Court at this time and the Magistrate Judge suggests no resolution of it.

2244(d)(1)(D)[3]. Johnson sought as a start date the day on which a Georgia court vacated a prior conviction on which the federal court had later relied to enhance his sentence. The Supreme Court held Johnson did not show due diligence in attacking the state judgment in that he did not file for *vacatur* until more than three years after the federal sentence relying on the state court judgment was entered. Johnson's situation precisely parallels Sexton's. And as the *Shorter* Court noted, the *DiCenzi* court did not consider the impact of *Johnson*, even though it had been decided before *DiCenzi* reached the Sixth Circuit.

Sexton certainly has not shown he exercised due diligence in filing his motion for delayed direct appeal. He relies on his having contacted the Ohio Public Defender in December 1998, but, as the Original Report noted, he did nothing after denial of his *pro se* post-conviction petition until speaking with the inmate law clerk in June 2017. Therefore his First Ground for Relief should be dismissed with prejudice as barred by the statute of limitations.

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[3] The two statutes should be read *in pari materia* since both were adopted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA").

Sexton's Objections

Objection 1: The Magistrate Judge Erred in Not Considering Whether Ground Three Was Timely Due to the Operation of 28 U.S.C. § 2254(d)(1)(B).

In his first objection, Sexton asserts the Magistrate Judge should find his Ground Three is timely, based on his state-created impediment theory. The asserted impediment is his trial attorney's failure to consult with him about his right to appeal and that his guilty plea is invalid under the Sixth Amendment because it did not comply with Ohio Revised Code § 2945.06 (Objections, ECF No. 22, PageID 230).

For his theory that ineffective assistance of trial counsel constitutes a state-created impediment within the meaning of § 2244(d)(1)(B), Sexton relies on *Waldron v. Jackson,* 348 F. Supp. 2d 877 (N.D. Ohio 2004). Waldron was convicted by a jury on two counts of rape and two counts of compelling prostitution; he was sentenced to fifty-two years to life. Judge Wells recited the relevant procedural facts as follows:

> During sentencing, the trial court advised Mr. Waldron of his appellate rights and asked him if he wished to appeal. (Tr. at 708). Both Mr. Waldron and his attorney responded that Mr. Waldron intended to pursue an appeal. (Tr. at 708). The trial court then determined that Mr. Waldron was indigent and appointed attorney James Ingalls to represent him on appeal. (Tr. at 708).

Because Mr. Waldron's judgment entry of conviction and sentence was filed in the trial court on 11 August 1998 (Docket # 14, Ex. D), Mr. Waldron had until 10 September 1998 to file a timely notice of appeal. See Ohio App. R. 4(A) (requiring defendants to file a notice of appeal within 30 days "of entry of the judgment or order appealed . . ."). Mr. Ingalls, Mr. Waldron's court-appointed appellate counsel, missed that deadline by four days, filing a notice of appeal on 14 September 1998. (Docket # 14, Ex. F). On 11 January 1999, the court of appeals dismissed *sua sponte* Mr. Waldron's appeal as untimely. (Docket # 14, Ex. G). According to Mr. Waldron, his appellate counsel did not notify him that the court of appeals had dismissed his appeal. (Waldron Aff. at PP5-6). 2 Eventually, Mr. Waldron asked a friend to contact the court of appeals about his appeal and consequently learned, for the first time, that it had been dismissed. (Waldron Aff. at P7). He then sought assistance from the Office of the Ohio Public Defender. (Waldron Aff. at P8).

On 10 September 2001, the Ohio Public Defender filed, on Mr. Waldron's behalf, a motion for leave to file a delayed appeal, pursuant to Ohio App. R. 5(A). (Docket # 14, Ex. H). On 15 October 2001, the court of appeals denied Mr. Waldron's motion for leave. (Docket # 14, Ex. I). Shortly thereafter, Mr. Waldron filed a motion for reconsideration which the court of appeals also denied on 20 November 2001. (Docket # 14, Exs. J and K). On 26 November 2001 and 3 January 2002, Mr. Waldron appealed both rulings to the Ohio Supreme Court. (Docket # 14, Exs. L and N). The

> Ohio Supreme Court, on 6 February 2002 and 20 March 2002, denied leave to appeal and dismissed both appeals as not involving any substantial constitutional question. (Docket # 14, Exs. M and P).
>
> On 29 July 2002, Mr. Waldron filed a petition for a federal writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in which he asserts two grounds for relief

348 F. Supp. 2d at 880-81. The State had moved to dismiss Waldron's habeas petition as untimely. Judge Wells first concluded that it was ineffective assistance of appellate counsel for Waldron's appointed appellate attorney to fail to file a timely notice of appeal despite Waldron's express request that he do so. *Id.* at 883-84, citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000); and *Ludwig v. United States,* 162 F.3d 456 (6th Cir. 1998). Because ineffective assistance of appellate counsel is imputed to the State, Judge Wells concluded it constituted a state-created impediment to filing a habeas petition. *Id.* at 884, citing *Winkfield v. Bagley,* 66 Fed. Appx. 578 (6th Cir. May 28, 2003). She adopted Waldron's argument that he could not have brought the habeas petition without exhausting the delayed direct appeal possibility, but he had only needed to file a motion for delayed appeal because his attorney, although appointed to do so, did not file a timely direct appeal. She concluded the ineffective assistance of appellate counsel impediment was not effectively removed until the delayed appeal was denied.

Waldron's procedural situation was materially quite different from Sexton's. Waldron was convicted at trial and had not negotiated a favorable plea agreement as Sexton did. Waldron knew of his right to appeal and expressed his desire to do so in open court at sentencing, which is why a new appellate attorney was appointed to prosecute that appeal[4]. Sexton claims neither his trial judge nor his attorney told him of his appeal rights. He does not claim he ever told either the judge or his attorney that he wanted to appeal. In the event, no direct appeal was filed and Sexton never asked for an appellate attorney until the delayed appeal motion, August 8, 2017.

Sexton never had an appointed direct appeal attorney, so he cannot blame his failure to appeal on the purported ineffectiveness of any such attorney, who never existed. Had he directed his trial attorney to file a notice of appeal and that attorney had failed to do so, that would have constituted ineffective assistance of trial counsel under *Roe, supra.*[5] However, he does not claim he ever told his trial attorney to appeal.

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[4] In Ohio it is standard practice to appoint new counsel for appeal because Ohio requires ineffective assistance of trial counsel claims which can be shown from the appellate record to be raised on direct appeal and an attorney cannot be expected to plead his or her ineffectiveness.

[5] *Roe* was decided in 2000, well after Sexton's conviction. *Ludwig* was decided in 1998, but it followed every Court of Appeals to decide that question. 162 F.3d at 459. Thus a reasonably competent attorney at the time of Sexton's trial would have understood it would be ineffective assistance of trial counsel to fail to file a notice of appeal if the client requested it.

Sexton has not demonstrated that it was ineffective assistance of trial counsel to fail to file a notice of appeal in his circumstances. His trial attorney had negotiated a dismissal of two out of three aggravated murder counts. He had also negotiated an agreed sentence that was at the time the mandatory minimum for aggravated murder – twenty years to life. In the absence of the plea agreement, Sexton had three chances to find himself in the execution chamber at Lucasville. It is therefore not obvious that he would have wanted to appeal and risk losing the benefit of that plea agreement. In *Ludwig* the Sixth Circuit held

> We emphasize, of course, that a defendant's actual "request" is still a crucial element in the Sixth Amendment analysis. The Constitution does not require lawyers to advise their clients of the right to appeal. Rather, the Constitution is only implicated when a defendant actually requests an appeal, and his counsel disregards the request.

162 F.3d at 459. In *Roe* the Supreme Court rejected a *per se* rule which would require an attorney to file a notice of appeal regardless of whether the client asks. The Court held counsel must consult with the client about the advantages and disadvantages of taking an appeal when there is reason to think that a rational defendant would want to appeal or this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In sum, Judge Wells' reasoning in *Waldron* depends upon a finding of ineffective assistance of counsel which Sexton has not demonstrated.

Waldron also depends on construing ineffective assistance of trial or appellate counsel as a state-created impediment within the meaning of 28 U.S.C. § 2244(d)(1)(B). For that proposition, Judge Wells relied entirely on *Winkfield v. Bagley, supra*. In that case the trial judge was told at sentencing that one of the trial attorneys, Roger Warner, would be handling the appeal, but no appeal was ever filed. Although Winkfield was not sentenced to death, Mr. Warner, who was then a member of the death penalty bar of this Court, gave Winkfield the standard death penalty attorney excuse for delay:

> Contrary to your mistaken belief at this time, we have been working on your case …. Delay at this point in time can only help your case. I cannot emphasize that enough …. the negligence that you allege in your letter is not correct-- it is a trial tactic, or an appellate tactic, designed to be of benefit to you …. One must consider what is the makeup of the [Supreme Court] potentially five to ten years from now. The further I can delay it now, the better the chance we will have a favorable court reviewing your case some time in the future …. Therefore, the decision to not expedite the appellate process is a carefully reasoned and thought out process with consultation with numerous other attorneys on your behalf.

Ten years later, finding this conduct to constitute ineffective assistance of appellate counsel, the Tenth District Court of Appeals granted Winkfield's motion for delayed appeal. While the Sixth Circuit accepted that finding and imputed the ineffective assistance of

appellate counsel to the State, it was unwilling to find that the ineffective assistance of appellate counsel prevented Winkfield from filing his petition:

> No connection has been established between Warner's ineffective assistance and Winkfield's ability to file a federal habeas petition. The fact that Winkfield was able to file his Rule 5(a) motion for a delayed appeal while the alleged impediment still existed (i.e., while operating under the mistaken belief that his appeal was pending or was being strategically delayed by Warner) also suggests that Winkfield was not prevented by Warner's advice from timely filing his habeas petition. Cf. *Dean v. Pitcher*, 2002 U.S. Dist. LEXIS 24628, No. Civ. 02-71203-DT, 2002 WL 31875460, at *3 (E.D. Mich. Nov. 7, 2002) ("The fact that petitioner eventually filed his habeas petition even though his state appellate counsel had advised him not to do so demonstrates that his counsel's advice was not an unconstitutional impediment to the filing of his habeas petition.") Therefore, Winkfield has failed to "allege facts that establish that he was so inhibited by the state's action that he was unable to file and state a legal cause of action before the limitation period expired." *Neuendorf v. Graves*, 110 F. Supp.2d 1144, 1153 (N.D. Iowa 2000) (quotation omitted).

Id. at 583. Sexton is in the same position: he asserts a causal relationship between his trial attorney's failure to file and his delay, but he has not proved such a causal relationship.

In sum, Sexton has not established that the failure of his trial attorney to tile a notice of appeal was ineffective assistance of trial counsel or that, even if it was, that failure prevented him from filing his petition here in time. Sexton is not entitled to a start date for the statute of limitations under 28 U.S.C. § 2244(d)(1)(B).

Objection 2: The Magistrate Failed to Liberally Construe Sexton's Claim that Ineffective Assistance of Counsel Constituted a State-Created Impediment that Prevented the Filing of His Habeas Petition.

Sexton contends the Magistrate Judge mischaracterized his state-created impediment argument by limiting it to failure to advise of appellate rights. Instead, he says, the Court must also consider trial counsel's ineffectiveness in failing to advise that the guilty plea was unintelligent because trial counsel did not advise Sexton of the three-judge panel requirement for taking a guilty plea in a capital case (Objections, ECF No. 22, PageID 232-34).

The Magistrate Judge agrees that Sexton's state-created impediment claim embraces both these ineffective assistance of trial counsel assertions. However, expanding the analysis to include this second sub-claim does not change the outcome.

Sexton's material added by expansion of the record shows that he learned about delayed appeal and of the three-judge panel requirement from Inmate Law Clerk Smith in June, 2017. This does not prove that he could not have learned of it earlier or that ineffective assistance of trial counsel

prevented him from filing. First of all, for the reasons given under Objection 1, he has not proven an ineffective assistance of trial counsel claim on failure to take an appeal.

As to the second new piece of law learned from Inmate Smith, Sexton has also not proved ineffective assistance of trial counsel. Under the governing federal standard adopted in *Strickland v. Washington,* 466 U.S. 668 (1984), a habeas petitioner must prove both deficient performance and resulting prejudice. Trial counsel's failure to advise of the three-judge panel requirement as a basis for appeal did not constitute deficient performance.

In *State v. Parker*, 95 Ohio St. 3d 524 (2002), the Ohio Supreme Court held that "A defendant charged with a crime punishable by death who has waived his right to trial by jury must, pursuant to R.C. 2945.08 and Crim. R. 11(C)(3), have his case heard and decided by a three-judge panel even if the state agrees it will not seek the death penalty." *Id.* at syllabus. Justice Douglas noted "regardless of the state's agreement that it would not seek the death penalty, appellee was still *charged* with an offense that was punishable with death." 95 Ohio St. 3d at ¶ 11. That language describes Sexton's situation: even though he had an agreed sentence of twenty years to life, Count Two of the Indictment, to which he pleaded guilty, still contained a capital specification.

However, trial counsel's failure to advise Sexton about the three-judge panel requirement was not ineffective assistance of trial counsel. First of all, *Parker* was not decided until June 26, 2002, more than four and one-half years after Sexton pleaded

guilty. Nor was Parker a foreordained decision just waiting for pronouncement by the Supreme Court: in *Parker* the Supreme Court of Ohio adopted an interpretation of Ohio Revised Code § 2945.06 given by the Eighth District Court of Appeals but in conflict with the interpretations of that statute by the Fifth District. The Supreme Court of Ohio took the case in part to resolve the conflict. 95 Ohio St. 3d at ¶ 3. Moreover, *Parker* was decided by a narrowly divided court, on a vote of four to three. In dissent Justice Resnick called the decision hypertechnical. *Id.* at ¶ 13. Counsel is not ineffective for failure to predict the development of the law. *Thompson v. Warden*, 598 F.3d 281 (6th Cir. 2010), *citing Lott v. Coyle,* 261 F.3d 594, 609 (6th Cir. 2001)(not ineffective assistance of appellate counsel to fail to anticipate *State v. Foster* in an appellate district which had ruled the other way.) *Accord, Carter v. Timmerman-Cooper*, 2010 U.S. App. LEXIS 10549 (6th Cir. 2010).

Because it was not ineffective assistance of trial counsel to fail to anticipate *Parker*, that was not a state-created impediment to filing in habeas.

Objection 3: The Magistrate Judge Erroneously Concluded Mr. Sexton Was Aware of the Factual Predicates of Grounds Two and Three

Petitioner claims his Second and Third Grounds for Relief are timely because he filed his Petition within a year of learning the factual predicates of the claims. If that were so, the Petition would be timely under 28 U.S.C. § 2244(d)(1)(D). The factual predicate of Ground Two is that neither the trial judge nor Petitioner's counsel advised him of his

right to appeal. The factual predicate of Ground Three is that trial counsel did not consult with Sexton about taking an appeal or the three-judge panel rule.

The Original Report concluded Sexton learned of these facts when they happened – in October 1997 at the time of sentencing. Sexton now claims he did not learn of these facts until he consulted with Inmate Smith in June 2017 (Objections, ECF No. 22, PageID 234). He claims to have prove this with Inmate Smith's Affidavit and notes that Respondent has not refuted that Affidavit which he asserts means the Affidavit must be taken as true. *Id.*

Smith's Affidavit does not speak to the factual predicates of Grounds Two and Three, but to their purported legal significance. Sexton was in court when the trial judge failed to advise of appeal rights; Smith was not. Smith only learned of the lack of advice of rights from Sexton (See Affidavit, ECF No. 14-1, ¶ 7). Learning the legal significance of historical facts one has known for over eighteen years does not re-start the statute of limitations.

Even if discovering what Smith had to tell him were to constitute discovery of the factual predicate of Grounds Two and Three, Sexton has done nothing to show he exercised due diligence in learning about those predicates. Doing nothing between January 1999 and June 2017 is not due diligence.

Objection 4. Respondent's Reliance on Unpublished Cases Is Misplaced.

This Objection is dealt with in the discussion of Shorter under Objection 1.

Conclusion

Based on the foregoing analysis, the Magistrate Judge recommends granting Respondent's Motion in its entirety. The Petition herein should be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

October 26, 2018

/s/ Michael R. Merz
United States Magistrate Judge

APPENDIX D

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 17AP-564

(C.P.C. No. 97CR-1148)

(REGULAR CALENDAR)

State of Ohio,

Plaintiff-Appellee,

v.

Jason S. Sexton,

Defendant-Appellant.

MEMORANDUM DECISION

Rendered on September 21, 2017

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Jason S. Sexton, pro se.

ON MOTION FOR LEAVE TO APPEAL

TYACK, P.J.

{¶ 1} Jason S. Sexton has filed a motion asking that he be allowed to pursue a delayed appeal from his conviction and sentence journalized in 1997.

{¶ 2} In 1997, Sexton entered into a plea bargain and pled guilty to one count of aggravated murder with specifications and one count of aggravated

robbery. The plea bargain included a recommendation that he serve consecutive sentences of life without eligibility for parole until he has completed 20 years of incarceration on the aggravated murder charge and 10 to 25 years of incarceration on the aggravated robbery charge. The trial court judge accepted the plea bargain.

{¶ 3} Sexton has presented no viable reason for the delay in his attempt to appeal. He entered into a plea bargain and received the benefit of that plea bargain. He should not now be permitted a direct appeal from the agreement he made almost 20 years ago.

{¶ 4} The motion for leave to appeal is denied.

Motion for leave to appeal denied.

BRUNNER and HORTON, JJ., concur.

APPENDIX E

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 17AP-564

(C.P.C. No. 97CR-1148)

(REGULAR CALENDAR)

State of Ohio,

Plaintiff-Appellee,

v.

Jason S. Sexton,

Defendant-Appellant.

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein September 21, 2017, it is the order of this court that appellant's motion for leave to file a delayed appeal is denied.

TYACK, P.J., BRUNNER & HORTON, JJ.

/s/ JUDGE
Judge G. Gary Tyack

APPENDIX F

THE SUPREME COURT OF OHIO

Case No. 2017-1554

State of Ohio

v.

Jason S. Sexton

FILED
JAN 31 2018
CLERK OF COURT
SUPREME COURT OF OHIO

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Franklin County Court of Appeals; No. 17AP-564)

/s/ Maureen O'Connor
Maureen O'Connor
Chief Justice