

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

May 21, 2020

DEBORAH S. HUNT, Clerk

JERMAINE D. HILL,

)

Petitioner-Appellant,

)

v.

)

O R D E R

CATHERINE S. BAUMAN, Warden,

)

Respondent-Appellee.

)

Before: COOK, Circuit Judge.

Jermaine D. Hill, a Michigan prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. This court construes Hill's timely notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2). Hill has also filed motions for a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for an evidentiary hearing, and to proceed in forma pauperis.

On November 10, 1995, nineteen-year-old Hill fired multiple shots at a Ford Bronco, killing the driver and injuring the passenger. In October 1996, a jury convicted Hill of first-degree murder, assault with intent to commit murder, and possession of a firearm during the commission of a felony. The trial court sentenced Hill to life imprisonment without the possibility of parole for the first-degree-murder conviction, life imprisonment for the assault-with-intent-to-commit-murder conviction, and two years' imprisonment for the felony-firearm conviction. The Michigan Court of Appeals affirmed. *People v. Hill*, No. 200313, 1998 WL 1991817 (Mich. Ct. App. Apr. 3, 1998) (per curiam). The Michigan Supreme Court denied leave to appeal. *People v. Hill*, 615 N.W.2d 735 (Mich. 1998) (table).

Over eighteen years later, Hill filed a motion for relief from judgment in the trial court, arguing that he was entitled to resentencing for the murder and assault convictions under *Miller v. Alabama*, 567 U.S. 460 (2012). He further argued that resentencing was warranted because his attorney waived the hearing necessary to transfer the criminal matter out of juvenile court. The trial court denied the motion, and the Michigan Court of Appeals denied Hill's delayed application for leave to appeal. The Michigan Supreme Court denied leave to appeal. *People v. Hill*, 919 N.W.2d 261 (Mich. 2018) (mem.).

On April 30, 2019, Hill filed a § 2254 petition in the district court. Hill raised two grounds for relief: (1) he is entitled to relief under *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), because, at the time of the crime, he was on “juvenile probation” pursuant to the Holmes Youthful Trainee Act (HYTA); and (2) he is entitled to resentencing because both the Family Court and the Circuit Court failed to conduct a “‘phase II’ dispositional hearing” before removing his case to the Circuit Court. The State moved to dismiss Hill’s petition on the ground that it was barred by the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA). The district court concluded that Hill’s petition was untimely, denied the petition, and 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). To satisfy this standard, the applicant must demonstrate that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a district court denies a 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).

AEDPA imposes a one-year statute of limitations for filing federal habeas corpus petitions. 28 U.S.C. § 2244(d)(1). Generally, the one-year statute of limitations for habeas petitions filed by

state prisoners begins to run on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). The statute provides for tolling of the limitations period during the time in which “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). And, under certain circumstances, the AEDPA limitations period may be equitably tolled. *Holland v. Florida*, 560 U.S. 631, 645 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). A credible showing of actual innocence may also allow a habeas petitioner to overcome AEDPA’s limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 387 (2013).

For purposes of § 2244(d)(1)(A), Hill’s conviction became final on March 30, 1999, when the time for filing a petition for a writ of certiorari in the United States Supreme Court expired. *See* Sup. Ct. R. 13.1; *Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). Absent tolling, Hill had one year from that date, or until March 30, 2000, to file a § 2254 petition in the district court. Hill’s petition was untimely because he filed it in April 2019, over nineteen years after the expiration of the limitations period. His state post-conviction motion did not have a tolling effect because it was filed long after the limitations period had expired. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Further, Hill did not allege, nor did the record reveal, any extraordinary circumstances that would warrant equitable tolling. And Hill made no showing of actual innocence that would allow him to overcome the limitations period.

Section 2244(d)(1)(C) allows for the delay of the start of the statute of limitations until “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.” 28 U.S.C. § 2244(d)(1)(C). Hill’s claims rely on the Supreme Court’s decision in *Miller*, which held that a mandatory sentence of life without parole for an individual under the age of eighteen violates the Eighth Amendment’s prohibition against cruel and unusual

punishment, 567 U.S. at 465, and *Montgomery*, which made *Miller* retroactively applicable to cases on collateral review, 136 S. Ct. at 736. But *Miller* has no impact on Hill's case because he was nineteen years old at the time he committed the murder and assault. Even if Hill was on probation under the HYTA at the time, *Miller* did not hold that a defendant's status as a juvenile offender under state law prohibits imposition of a mandatory life sentence.

Moreover, even if *Miller* did have some bearing on Hill's case, Hill's petition would still be untimely under § 2244(d)(1)(C) because the one-year limitations period would have commenced on June 25, 2012, when *Miller* was decided, not when *Montgomery* made *Miller* retroactively applicable to cases on collateral review. *See Dodd v. United States*, 545 U.S. 353, 358-59 (2005). Hill did not file his state motion for relief from judgment based on *Miller* until January 2017, and it therefore had no tolling effect. *See Vroman*, 346 F.3d at 602. He did not file his § 2254 petition until April 2019, well beyond the expiration of the limitations period.

Accordingly, Hill's application for a COA and his motions for a *Daubert* hearing and an evidentiary hearing are **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

XX;

JERMAINE D. HILL,

Petitioner,

Case No. 2:19-CV-11336

v.

HONORABLE PAUL D. BORMAN
UNITED STATES DISTRICT COURT JUDGE

RANDEE REWERTS,

Respondent,

JUDGMENT

The above entitled matter having come before the Court on a Petition for Writ of Habeas Corpus, Honorable Paul D. Borman, a United States District Judge, presiding, and in accordance with the Memorandum Opinion and Order entered on January 16, 2020:

- (1) The Petition for Writ of Habeas Corpus is DENIED WITH PREJUDICE.
- (2) A Certificate of Appealability is DENIED.
- (3) Petitioner is denied leave to appeal *in forma pauperis*.

Dated at Detroit, Michigan, this 16th day of January, 2020.

DAVID J. WEAVER
CLERK OF THE COURT

APPROVED:

BY: s/D. Tofil
DEPUTY CLERK

s/Paul D. Borman

HON. PAUL D. BORMAN
UNITED STATES DISTRICT COURT JUDGE

W W:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JERMAINE D. HILL,

Petitioner,

CIVIL NO. 2:19-CV-11336

v.

HONORABLE PAUL D. BORMAN
UNITED STATES DISTRICT COURT

RANDEE REWERTS,

Respondent.

**OPINION AND ORDER (1) SUMMARILY DENYING THE PETITION
FOR WRIT OF HABEAS CORPUS, (2) DENYING A CERTIFICATE OF
APPEALABILITY, AND (3) DENYING LEAVE TO APPEAL IN FORMA
PAUPERIS**

Jermaine D. Hill, ("Petitioner"), confined at the Alger Correctional Facility in Munising, Michigan, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction for first-degree murder, Mich. Comp. Laws § 750.316, assault with intent to commit murder, Mich. Comp. Laws § 750.83, and possession of a firearm in the commission of a felony, Mich. Comp. Laws § 750.227b. Respondent filed a motion to dismiss the petition, on the ground that it was not timely filed in accordance with the statute of limitations contained in 28 U.S.C. § 2244 (d)(1). For the reasons stated below, the petition for a writ of habeas corpus is summarily denied with prejudice.

I. BACKGROUND

Petitioner was convicted following a jury trial in the Detroit Recorder's Court.

Direct review of petitioner's conviction ended in the state courts on December 30, 1998, when the Michigan Supreme Court denied petitioner's application for leave to appeal following the affirmance of his conviction by the Michigan Court of Appeals. *People v. Hill*, 459 Mich. 933, 615 N.W. 2d 735 (1998).

Petitioner filed a post-conviction motion for relief from judgment with the state trial court on January 27, 2017. (See ECF No. 9-1, Page ID 73). After the trial court and the Michigan Court of Appeals denied petitioner post-conviction relief, collateral review of petitioner's conviction ended in the Michigan courts on October 30, 2018, when the Michigan Supreme Court denied petitioner leave to appeal the denial of his post-conviction motion. *People v. Hill*, 503 Mich. 887, 919 N.W. 2d 261 (2018).

On April 30, 2019, petitioner filed his habeas petition with this Court.¹

¹ Under the prison mailbox rule, this Court will assume that petitioner actually filed his habeas petition on April 30, 2019, the date that it was signed and dated. *See Towns v. U.S.*, 190 F. 3d 468, 469 (6th Cir. 1999).

II. DISCUSSION

In the statute of limitations context, “dismissal is appropriate only if a complaint clearly shows the claim is out of time.” *Harris v. New York*, 186 F.3d 243, 250 (2nd Cir.1999); *See also Cooey v. Strickland*, 479 F.3d 412, 415-16 (6th Cir. 2007).

28 U.S.C. § 2244(d) imposes a one-year statute of limitations upon petitions for habeas relief:

- (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 originally 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.

Although not jurisdictional, the AEDPA’s one year limitations period “effectively bars relief absent a showing that the petition’s untimeliness should be excused based on equitable tolling and actual innocence.” *See Akrawi v. Booker*, 572 F. 3d 252, 260 (6th Cir. 2009).

The Michigan Supreme Court denied petitioner's application for leave to appeal on December 30, 1998. However, the one year statute of limitations under 28 U.S.C. § 2244(d)(1) did not start running on that day. Where a state prisoner has sought direct review of his conviction in the state's highest court but never files a petition for certiorari with the U.S. Supreme Court, the one year limitation period for seeking habeas review under 28 U.S.C. § 2244(d)(1) begins to run not on the date that the state court entered judgment against the prisoner, but on the date that the 90 day time period for seeking certiorari with the U.S. Supreme Court expired. *See Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). Petitioner's judgment became final on March 30, 1999, when he failed to file a petition for writ of certiorari with the U.S. Supreme Court. *Thomas v. Straub*, 10 F. Supp. 2d 834, 835 (E.D. Mich. 1998). Absent state collateral review, petitioner would have been required to file his petition for writ of habeas corpus with this Court no later than March 30, 2000 in order for the petition to be timely filed. *See Corbin v. Straub*, 156 F. Supp. 2d 833, 836 (E.D. Mich. 2001).

Petitioner filed a post-conviction motion with the state courts on January 27, 2017, after the one year limitations period expired. A state court post-conviction motion that is filed after the limitations period expired does not toll that period pursuant to 28 U.S.C. § 2244(d)(2) because there is no period left to be tolled. *See*

Jurado v. Burt, 337 F.3d 638, 641 (6th Cir. 2003); *see also Hargrove v. Brigano*, 300 F.3d 717, 718, n. 1 (6th Cir. 2002). The petition is untimely.

Petitioner argues that his petition is timely because it is based on a retroactive change in the law. Petitioner alleges that his sentence for life imprisonment without parole violates the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 640, 645 (2012), in which the Supreme Court held that a mandatory sentence of life imprisonment without parole for defendants who were under 18 years old when they committed their crimes violates the Eighth Amendment. Although petitioner was nineteen years old when he committed the murder for which he received a non-parolable life sentence, petitioner argues that the holding in *Miller* should be extended to a defendant like himself who was on juvenile probation for another offense, and thus under the jurisdiction of the juvenile court, at the time that he committed the murder. Petitioner further argues that the one year limitations period did not commence until 2016, when the Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) held that *Miller* should be applied retroactively.

28 U.S.C. § 2244(d)(1)(C) indicates that the one year limitations period can run from "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." A

federal district court has the ability to determine whether a newly recognized right has been made retroactively applicable to cases on collateral review, for purposes of this section or 28 U.S.C. § 2255 ¶ (3), the analogous provision of the statute of limitations for federal motions to vacate sentence. *See Wiegand v. United States*, 380 F. 3d 890, 892-93 (6th Cir. 2004).

The Supreme Court's holding in *Miller* is inapplicable to petitioner's case because petitioner was nineteen years old at the time that he murdered the victim and *Miller* only invalidated mandatory non-parolable life sentences for persons who committed their offense before they turned eighteen years old. The express language of 28 U.S.C. § 2244(d)(1)(C) and its counterpart in 28 U.S.C. § 2255 ¶ (3) is limited "to decisions of the Supreme Court in which new rights are recognized and explicitly made retroactive to cases on collateral review." *Nichols v. United States*, 285 F.3d 445, 447 (6th Cir. 2002). Because petitioner can point to no Supreme Court decision which retroactively invalidates mandatory non-parolable life sentences for persons who committed their offense when they were nineteen years old, petitioner cannot delay the running of the limitations period. *Id.*

Moreover, assuming that *Miller* somehow invalidated petitioner's sentence, the instant petition is still untimely. The one-year limitation period for filing a petition for writ of habeas corpus or a motion to vacate sentence based on a right that was newly recognized by the Supreme Court runs from the date on which the

Supreme Court initially recognized the right asserted, not from the date on which the right asserted was made retroactively applicable. *See Dodd v. United States*, 545 U.S. 353, 358 (2005). Pursuant to § 2244(d)(1)(C), the one year statute of limitations began running from June 25, 2012, when the Supreme Court decided *Miller*, and not from the date of the decision in *Montgomery*, which held *Miller* to be retroactive. *See Malvo v. Mathena*, 259 F. Supp. 3d 321, 330 (D. Md. 2017). Petitioner therefore had until June 25, 2013 to timely file his habeas petition or to file his post-conviction motion for relief from judgment to toll the limitations period. Because petitioner did not file his post-conviction motion for relief from judgment until January 27, 2017, after the limitations period had expired, the instant petition is untimely.

The AEDPA's statute of limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). A habeas petitioner is entitled to equitable tolling "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way'" and prevented the timely filing of the habeas petition. *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Petitioner is not entitled to equitable tolling of the one year limitations period, because he failed to argue or show that the facts of case support equitable tolling. *See Giles v. Wolfenbarger*, 239 F. App'x. 145, 147 (6th Cir. 2007).

The one year statute of limitations may be equitably tolled if the petitioner can make a credible showing of actual innocence under the standard enunciated in *Schlup v. Delo*, 513 U.S. 298 (1995). *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). The Supreme Court cautioned that “tenable actual-innocence gateway pleas are rare[.]” *Id.* “[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* (quoting *Schlup*, 513 U.S., at 329). For an actual innocence exception to be credible under *Schlup*, such a claim requires a habeas petitioner to support his or her allegations of constitutional error “with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial.” *Schlup*, 513 U.S. at 324.

Petitioner’s case falls outside of the actual innocence tolling exception, because he presented no new, reliable evidence to establish that he was actually innocent of the crime charged. *See Ross v. Berghuis*, 417 F.3d 552, 556 (6th Cir. 2005).

III. CONCLUSION

Based on the foregoing analysis, the Court concludes that petitioner failed to file his habeas petition within the one-year limitations period established by 28 U.S.C. § 2244(d) and the statute of limitations precludes federal review of the

petition. Accordingly, the Court summarily dismisses with prejudice the petition for writ of habeas corpus.

Before petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(1)(a); Fed. R.App. P. 22(b). A certificate of appealability may issue "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 federal district court denies a habeas claim on procedural grounds without addressing the claim's merits, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed. In such a case, no appeal is warranted. *Id.* "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254; *See also Strayhorn v. Booker*, 718 F. Supp. 2d 846, 875 (E.D. Mich. 2010).

After conducting the required inquiry and for the reasons stated herein, the Court is satisfied that jurists of reason would not find the Court's procedural ruling debatable. No certificate of appealability is warranted in this case. Accordingly, the Court denies a certificate of appealability. The Court also denies petitioner leave to appeal *in forma pauperis*, because the appeal would be frivolous. *Allen v. Stovall*, 156 F. Supp. 2d 791, 798 (E.D. Mich. 2001).

IV. ORDER

Accordingly, the Court **SUMMARILY DENIES WITH PREJUDICE** the petition for a writ of habeas corpus. The Court further **DENIES** a certificate of appealability and leave to appeal *in forma pauperis*.

SO ORDERED.

Dated: January 16, 2020

s/Paul D. Borman

Paul D. Borman
United States District Judge