No. 20-1037

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



HENRY T. LIGGINS,

Petitioner-Appellant,

v.

BOB VASHAW, Warden,

Respondent-Appellee.

ORDER

Before: SUTTON, Circuit Judge.

Henry T. Liggins, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Liggins has filed an application for a certificate of appealability, a motion to proceed in forma pauperis, three memoranda in support of his application, and a motion for discovery.

In March 1997, Liggins was sentenced to 5 to 15 years of imprisonment after pleading guilty to second-degree criminal sexual conduct. The Michigan Court of Appeals denied his delayed application for leave to appeal, and the Michigan Supreme Court denied him leave to appeal. *People v. Liggins*, 590 N.W.2d 68 (Mich. 1999) (table). In July 2019, Liggins filed a § 2254 petition, arguing that his guilty plea was void because the prosecutor did not charge him with fourth-degree criminal sexual conduct. The district court determined that the § 2254 petition was untimely, that Liggins was not entitled to equitable tolling, and that he did not make a viable claim of actual innocence. Accordingly, the district court denied the § 2254 petition and declined to issue a certificate of appealability.

A certificate of appealability 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 when the district court has denied a § 2254 petition on procedural grounds, a petitioner must show

"that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations for filing a federal habeas petition. 28 U.S.C. § 2244(d)(1). Generally, a habeas petition must be filed within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Liggins's conviction became final on May 26, 1999, ninety days after the Michigan Supreme Court denied his application for leave to appeal on February 25, 1999. *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). Therefore, under § 2244(d)(1)(A), the statute of limitations expired on May 27, 2000. Liggins is not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) because he did not file a motion for collateral review until 2011, long after the statute of limitations had already expired. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Because the § 2254 petition was not filed prior to May 27, 2000, reasonable jurists would not debate the district court's determination that the petition was time-barred under § 2244(d)(1)(A).

Section 2254's statute of limitations may be equitably tolled when a petitioner shows "that he has been pursuing his rights diligently" and "that some extraordinary circumstance stood in his way and prevented timely filing." *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Even if he were able to show that extraordinary circumstances prevented the timely filing of his habeas petition, Liggins has failed to demonstrate that he pursued his rights diligently because he waited almost twenty years after his conviction became final before filing the § 2254 petition. *See Jurado v. Burt*, 337 F.3d 638, 644 (6th Cir. 2003). Accordingly, reasonable jurists would not debate the district court's determination that Liggins was not entitled to equitable tolling.

In extraordinary cases, a colorable claim of actual innocence may be used as a gateway to review an otherwise barred constitutional claim. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

In order to show actual innocence based upon new evidence, a petitioner must establish 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 v. Delo*, 513 U.S. 298, 329 (1995)). Because Liggins offers no newly discovered evidence to support his assertion that he is actually innocent, reasonable jurists would not debate the district court's determination that Liggins did not make a credible showing of actual innocence.

Based upon the foregoing, the court **DENIES** the application for a certificate of appealability and **DENIES** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY T. LIGGINS,

Petitioner,

v.

GREGORY SKIPPER,

Respondent.
_____/

Case No. 1:19-cv-592

Honorable Robert J. Jonker

**REPORT AND RECOMMENDATION**

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

undertaking the review required by Rule 4, I conclude that the petition is barred by the one-year statute of limitations.

## Discussion

### I. Factual Allegations

Petitioner Henry T. Liggins is incarcerated with the Michigan Department of Corrections at the Michigan Reformatory (RMI) in Ionia County, Michigan. According to the Michigan Department of Corrections Offender Tracking Information System (OTIS), Petitioner is serving consecutive sentences: a sentence of five to fifteen years for second-degree criminal sexual conduct (CSC-II) imposed by the Wayne County Circuit Court on March 7, 1997, following Petitioner's guilty plea; and, a sentence of seven years, six months to fifteen years for CSC-II imposed by the Chippewa County Circuit Court on May 26, 1998, following Petitioner's guilty plea. *See* https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=147829 (last visited November 18, 2019).

Petitioner has twice filed habeas petitions challenging the conviction and sentence imposed by the Chippewa County Circuit Court. Both petitions were dismissed as untimely. *See Liggins v. Bergh*, No. 2:08-cv-225 (W.D. Mich. June 18, 2009); *Liggins v. Bauman*, No. 2:14-cv-120 (W.D. Mich. Dec. 11, 2014).

Petitioner has never challenged his Wayne County Circuit Court conviction and sentence by way of a federal habeas petition. He filed a delayed application for leave to appeal in the Michigan Court of Appeals. That application was denied by

order entered June 5, 1998.[1] He then sought leave to appeal in the Michigan Supreme Court. That court denied leave by order entered February 25, 1999. *Id.* Petitioner then waited more than twenty years before filing his habeas petition on July 18, 2019.

## II. Statute of Limitations

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

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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[1] *See* https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=112485&CourtType_CaseNumber=1 (last visited November 18, 2019).

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

In most cases, § 2244(d)(1)(A) provides the operative date from which the one-year limitations period is measured. Under that provision, the one-year limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Petitioner appealed the judgment of conviction to the Michigan Court of Appeals and the Michigan Supreme Court. The Michigan Supreme Court denied his application on February 25, 1999. Petitioner did not petition for certiorari to the United States Supreme Court. (Am. Pet., ECF No. 5, PageID.43.) The one-year limitations period, however, did not begin to run until the ninety-day period in which Petitioner could have sought review in the United States Supreme Court had expired. *See Lawrence v. Florida*, 549 U.S. 327, 332-33 (2007); *Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The ninety-day period expired on May 26, 1999.

Petitioner had one year, until May 26, 2000, to file his habeas application. Petitioner filed his application on July 18, 2019. Obviously, he filed more than one year after the period of limitations began to run. Thus, absent tolling, his application is time-barred.

The running of the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (limiting the tolling provision to only State, and

not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining "properly filed"). Petitioner suggests that he pursued collateral relief in the state courts; but he declines to identify when or how long his efforts persisted. Instead, he invites the Court to review the case filings in the state trial court, the court of appeals, and the supreme court. The Court has done so.

Based on the dockets of the Wayne County Circuit Court,[2] and the appellate courts,[3] there are significant gaps when it is apparent Petitioner was not pursuing any collateral challenges to the Wayne County conviction. Those gaps often coincide with periods of time Petitioner was pursuing his direct appeal and collateral attacks on the Chippewa County conviction. Those gaps total years over the two decades that have passed since Petitioner was sentenced and foreclose any possibility that tolling by virtue of collateral attacks might suffice to render Petitioner's present petition timely.

The one-year limitations period applicable to § 2254 is also subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 645 (2010); *Akrawi v. Booker*, 572 F.3d 252, 260 (6th Cir. 2009); *Keenan v. Bagley*, 400 F.3d 417, 420 (6th Cir. 2005). A petitioner bears the burden of showing that he is entitled to equitable tolling. *See Keenan*, 400 F.3d at 420; *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). The Sixth Circuit repeatedly has cautioned that equitable tolling should be applied "sparingly"

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[2] *See* https://cmspublic.3rdcc.org/CaseDetail.aspx?CaseID=239335 (last visited October 13, 2019)

[3] *See* https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx (search "Liggins Henry," last visited Oct. 13, 2019)

by this Court. *See, e.g., Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011); *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *Sherwood v. Prelesnik*, 579 F.3d 581, 588 (6th Cir. 2009). A petitioner seeking equitable tolling of the habeas statute of limitations has the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland*, 560 U.S. at 649 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Lawrence v. Florida*, 549 U.S. 327, 335 (2007); *Hall*, 662 F.3d at 750; *Akrawi*, 572 F.3d at 260.

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

In *McQuiggin v. Perkins*, 569 U.S. 383, 391-393 (2013), the Supreme Court held that a habeas petitioner who can show actual innocence under the rigorous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), is excused from the procedural bar of the statute of limitations under the miscarriage-of-justice exception. In order to

make a showing of actual innocence under *Schlup*, a Petitioner must present new evidence showing that "'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 329 (addressing actual innocence as an exception to procedural default)). Because actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in determining the credibility of the evidence of actual innocence. *Id.* at 399-400.

In the instant case, although Petitioner may baldly claim that he is actually innocent, he proffers no new evidence of his innocence, much less evidence that makes it more likely than not that no reasonable jury would have convicted him. *Schlup*, 513 U.S. at 329. Because Petitioner has wholly failed to provide evidence of his actual innocence, he is not excused from the statute of limitations under 28 U.S.C. § 2244(d)(1). His habeas petition therefore is time-barred.

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

### III. Certificate of appealability

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

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

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

Moreover, although I conclude that Petitioner has failed to demonstrate that he is in custody in violation of the constitution and has failed to make a substantial showing of a denial of a constitutional right, I would not conclude that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

**Recommended Disposition**

For the foregoing reasons, I recommend that the habeas corpus petition be denied because it is barred by the one-year statute of limitations. I further recommend that a certificate of appealability be denied. Finally, I recommend that the Court not certify that an appeal would not be taken in good faith.

Dated: November 18, 2019

/s/ Phillip J. Green
Phillip J. Green
United States Magistrate Judge

**NOTICE TO PARTIES**

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY T. LIGGINS,

Petitioner,

v.

GREGORY SKIPPER,

Respondent.
_____/

File no: 1:19-CV-592

HON. ROBERT J. JONKER

**ORDER APPROVING MAGISTRATE'S REPORT AND RECOMMENDATION**

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on November 18, 2019 (ECF No. 9). The Report and Recommendation was duly served on the parties. No objections have been filed under 28 U.S.C. § 636(b)(1)(C).

**ACCORDINGLY, IT IS ORDERED** that the Report and Recommendation of the Magistrate Judge (ECF No. 9) is approved and adopted as the opinion of the Court.

**IT IS FURTHER ORDERED** that Petitioner's habeas petition is **DENIED**.

**IT IS FURTHER ORDERED** that this matter is **TERMINATED**.

The Court discerns no good-faith basis for appeal of this matter. *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997); 28 U.S.C. § 1915(a)(3).

Date: December 17, 2019

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
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HENRY T. LIGGINS,

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_____/

File no: 1:19-CV-592

HON. ROBERT J. JONKER

**JUDGMENT**

**JUDGMENT** is entered in favor of Respondent.

Date: December 17, 2019

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE