

No. 20-3205

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

Jun 29, 2020

DEBORAH S. HUNT, Clerk

DAVID BOYLE,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

ORDER

Before: MURPHY, Circuit Judge.

David Boyle, a pro se Ohio prisoner, appeals the judgment of the district court denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Boyle has filed an application for a certificate of appealability (“COA”) in this court. *See* Fed. R. App. P. 22(b)(1). He also moves to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

In 2013, Boyle was charged with sixteen counts of raping his daughter. *State v. Boyle*, No. 2013-CA-43, 2014 WL 1338699 (Ohio Ct. App. Mar. 28, 2014). Boyle subsequently agreed to plead guilty to six counts in exchange for the dismissal of the ten remaining counts. *Id.* The trial court imposed a term of imprisonment of ten years on each of the six counts, with the sentences for four counts to be served consecutively and the sentences for the remaining two to be served concurrently with the other counts, resulting in a total term of forty years in prison. *Id.*

Boyle appealed. The Ohio Court of Appeals allowed counsel to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirmed the trial court’s judgment on March 28, 2014. *Boyle*, 2014 WL 1338699, at \*3. Boyle did not appeal to the Ohio Supreme Court.

In 2018, Boyle filed a “Motion to Dismiss Defective Indictment” in the trial court, asserting that the indictment violated his right to due process because it contained undifferentiated counts of rape that failed to sufficiently describe the charges and prevented him from preparing a defense.

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The trial court denied the motion, finding that Boyle waived any error in the indictment by pleading guilty. The trial court also noted that, under Ohio law, the sufficiency of an indictment must be raised on direct appeal and not in a collateral attack. Because Boyle did not raise the claim on direct appeal, it was also barred by res judicata. The Ohio Court of Appeals affirmed. *State v. Boyle*, No. 2018-CA-12, 2018 WL 3954272 (Ohio Ct. App. Aug. 17, 2018). On November 7, 2018, the Ohio Supreme Court declined to review Boyle's appeal. *State v. Boyle*, 111 N.E.3d 21 (Ohio 2018).

Boyle filed his habeas petition in the district court on October 1, 2019, alleging that his indictment was defective due to multiplicity. A magistrate judge reviewed Boyle's petition and recommended that it be dismissed under Rule 4 of the Rules Governing § 2254 Cases because it was barred by the one-year habeas statute of limitations. Boyle filed objections, asserting that his petition was timely because he was not challenging his 2014 appeal, but rather the denied motion to dismiss the indictment that became final in 2018. The district court recommitted these objections to the magistrate judge, who issued a supplemental report that again recommended dismissal because Boyle's collateral attack on his indictment—filed after the one-year statute of limitations for federal habeas petitions had expired—did not re-start the limitations period.

Boyle filed objections to the supplemental report and recommendation, too, arguing that because the Ohio courts "allowed the full exercise of [briefing] and rebuttal from both sides," it therefore "re-opened [Boyle]'s ability to litigate his claim[.]" He asserted that his case was like *Jimenez v. Quarterman*, 555 U.S. 113 (2009), in which the state courts had allowed the defendant to file a delayed direct appeal and the Supreme Court held that this reopening of Jimenez's direct appeal had "reset" the habeas limitations period.

The district court again recommitted these objections to the magistrate judge, who issued a second supplemental report and recommendation. The magistrate judge explained that Boyle's *unsuccessful* motion to dismiss the indictment did not reopen his judgment of conviction the way that Jimenez's *successful* motion for a delayed direct appeal did. So the magistrate judge again recommended that Boyle's petition be dismissed as untimely.

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Because he did not do so, the Court of Appeals judgment became final forty-five days later on May 12, 2014. The one-year habeas limitations period then began to run and expired one year later on May 12, 2015. *See* 28 U.S.C. § 2244(d)(1)(A). Boyle's petition, filed in October 2019, was filed long after the limitations period expired and was thus untimely. Boyle's 2018 motion to dismiss the indictment does not change things, as it was filed after the one-year limitations period had expired. Once that period has expired, state collateral-review proceedings cannot "restart the clock." *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) (citation omitted).

In his COA application, Boyle asserts the decision of the Ohio courts to hear his motion to dismiss the indictment was the legal equivalent of the Texas state court allowing an out-of-time direct appeal in *Jimenez*. In *Jimenez*, the Texas courts allowed Jimenez to file an out-of-time appeal but ultimately affirmed his conviction and sentence and denied him post-conviction relief. 555 U.S. at 116. Jimenez then filed a § 2254 petition, which the district court determined was untimely under § 2244(d)(1)(A) because it was not filed within one year of the time when his original appeal was dismissed by the state courts. *Id.* at 116-18. The Supreme Court ultimately reversed, finding that Jimenez's direct review did not become final until his delayed appeal was resolved and the time for seeking certiorari review in the Supreme Court expired because the order granting the out-of-time appeal restored the pendency of his direct appeal. *Id.* at 120-21.

The Supreme Court made clear, however, that its holding was "narrow" and applied only "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief[.]" *Id.* at 121. These circumstances are not present in Boyle's case; Boyle was *not* granted leave to file an out-of-time direct appeal. Instead, Boyle can point to only the state collateral-review proceedings that he initiated years after his one-year habeas limitations period had expired. As a result, reasonable jurists would not debate that Boyle's petition is time-barred. Further, although the habeas limitations period is subject to equitable tolling, *Holland v. Florida*, 560 U.S. 631, 649 (2010), Boyle has not argued that he is entitled to equitable tolling. Nor has he made an assertion of actual innocence, which can in some circumstances justify equitable tolling. *See Souter v. Jones*, 395

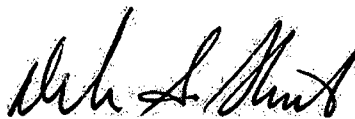
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F.3d 577, 588 (6th Cir. 2005); *see also* *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013). As a result, his claims do not deserve encouragement to proceed further.

Boyle's application for a COA is **DENIED**. His motion to proceed in forma pauperis on appeal is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

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Deborah S. Hunt, Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
DIVISION AT DAYTON**

DAVID BOYLE,

Petitioner,

: Case No. 3:19-cv-312

- vs -

District Judge Thomas M. Rose  
Magistrate Judge Michael R. Merz

Warden, Chillicothe Correctional  
Institution,

Respondent.

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**REPORT AND RECOMMENDATIONS**

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This is a habeas corpus case brought *pro se* by petitioner David Boyle to obtain relief from his conviction for six counts of rape in the Common Pleas Court of Greene County and his consequent sentence of forty years imprisonment. The case has been assigned to District Judge Thomas M. Rose and referred to the undersigned by virtue of General Order Day 13-01.

Under Rule 4 of the Rules Governing § 2254 Cases, the clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

The Petition avers that Boyle was sentenced on August 8, 2013 (ECF No. 1, PageID 1, ¶ 2(a)). He then appealed to the Ohio Court of Appeals for the Second District which affirmed his conviction and sentence. *State v. Boyle*, 2014-Ohio-1271 (2<sup>nd</sup> Dist. Mar. 28, 2014). Boyle did not

appeal to the Supreme Court of Ohio (Petition, ECF No. 1, 2, ¶ 9(g)). On January 24, 2018, Boyle filed a motion to dismiss the indictment on grounds of multiplicity. *Id.* at ¶ 11 which was denied. He claims to have subsequent matters pending in both the Green County Court of Common Pleas and the Second District Court of Appeals, but does not provide case numbers or any other description. *Id.* at ¶ 15, PageID 12.

## **Analysis**

28 U.S.C. § 2244(d), the habeas corpus statute of limitations, 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) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

According to his Petition, Boyle's convictions were affirmed in the Second District Court of Appeals on March 28, 2014. Under the Rules of the Ohio Supreme Court he had forty-five days from that date or until May 12, 2014, to file in that court. Since he did not do so, his conviction became final for purposes of § 2244(d) on May 12, 2014, and the statute began to run from that date, expiring May 13, 2015. According to his Petition, Boyle did nothing before that date to collaterally attack his conviction and thereby toll the statute of limitations. The statute thus expired May 13, 2015, and the Petition, filed October 1, 2019, is more than four years too late.

A district court may dismiss a habeas petition *sua sponte* on limitations grounds when conducting an initial review under Rule 4 of the Rules Governing § 2254 Cases. *Day v. McDonough*, 547 U.S. 198 (2006)(upholding *sua sponte* raising of defense even after answer which did not raise it); *Scott v. Collins*, 286 F.3d 923 (6<sup>th</sup> Cir. 2002). However, before doing so it must give the Petitioner notice and an opportunity to respond. *Shelton v. United States*, 800 F.3d 292 (6<sup>th</sup> Cir. 2015). This Report is subject to review by District Judge Rose. If Petitioner has any argument as to why the statute of limitations does not bar his Petition, he must raise it in any objections to this Report.

## **Conclusion**

Based on the foregoing analysis, it is respectfully recommended that the Petition herein be dismissed with prejudice as barred by the statute of limitations. 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 1, 2019.

s/ *Michael R. Merz*  
United States Magistrate Judge

### NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by mail. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

**David Boyle,**

*Petitioner,*

**v.**

**Case No. 3:19-cv-312  
Judge Thomas M. Rose**

**Warden, Chilicothe Correctional Institution,**

*Respondent.*

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**DECISION AND ENTRY ADOPTING SECOND SUPPLEMENTAL REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE MERZ (ECF 8), SUPPLEMENTAL REPORT AND RECOMMENDATIONS (ECF 5), AND REPORT AND RECOMMENDATIONS (ECF 2), AND OVERRULING PETITIONER'S OBJECTIONS TO SECOND SUPPLEMENTAL REPORT AND RECOMMENDATIONS (ECF 9), PETITIONER'S OBJECTIONS TO SUPPLEMENTAL REPORT AND RECOMMENDATIONS (ECF 6), AND PETITIONER'S OBJECTIONS TO REPORT AND RECOMMENDATIONS (ECF 3), DENYING PETITION FOR WRIT OF HABEAS CORPUS, (ECF 1), AND TERMINATING THE INSTANT CASE.**

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Pending before the Court are Petitioner's Objections to Second Supplemental Report and Recommendations (ECF 9), Petitioner's Objections to Supplemental Report and Recommendations (ECF 6), and Objection to Magistrate's Report and Recommendations. (ECF 3).

Magistrate Judge Michael R. Merz's Report and Recommendations (ECF 2), Supplemental Report and Recommendations (ECF 5), and Second Supplemental Report and Recommendations (ECF 8), all recommend dismissing Petitioner's Petition for Writ of Habeas Corpus, (ECF 1), and

denying permission to proceed *in forma pauperis*.

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court has made a *de novo* review of the record in this case. Upon said review, the Court finds that Petitioner's objections, (ECF 3, 6, 9), to the Magistrate Judge's Report and Recommendations, (ECF 2, 5, 8), are not well taken and they are hereby **OVERRULED**. The Magistrate Judge's Report and Recommendations, (ECF 2, 5, 8), are **ADOPTED**. Wherefore, the Court **DISMISSES** the Petition (ECF 1) **WITH PREJUDICE**. Because reasonable jurists would not disagree with this conclusion, Petitioner is denied a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and therefore Petitioner should not be permitted to proceed *in forma pauperis*. The Clerk is **ORDERED** to terminate the instant case.

**DONE** and **ORDERED** this Tuesday, January 14, 2020.

s/Thomas M. Rose

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THOMAS M. ROSE  
UNITED STATES DISTRICT JUDGE