

No. 20-3399

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES SCOTT, JR.,
Petitioner-Appellant,
v.
NORM ROBINSON, Warden,
Respondent-Appellee.

FILED
Jul 31, 2020
DEBORAH S. HUNT, Clerk

O R D E R

Before: WHITE, Circuit Judge.

James Scott, Jr., a pro se Ohio prisoner, appeals from the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This court construes Scott's notice of appeal as an application for a certificate of appealability ("COA"). Scott also requests permission to proceed in forma pauperis ("IFP").

In 2005, an Ohio jury convicted Scott of seven counts of trafficking in cocaine and two counts of possessing cocaine. Prior to sentencing, Scott absconded, and he was not apprehended until seven years later. In 2012, the trial court sentenced Scott to eighteen years of imprisonment. On direct appeal, the Ohio Court of Appeals affirmed his convictions and sentence. *State v. Scott*, No. CA2012-06-052, 2013 WL 3368856 (Ohio Ct. App. July 1, 2013). Scott did not appeal this decision to the Ohio Supreme Court.

In 2017, Scott filed a post-conviction motion, alleging errors in his sentencing, and the trial court denied his motion. The Ohio Court of Appeals affirmed this decision, *State v. Scott*, No. CA2017-10-152, 2018 WL 3025800 (Ohio Ct. App. June 18, 2018), and the Ohio Supreme Court denied further review.

On December 24, 2018, Scott filed his § 2254 petition, alleging several violations of his constitutional rights. Over Scott's objections, the district court adopted the magistrate judge's

report and recommendation, *Scott v. Warden, London Corr. Inst.*, No. 1:19-cv-22, 2020 WL 134577 (S.D. Ohio Jan. 13, 2020), and dismissed the petition as untimely. *Scott v. Warden, London Corr. Inst.*, No. 1:19-cv-22, 2020 WL 1428898 (S.D. Ohio Mar. 24, 2020). Additionally, the district court denied Scott a COA to appeal its decision.

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists “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.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003)); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a claim is denied on procedural grounds, the 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*, 529 U.S. at 484.

Reasonable jurists could not disagree with the district court’s conclusion that Scott’s § 2254 petition was untimely. A one-year limitations period applies to federal habeas corpus petitions filed by state prisoners. 28 U.S.C. § 2244(d)(1); *Holbrook v. Curtin*, 833 F.3d 612, 615 (6th Cir. 2016). This limitations period runs from the latest of four dates—and Scott argues that the relevant one is “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” *See* § 2244(d)(1)(D). In deciding whether the requirements of this provision were met, the court determines when a duly diligent person in the petitioner’s circumstances should have discovered the claim’s factual predicate. *See Smith v. Meko*, 709 F. App’x 341, 344 (6th Cir. 2017); *DiCenzi v. Rose*, 452 F.3d 465, 470 (6th Cir. 2006). The operative question in this inquiry is when the petitioner became aware of the vital facts for the claim, not when he understood their legal significance. *Smith*, 709 F. App’x at 344.

As the basis for his § 2254 claims, Scott argues that the trial court failed to make required findings before imposing consecutive sentences and that his sentence exceeds the maximum term authorized by law. Scott maintains that he did not discover the factual predicate for these claims until 2017 and that he filed his § 2254 petition shortly thereafter. However, the factual predicate for his claims was available to Scott at the time of his sentencing in 2012. Although Scott may not have understood the legal significance of those facts until 2017, his belated discovery at that time did not delay the running of the statute of limitations.

Since the provisions of § 2244(d)(1)(D) do not apply to Scott's petition, the relevant limitations period for the petition is the date on which his criminal judgment became final by the conclusion of direct review of his convictions and sentence or the expiration of the time for seeking such review. *See* § 2244(d)(1)(A); *Holbrook*, 833 F.3d at 615. This limitations period is tolled 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." *See* § 2244(d)(2).

Scott did not comply with the § 2244(d) statute of limitations for filing his § 2254 petition. As noted above, Scott pursued direct review of his convictions and sentence with the Ohio Court of Appeals, and that court affirmed the trial court's judgment on July 1, 2013. Scott had 45 days, until August 15, 2013, to file a timely appeal of this decision to the Ohio Supreme Court. *See* Ohio Sup. Ct. Prac. R. 7.01(A)(1)(a)(1). It is undisputed that Scott did not appeal to the Ohio Supreme Court during that period. Therefore, the statute of limitations began to run on August 16, 2013.

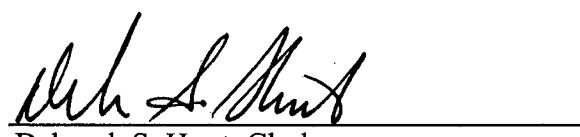
With no applicable period of tolling, the statutory period for Scott to timely file a § 2254 petition expired on August 16, 2014. While Scott subsequently filed a state post-conviction motion in 2017, that motion did not toll the running of the statute of limitations because the applicable one-year period under § 2244(d)(1) already had expired by that time. *See Parker v. Renico*, 105 F. App'x 16, 18 (6th Cir. 2004) (citing *McClelland v. Sherman*, 329 F.3d 490, 494 (6th Cir. 2003)). Scott did not submit his § 2254 petition for filing until December 24, 2018, well after the expiration of the § 2244(d)(1) statute of limitations.

Although he did not timely file his § 2254 petition, Scott argues that the district court should have equitably tolled the applicable limitations period. The § 2244(d)(1) statute of limitations is not a jurisdictional bar and, therefore, is subject to equitable tolling where a habeas petitioner “shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010). This court applies equitable tolling sparingly, and Scott bears the burden of proving that he is entitled to it. *See Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). Scott has not met this burden. Scott argues that he has diligently pursued his rights since he learned of his potential claim. Even accepting Scott’s argument as true, he cites to no extraordinary circumstance which prevented him from pursuing his claim in a timely manner. Scott’s “pro se status and lack of knowledge of the law are not sufficient to constitute an extraordinary circumstance and to excuse his late filing.” *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012).

Lastly, Scott asserts that the limitations period should be tolled because he is actually innocent. If proven, actual innocence may provide a basis for applying equitable tolling. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). A habeas petitioner meets the threshold requirement for actual innocence only if he demonstrates that, in the light of new evidence, no reasonable juror would have voted to find him guilty. *Id.* However, Scott has not made a substantial showing of actual innocence. He does not rely on any new evidence, and he fails to argue that he is not guilty of the underlying offense. Rather, he merely repeats his claims about his allegedly inappropriate sentence. Such an argument does not demonstrate his actual innocence.

Accordingly, Scott’s COA application is **DENIED**. His request to proceed IFP is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: May 19, 2020

Mr. James Scott Jr.
London Correctional Institution
P.O. Box 69
London, OH 43140

Re: Case No. 20-3399, *James Scott, Jr. v. Norm Robinson*
Originating Case No. : 1:19-cv-00022

Dear Mr. Scott,

The district court has ruled on your motion to reconsider, this court now has jurisdiction to review your appeal. This appeal has been docketed as case number **20-3399** with the caption that is enclosed on a separate page. The appellate case number and caption must appear on all filings submitted to the Court.

The district court has denied or denied in part your motion for pauper status. You have until **June 18, 2020** to either pay the \$505.00 appellate filing fee (or the amount stated by the district court) or file a motion for pauper status on appeal. If you choose to pay the fee, it must be submitted to the U.S. District Court. If you choose to request leave to proceed on appeal in forma pauperis, a motion and an accompanying financial affidavit must be submitted to this court, the U.S. Court of Appeals for the Sixth Circuit. **Failure to do one or the other may result in the dismissal of the appeal without further notice.**

For this appeal to proceed, the district court or this court must issue a certificate of appealability (COA) stating at least one issue for review. If the district court has denied the COA as to some or all issues, this court will review all issues rejected by the district court. You do not need to take any further action for this review to occur. However, if you choose to do so, you may submit **one signed** motion to grant a COA with this court, stating the issues for review and why this court should review them. If that is your choice, please do so as soon as possible. 6th Cir. R. 22(a).

This court's review may take several months. If both the district court and this court deny a certificate of appealability as to all issues, the appeal cannot proceed and will be closed. 28 U.S.C. § 2253(c).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES SCOTT JR.,

Petitioner,

v.

WARDEN, LONDON
CORRECTIONAL INSTITUTION,

Respondent.

Case No. 1:19-cv-22
JUDGE DOUGLAS R. COLE
Magistrate Judge Litkovitz

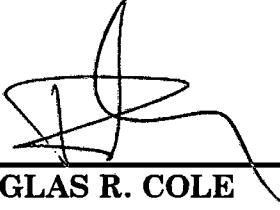
ORDER

This action comes before the Court on Petitioner James Scott Jr.'s Motion for Certificate of Appealability and Request for Leave to Proceed *In Forma Pauperis* on Appeal. (Doc. 25). On March 24, 2020, this Court issued an Order (Doc. 17) that adopted Magistrate Judge Litkovitz's Report and Recommendation (Doc. 14) suggesting that the Court deny Scott's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. (Doc. 2). In that Order, the Court denied Scott a Certificate of Appealability, certified that an appeal would not be taken in good faith, and denied Scott leave to proceed on appeal *in forma pauperis* upon a showing of financial necessity. (Doc. 17 at #701). For the reasons that the Court stated in its previous Order (*see id.*), which denied Scott the same relief that he seeks again here, the Court **DENIES** Scott's Motion. (Doc. 25). Scott remains free, however, to request *in forma pauperis* status and the issuance of a certificate of appealability from the United States Court of Appeals for the Sixth Circuit.

SO ORDERED.

June 24, 2020

DATE


DOUGLAS R. COLE
UNITED STATES DISTRICT JUDGE

Orders on Motions

1:19-cv-00022-DRC-KLL Scott v.

Warden, London Correctional

Institution CASE CLOSED on

03/24/2020

APPEAL,CASREF,HABEAS,LC3,PRO
SE

U.S. District Court

Southern District of Ohio

Notice of Electronic Filing

The following transaction was entered on 6/24/2020 at 10:38 AM EDT and filed on 6/24/2020

Case Name: Scott v. Warden, London Correctional Institution

Case Number: 1:19-cv-00022-DRC-KLL

Filer:

WARNING: CASE CLOSED on 03/24/2020

Document Number: 26

Docket Text:

ORDER denying [25] Petitioner James Scott Jr.'s Motion for Certificate of Appealability and Request for Leave to Proceed In Forma Pauperis on Appeal. Signed by Judge Douglas R. Cole on 6/24/20. (sct)(This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.)

1:19-cv-00022-DRC-KLL Notice has been electronically mailed to:

Hilda Rosenberg hilda.rosenberg@ohioattorneygeneral.gov, Habeas.DocketClerk@ohioattorneygeneral.gov, brian.higgins@ohioattorneygeneral.gov, christina.sharp@ohioattorneygeneral.gov, sandra.friedman@ohioattorneygeneral.gov

1:19-cv-00022-DRC-KLL Notice has been delivered by other means to:

James Scott, Jr
665-564
LONDON CORRECTIONAL INSTITUTION
P.O. Box 69
1580 State Route 56
London, OH 43140

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1040326259 [Date=6/24/2020] [FileNumber=7154525-0] [325eb4ad4881049ddeadaa60373fb19bc7f8af6c7e9fa970601a00c0bb400a53bba869001555f92f283a449ccf87cc4a14f901dd37343ac0c17d613008560838]]

No. 20-3809

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES SCOTT, JR.,

Petitioner-Appellant,

v.

NORM ROBINSON, Warden,

Respondent-Appellee.

FILED
Sep 04, 2020
DEBORAH S. HUNT, Clerk

ORDER

Before: SILER, MOORE, and BUSH, Circuit Judges.

This matter is before the court upon initial consideration to determine whether this appeal was taken from an appealable order.

On March 24, 2020, the district court entered its judgment dismissing James Scott, Jr.'s 28 U.S.C. § 2254 petition for a writ of habeas corpus. Scott filed a timely notice of appeal from that judgment (appeal No. 20-3399). On June 22, 2020, Scott filed a motion for a certificate of appealability, and the district court denied that motion on June 24, 2020. Scott then filed another notice of appeal, dated July 20, 2020, and docketed in the district court on July 27, 2020. That appeal was docketed in this court as appeal No. 20-3809, the current appeal. In the second notice of appeal, Scott states that he is appealing "the final judgment . . . denying the petition for a writ of habeas corpus entered in this action on the 24th day of June, 2020." The only ruling on June 24, 2020, is the order denying the motion for a certificate of appealability.

This court lacks jurisdiction over appeal No. 20-3809 if Scott is attempting to appeal the order denying his motion for a certificate of appealability. An order denying a motion for a certificate of appealability is not appealable. *Sims v. United States*, 244 F.3d 509, 509 (6th Cir. 2001). "The proper procedure when a district court denies a certificate of appealability is for the

petitioner to file a motion for a certificate of appealability before the appellate court in the appeal from the judgment denying the motion to vacate." *Id.* (citing Fed. R. App. P. 22(b)(1)). This court will decide in appeal No. 20-3399 whether it will grant a certificate of appealability. *See* Fed. R. App. P. 22(b). If Scott is attempting to appeal the judgment that dismissed his habeas corpus petition, this appeal is a duplicate of appeal No. 20-3399.

It is ordered that appeal No. 20-3809 is **DISMISSED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES SCOTT JR.,

Petitioner,

v.

Case No. 1:19-cv-22
JUDGE DOUGLAS R. COLE
Magistrate Judge Karen L. Litkovitz

**WARDEN, LONDON
CORRECTIONAL INSTITUTION,**

Respondent.

OPINION & ORDER

This cause comes before the Court on Petitioner James Scott Jr.'s Objections (Doc. 16) to the Magistrate Judge's Report and Recommendation ("R&R") (Doc. 14) suggesting the Court deny Scott's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus (Doc. 2) as time-barred under 28 U.S.C. § 2241(d)(1). For the reasons below, the Court **OVERRULES** Scott's Objections (Doc. 16), **ADOPTS** the Magistrate Judge's R&R (Doc. 14), and **DENIES** Scott's Section 2254 Petition (Doc. 2).

BACKGROUND

On February 25, 2005, a Warren County grand jury returned a nine-count indictment charging Scott with seven counts of cocaine trafficking and two counts of cocaine possession. (State Record, Ex. 1, Doc. 8, #37–52). Scott pled not guilty on all counts. (*Id.*, Ex. 2, #53).

Scott then proceeded to a jury trial. (*Id.*, Ex. 4, #72). After the jury began deliberating and before entering a verdict, Scott absconded. (Ex. 4, #72). The jury then found Scott guilty on all charges. (*Id.*, Ex. 3, #54–71).

Seven years later, authorities apprehended Scott and returned him to Warren County for sentencing for the cocaine possession and trafficking charges. (*Id.*, Ex. 5, #73–75). On May 30, 2012, the Warren County Court of Common Pleas sentenced Scott to 18 years of imprisonment. (*Id.*).

Two weeks later, on June 13, 2012, Scott (through new counsel) filed a notice of appeal to the Twelfth District Court of Appeals. (*Id.*, Ex. 6, #76–82). He raised three assignments of error:

1. Appellant's trial counsel was ineffective and appellant was prejudiced thereby.
2. The trial court erred in overruling appellant's motion for criminal rule 29 acquittal when venue was not established as to counts one (1) through five (5) of the indictment.
3. The trial court erred in imposing a sentence on count one (1) that exceeded the applicable sentencing range for the conviction.

(*Id.*, Ex. 7, #86).

On July 1, 2013, the Twelfth District overruled Scott's assignments of error and affirmed the judgment of the trial court. (*Id.*, Ex. 11, #160–84). Scott did not seek review by the Supreme Court of Ohio.

More than four years later, on August 2, 2017, Scott (on his own behalf) filed a “Motion to Correct Void Sentence and/or Judgment” in the Warren County Court of Common Pleas. (*Id.*, Ex. 12, #185–90). (The Magistrate Judge in his R&R concluded that this second round of state filings constituted Scott seeking post-conviction relief. Scott seems to agree with this characterization, as he refers to this August 2017 filing as proof that he diligently pursued relief in “State … Habeas Court.” (Scott Obj. at 7,

#686).) About a month later, on September 5, 2017, the Warren County Court denied Scott's motion for post-conviction relief, concluding that *res judicata* barred the legal issues he raised. (*Id.*, Ex. 14, #201). Fifty-three days later, on October 27, 2017, Scott filed a notice of appeal and a "Motion for Leave to File Delayed Appeal" to the Twelfth District Court on October 27, 2017. (*Id.*, Exs. 15–17, #202–09). The reason he sought leave to file this appeal as "delayed" was that his notice of appeal was outside the 30-day window that Ohio law provides for appealing final judgments. The appeals court, however, denied Scott's motion for leave on December 7, 2017, finding that, because the trial court clerk had never properly served Scott with the trial court's decision, Scott's appeal *was* timely and so Scott did not need leave to file a delayed appeal after all. (*Id.*, Ex. 18, #210).

Scott then filed his merit brief in his post-conviction proceedings with the Twelfth District, asserting a single assignment of error:

Trial court erred by failing to make the requisite statutory findings pursuant to [Ohio Revised Code §] 2929.14(C)(4), prior to imposing consecutive sentencing, violating appellant's right of due process of law, as guaranteed by the 5th and 14th Amendment[s], United States Constitution; Section 16, Article 1, Ohio Constitution.

(*Id.*, Ex. 19, #214).

On June 18, 2018, the Twelfth District overruled Scott's assignment of error and affirmed the Warren County Common Pleas Court's judgment. (*Id.*, Ex. 22, #238–43). Scott then asked the Twelfth District to reconsider its decision, which the court denied on September 12, 2018. (*Id.*, Exs. 23–25, #244–51).

Less than a month later, on October 5, 2018, Scott filed a *pro se* notice of appeal to the Supreme Court of Ohio. (*Id.*, Ex. 26, #252–53). In his memorandum in support of jurisdiction, Scott raised a single proposition of law, which mirrored the assignment of error that he had recently asserted in the Twelfth District (*Id.*, Ex. 27, #255). On December 12, 2018, the Supreme Court of Ohio declined to exercise jurisdiction over Scott’s case. (*Id.*, Ex. 29, #271).

Later that month, on December 24, 2018, Scott initiated this federal habeas action. He raises two grounds for relief:

GROUND ONE: Due Process, as guaranteed by the 5th and 14th Amendment[s], United States Constitution, violated; Sect. 16, Art. 1, Ohio violated, Trial Court’s failure to make the requisite statutory findings pursuant to [Ohio Revised Code §] 2929.14(C)(4), prior to imposing consecutive sentencing.

GROUND TWO: Due Process, as guaranteed by the 5th and 14th Amendment[s], United States Constitution violated; Sect. 16, Ar. 1, Ohio Constitution, Sentence exceeds term authorized by law.

(Scott’s Pet., Doc. 2, #6–7). After Respondent Warden of London Correctional Institution filed a Writ in Opposition to Scott’s Petition (Doc. 9), Scott filed a Reply (Doc. 12).

On January 13, 2020, the Magistrate Judge issued an R&R advising the Court to deny Scott’s Petition as untimely under 28 U.S.C. § 2244(d)(1) because: (1) Scott filed his Petition after the statute of limitations expired on August 16, 2014; and (2) no statutory or equitable tolling applies here. (R&R at 4–7, #668–71). Scott then timely filed an Objection. (Doc. 16).

LEGAL STANDARD

If a party objects to a report and recommendation within the allotted time, the district court must review *de novo* any portion of the magistrate judge's report "that has been properly objected to." Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Here, the petitioner is proceeding *pro se*. While a *pro se* litigant's pleadings are to be construed liberally and have been held to less stringent standards than formal pleadings filed by attorneys, *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), *pro se* litigants must still comply with the procedural rules that govern civil cases. *McNeil v. United States*, 508 U.S. 106, 113 (1993).

LAW & ANALYSIS

A. The Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that a one-year period of limitation applies to a petition for writ of habeas corpus filed "by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). The limitations period starts to run at the latest of four possible occurrences. *Id.* Here, the Magistrate Judge concluded that the first of the four events listed in the statute occurred last in this case, and thus was the event that triggered the limitations period. More specifically, that event is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). The Magistrate Judge concluded that this event occurred for Scott on August 15, 2013. That was when the 45-day period expired for Scott to seek review in the Ohio Supreme Court of the Twelfth District's July 1, 2013 judgment that had dismissed his appeal challenging his conviction and

sentence. (R&R at 5, #669). Thus, the statute of limitations for Scott to file his habeas petition began running on August 16, 2013, the next business day after the sentence became final. (*Id.* (citing Fed. R. Civ. P. 6(a); *Bronaugh v. Ohio*, 235 F.3d 280, 285 (6th Cir. 2000))). The limitations period thus expired one year later, on August 16, 2014.

Moreover, the Magistrate Judge specifically found that the fourth possible event listed in Section 2244(d)(1)—“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)—either did not occur at all or, alternatively, occurred before—i.e., not later than—the close of Scott’s direct review in state court on August 15, 2013, and thus was not the applicable triggering event. (*Id.*). In that regard, the Magistrate Judge concluded that Scott bases his habeas relief on alleged errors that occurred during sentencing, errors about which Scott was then aware. (R&R at 5, #669). The Magistrate Judge further explained that, even if Scott did not know the predicate facts regarding the alleged sentencing errors at the time of that proceeding, he would have discovered those facts before the close of his direct appeal had he exercised due diligence. (*Id.*).

In his objection to the Magistrate Judge’s R&R, Scott takes issue with the Magistrate Judge’s conclusion that the fourth statutory circumstance is not the relevant triggering event. First, Scott argues that he discovered the full nature of his claim’s factual predicate only on August 2, 2017, when he filed his Motion to Correct Void Sentence and/or Judgment in the Warren County Court of Common Pleas.

(Scott's Obj. at 7, #686). Second, he claims that the fourth circumstance applies because he exercised due diligence in seeking habeas relief in state and federal courts. Both objections lack merit.

Consider Scott's first objection: his claim that he discovered the full nature of his habeas Petition's factual predicate on August 2, 2017, the date when he applied for state post-conviction relief. While he asserts this is true, Scott does not proffer any specific facts that he discovered on or around that date. Rather, he focuses on alleged legal errors that the trial court committed when sentencing him in May 2012. For example, Scott discusses specific Ohio statutes, rules for criminal procedure, and case law, all of which pertain to sentencing. (Scott Obj. at 4–6, #683–85). In doing so, Scott essentially reiterates his legal arguments for habeas relief, which, the Court notes, mirror his first and second rounds of appellate review in the Ohio courts (as further evidenced by the state trial and intermediate appellate courts' conclusions that his post-conviction arguments were barred by *res judicata*). Since Scott has not proffered any newly discovered facts for the Court to analyze under Section 2244(d)(1)(D), the Court construes the factual predicate of Scott's habeas relief to include only his sentencing proceedings before the state trial court in May 2012. As those proceedings of course occurred before the state appellate court reviewed them and entered judgment, Section 2244(d)(1)(D) was not the last of the four statutory circumstances to occur. Rather, the first of those circumstances, i.e., the date when his sentence became final (August 15, 2013), was the last to take place. Thus, absent any tolling,

Scott's statute of limitations commenced on August 16, 2013, and expired on August 16, 2014.

B. The Equitable And Statutory Tolling Doctrines Do Not Apply Here.

In certain circumstances, statutory and equitable tolling apply to the AEDPA's limitations period. *Holland v. Florida*, 560 U.S. 631 (2010); 28 U.S.C. § 2244(d)(2). Of particular relevance here, under 28 U.S.C. § 2244(d)(2), the limitations period for filing a federal habeas petition is statutorily tolled during the pendency of a "properly filed application for State post-conviction relief or other collateral review." *Id.*

In the R&R, the Magistrate Judge concluded that Section 2244(d)(2) does not apply here because, although a properly filed application for state post-conviction relief may statutorily *toll* the limitations period, it can neither *revive* that period once it has already expired, nor otherwise *impact* the date when a petitioner's conviction became final under Section 2244(d)(1). (R&R at 5 n.2, #669 (citing *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003))). For the reasons discussed above, Scott's limitations period expired on August 16, 2014, and he filed his State application for post-conviction relief more than three years later. Thus, the Magistrate Judge found that tolling under Section 2244(d)(2) could not be of assistance to Scott.

Scott objects to the Magistrate Judge's conclusion. He claims that Section 2244(d)(2) does in fact apply because he timely filed his application for State post-conviction relief. (Scott Obj. at 9, #688). Even accepting that assertion as true, however, whether Scott properly filed that application on August 2, 2017 is of no consequence here. Rather, the issue is whether Scott properly filed his state

application before August 16, 2014—the date on which the limitations period for seeking federal habeas relief otherwise expired. As there is no dispute that he did not file his State application until August 2, 2017, Section 2244(d)(2) offers Scott no support for his statutory tolling argument here.

Nor, as the Magistrate Judge correctly concluded, does equitable tolling bridge that gap. (R&R at 7–8, #671–72). Equitable tolling of the AEDPA’s limitations period “allows courts to toll a statute of limitations when a litigant’s failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant’s control.” *Robertson v. Simpson*, 624 F.3d 781, 783 (6th Cir. 2010) (internal quotation marks omitted). Courts grant this remedy “sparingly.” *Id.* at 784. The party seeking equitable tolling bears the burden of proving that he is entitled to it. *Id.* To do so, a habeas petitioner must show that: (1) he has pursued his rights diligently, and (2) an extraordinary circumstance prevented timely filing. *Id.*

The Magistrate Judge determined that, because Scott waited more than five years after his conviction and sentence became final—from August 16, 2013 until December 24, 2018—to file his federal habeas petition, he cannot now claim to have diligently pursued his federal rights. (R&R at 8, #672 (citing *Vroman*, 346 F.3d at 605)). Thus, the Magistrate Judge concluded that Scott is not entitled to equitable tolling.

In his Objection, Scott disagrees but does not explain how or why the Court can or should overlook his five-year delay in filing the federal habeas petition. He bears the burden of showing that he diligently pursued his rights, and yet has offered

no justification for missing his federal petition deadline by more than five years. Accordingly, the Court concludes that Scott has not established that he is entitled to equitable tolling.

The deadline for Scott to file his Petition was August 16, 2014. He instead filed on December 28, 2019. Thus, the Petition (Doc. 2) is time-barred.

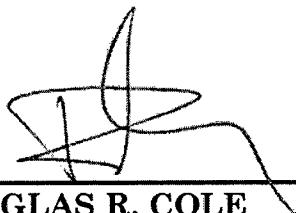
CONCLUSION

For the reasons above, the Court **OVERRULES** Scott's Objections (Doc. 16), **ADOPTS** the Magistrate Judge's R&R (Doc. 14), and **DENIES WITH PREJUDICE** Scott's Petition (Doc. 2). Moreover, as the Magistrate Judge further recommended, the Court **DENIES** Scott a certificate of appealability with respect to any claims Scott alleges in his Petition since "jurists of reason" would not disagree with the Court's procedural ruling here. Finally, the Court **CERTIFIES** that an appeal of this Order would not be taken in good faith, and thus, **DENIES** Scott leave to appeal *in forma pauperis* upon a showing of financial necessity.

SO ORDERED.

March 24, 2020

DATE



DOUGLAS R. COLE
UNITED STATES DISTRICT JUDGE

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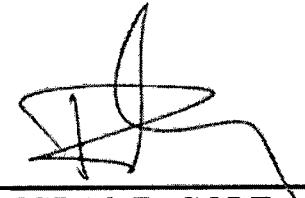
Case: 1:19-cv-00022-DRC-KLL Doc #: 24 Filed: 05/18/20 Page: 4 of 4 PAGEID #:

his Notice of Appeal has now effectively divested this Court of jurisdiction over
case. *Id.*

SO ORDERED.

May 18, 2020

DATE



DOUGLAS R. COLE
UNITED STATES DISTRICT JUI

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

JAMES SCOTT, JR.,
Petitioner,

vs.

Case No. 1:19-cv-22

Cole, J.
Litkovitz, M.J.

WARDEN, LONDON
CORRECTIONAL INSTITUTION,
Respondent.

**REPORT AND
RECOMMENDATION**

Petitioner, an inmate in state custody at the London Correctional Institution, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 2). This matter is before the Court on respondent's return of writ (Doc. 9) and petitioner's reply. (Doc. 12). For the reasons stated below, the undersigned recommends that the petition be denied on the ground that it is time-barred pursuant to 28 U.S.C. § 2241(d)(1).

I. PROCEDURAL HISTORY

State Trial Proceedings

On February 25, 2005, the Warren County, Ohio, grand jury returned a nine-count indictment charging petitioner with seven counts of trafficking in cocaine and two counts of possession of cocaine. (Doc. 8, Ex. 1). Petitioner entered a not guilty plea. (Doc. 8, Ex. 2).

Following a jury trial, petitioner was found guilty on all counts charged in the indictment. (Doc. 8, Ex. 4). However, after the case was submitted to the jury for deliberation, but prior to the verdict petitioner absconded. (*See* Doc. 8, Ex. 11 at PageID 163). Petitioner was apprehended seven years later and returned to Warren County for sentencing. (*Id.*). On June 5, 2012, petitioner was sentenced to a total aggregate prison sentence of 18 years in the Ohio Department of Corrections. (Doc. 8, Ex. 5).

Direct Appeal

On June 13, 2012, petitioner, through new counsel, filed a notice of appeal to the Ohio Court of Appeals. (Doc. 8, Ex. 6). Petitioner raised the following three assignments of error in his merit brief:

1. Appellant's trial counsel was ineffective and appellant was prejudiced thereby.
2. The trial court erred in overruling appellant's motion for criminal rule 29 acquittal when venue was not established as to counts one (1) through five (5) of the indictment.
3. The trial court erred in imposing a sentence on count one (1) that exceeded the applicable sentencing range for the conviction.

(Doc. 8, Ex. 7). On July 1, 2013, the Ohio Court of Appeals overruled petitioner's assignments of error and affirmed the judgment of the trial court. (Doc. 8, Ex. 11).

Petitioner did not seek review of the decision in the Ohio Supreme Court.

Motion for Post-Conviction Relief

On August 2, 2017, more than four years later, petitioner filed a "Motion to Correct Void Sentence and/or Judgment." (Doc. 8, Ex. 12). On September 5, 2017, the trial court determined the motion was barred by the doctrine of *res judicata*. (Doc. 8, Ex. 14).

On October 27, 2017, petitioner filed a notice of appeal and motion for leave to file a delayed appeal. (Doc. 8, Ex. 15–17). On December 7, 2017, the Ohio Court of Appeals denied petitioner's motion for leave to file a delayed appeal as unnecessary because the trial court decision was not properly served and accepted the appeal as being timely filed. (Doc. 8, Ex. 18). In his merit brief, petitioner asserted the following single assignment of error:

Trial court erred by failing to make the requisite statutory findings pursuant to O.R.C. 2929.14(C)(4), prior to imposing consecutive sentencing, violating

appellant's right of due process of law, as guaranteed by the 5th and 14th Amendment, United States Constitution; Section 16, Article 1, Ohio Constitution.

(Doc. 8, Ex. 19). On June 18, 2018, the Ohio appeals court overruled petitioner's assignment of error and affirmed the judgment of the trial court. (Doc. 8, Ex. 22). Petitioner unsuccessfully sought reconsideration of the decision. (Doc. 8, Ex. 23-25).

On October 5, 2018, petitioner filed a pro se notice of appeal to the Ohio Supreme Court. (Doc. 8, Ex. 26). Petitioner raised the following single proposition of law in his memorandum in support of jurisdiction:

Appellant's rights of Due Process, as guaranteed by the 5th and 14th Amendments, United States Constitution; Section 16, Article 1, Ohio Constitution violated, by Trial Court's failure to make the requisite Statutory findings pursuant to R.C. 2929.14(C)(4), prior to imposing consecutive sentencing.

(Doc. 8, Ex. 27). On December 12, 2018, the Ohio Supreme Court declined to accept jurisdiction over the appeal. (Doc. 8, Ex. 29).

Federal Habeas Corpus

On December 24, 2018, petitioner commenced the instant federal habeas corpus action.¹

Petitioner raises the following two grounds for relief in the petition:

GROUND ONE: Due Process, as guaranteed by the 5th and 14th Amendment, United States Constitution, violated; Sect. 16, Art. 1 Ohio violated, Trial Court's failure to make the requisite statutory findings pursuant to R.C. 2929.14(C)(4), prior to imposing consecutive sentencing.

GROUND TWO: Due Process as guaranteed by the 5th and 14th Amendments, United States Constitution violated, Sect. 16, Article I, Ohio Constitution, Sentence

¹ The petition was filed with the Court on January 7, 2019. (See Doc. 1). Petitioner avers, however, that he placed the petition in the prison mailing system for delivery to the Court on December 24, 2018. (See Doc. 2 at PageID 15). Because under *Houston v. Lack*, 487 U.S. 266 (1988), the filing date of a federal habeas corpus petition submitted by a pro se prisoner is the date on which the prisoner provides his papers to prison authorities for mailing, see *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), it is presumed that the petition was "filed" on December 24, 2018.

exceeds term authorized by law. Sentence term exceeds the maximum sentence authorized by law.

(Doc. 2 at PageID 6-7).

Respondent has filed a return of writ in opposition to the petition, to which petitioner has replied. (Doc. 9, 12). According to respondent, petitioner's grounds for relief are time-barred, not cognizable, and procedurally defaulted.

II. THE PETITION SHOULD BE DENIED.

Under 28 U.S.C. § 2244(d)(1), as amended by § 101 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, a person in custody pursuant to the judgment of a state court must file an application for a writ of habeas corpus within one year 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.

28 U.S.C. § 2244(d)(1). Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled during the pendency of a properly filed application for state post-conviction relief or other collateral review.

There is no evidence in the record in this case to suggest that the provisions set forth in §§ 2244(d)(1)(B) through (D) apply to petitioner's grounds for relief. Petitioner has not alleged

that a State created impediment prevented him from filing the instant petition or that his claims are governed by a newly recognized constitutional right made retroactively applicable to his case. Furthermore, petitioner's grounds for habeas relief are based on alleged errors that occurred during sentencing. Because petitioner was aware of the facts underlying his claims or the claims could have been discovered through the exercise of due diligence by the close of the direct review, his grounds for relief are governed by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1)(A), which began to run when petitioner's conviction became final "by the conclusion of direct review or the expiration for the time for seeking such review."

In this case, petitioner's conviction and sentence became final on August 15, 2013, upon the expiration of the 45-day period for filing an appeal as of right from the court of appeals' July 1, 2013 judgment entry dismissing his appeal. *See* Ohio Sup. Ct. Prac. R. 7.01(A)(1)(a)(1). *See also* *Gonzalez v. Thaler*, 565 U.S. 134, 149-52 (2012) (holding that because the petitioner did not appeal to the State's highest court, his conviction became final under § 2244(d)(1)(A) "when his time for seeking review with the State's highest court expired"). The statute commenced running on August 16, 2013, the next business day after petitioner's conviction became final, *see* Fed. R. Civ. P. 6(a); *Bronaugh v. Ohio*, 235 F.3d 280, 285 (6th Cir. 2000), and expired one year later on August 16, 2014, absent the application of statutory or equitable tolling principles.²

During the one-year limitations period, petitioner was entitled to tolling of the statute

² Petitioner argues that the limitations period did not begin to run until the Ohio Supreme Court denied his appeal from his motion to correct void sentence on December 12, 2018. (*See* Doc. 12 at PageID 647-49). However, as discussed below, while a properly filed application for state post-conviction relief may statutorily toll the limitations period, it does not revive the limitations period once it has expired or otherwise impact date on which petitioner's conviction became final under 28 U.S.C. § 2244(d)(1). *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). For the reasons stated above, petitioner's conviction and sentence became final, pursuant to 28 U.S.C. § 2244(d)(1)(A), upon the conclusion of direct review.

under 28 U.S.C. § 2244(d)(2) based on any pending “properly filed” applications for state post-conviction relief or other collateral review. *See* 28 U.S.C. § 2244(d)(2); *see also Holland v. Florida*, 560 U.S. 631, 635 (2010); *Allen v. Siebert*, 552 U.S. 3, 4 (2007) (per curiam); *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). “The tolling provision does not, however, ‘revive’ the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run.” *Vroman*, 346 F.3d at 602 (quoting *Rashid v. Khulmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)). Once the limitations period is expired, state collateral review proceedings can no longer serve to avoid the statute-of-limitations bar. *Id.*

It is well-settled that a state application for post-conviction relief is “properly filed” within the meaning of § 2244(d)(2) “when its delivery and acceptance are in compliance with the applicable laws and rules governing filings,” such as those prescribing the time limits for filing. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). State post-conviction or collateral review applications rejected by the state courts on timeliness grounds are not “properly filed” and, therefore, are not subject to statutory tolling under § 2244(d)(2). *See Allen*, 552 U.S. at 5-6; *see also Pace v. DiGuglielmo*, 544 U.S. 408, 413-14 (2005); *Vroman*, 346 F.3d at 603.

No statutory tolling applies under Section 2244(d)(2) to extend the limitations period in this case. The statute of limitations had run for 1,447 days before petitioner filed his August 2, 2017 post-conviction motion. Because petitioner’s motion was filed after the one-year statute of limitations had already expired, statutory tolling would not serve to extend the limitations period. *Vroman*, 346 F.3d at 602. Therefore, petitioner is not entitled to statutory tolling based on the untimely application. *See Allen*, 552 U.S. at 5-6; *see also Pace*, 544 U.S. at 413-14; *Vroman*, 346 F.3d at 603.

The AEDPA's statute of limitations is subject to equitable tolling, *see Holland*, 560 U.S. at 645, "when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond the litigant's control." *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011) (quoting *Robertson v. Simpson*, 624 F.3d 781, 783 (6th Cir. 2010)). Equitable tolling is granted "sparingly." *Id.* (quoting *Robertson*, 624 F.3d at 784). A habeas petitioner is entitled to equitable tolling only if he establishes that (1) "he has been pursuing his rights diligently;" and (2) "some extraordinary circumstance stood in his way and prevented timely filing." *Id.* (quoting *Holland*, 560 U.S. at 649 (internal quotations omitted)); *see also Pace*, 544 U.S. at 418. Although the Sixth Circuit previously utilized a five-factor approach in determining whether a habeas petitioner is entitled to equitable tolling, *Holland*'s two-part test has replaced the five-factor inquiry as the "governing framework" to apply. *Hall*, 662 F.3d at 750 (citing *Robinson v. Easterling*, 424 F. App'x 439, 442 n.1 (6th Cir. 2011)). "With *Holland* now on the books, the 'extraordinary circumstances' test, which requires both reasonable diligence and an extraordinary circumstance, has become the law of this circuit." *Id.*; *see also Patterson v. Lafler*, 455 F. App'x 606, 609 n.1 (6th Cir. 2012).

Petitioner is not entitled to equitable tolling in this case. Petitioner argues that he pursued his August 2, 2017 post-conviction motion and appeal after discovering the alleged sentencing error. He further contends that the post-conviction motion was timely and that he filed his federal habeas petition within one year of the Ohio Supreme Court's December 12, 2018 denial of his subsequent appeal. (*See* Doc. 2 at PageID 14; Doc. 12 at PageID 647–49). Although petitioner claims he was diligent in pursuing relief in the state courts, the Sixth Circuit has indicated that the relevant inquiry in determining whether equitable tolling applies is whether

petitioner was diligent in pursuing federal habeas relief. In this case, petitioner waited more than five years—from August 16, 2013 until December 24, 2018—to file his habeas petition after his conviction and sentence became final.³ Accordingly, petitioner has not demonstrated that he was diligent in pursuing his federal rights. *Vroman*, 346 F.3d at 605 (finding that the petitioner’s decision to proceed solely in state court “rather than filing his federal habeas petition and protecting his federal constitutional rights, demonstrates a lack of diligence”). Petitioner is therefore not entitled to equitable tolling.

Finally, petitioner has neither argued nor otherwise demonstrated that the procedural bar to review should be excused based on a colorable showing of actual innocence. “To invoke the miscarriage of justice exception to AEDPA’s statute of limitations, . . . a petitioner ‘must show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.’” *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). No such showing has been made in this case.

Accordingly, in sum, the undersigned concludes that the instant federal habeas corpus petition is barred from review by the one-year statute of limitations governing habeas corpus actions brought pursuant to 28 U.S.C. § 2254. Under the applicable provision set forth in 28 U.S.C. § 2244(d)(1)(A), petitioner’s conviction and sentence became final on August 15, 2013. The limitations period ran for 365 days and expired on August 16, 2014. Statutory or equitable tolling principles do not apply to extend the limitations period or otherwise avoid the statute-of-limitations bar to review in this case. Therefore, petitioner’s habeas corpus petition, filed on

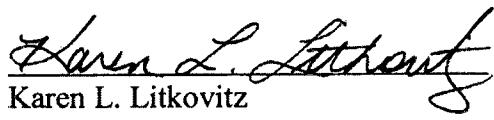
³ Petitioner also waited more than two years—from August 2, 2017 (the date upon which he filed his post-conviction motion) until December 24, 2018—to file his habeas petition after he claims he discovered the alleged sentencing error.

December 24, 2018, is time-barred.

IT IS THEREFORE RECOMMENDED THAT:

1. The petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 2) be **DENIED** with prejudice on the ground that the petition is time-barred under 28 U.S.C. § 2244(d).
2. A certificate of appealability should not issue with respect to any of the claims for relief alleged in the petition, which this Court has concluded are barred from review on a procedural ground, because under the first prong of the applicable two-part standard enunciated in *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000), “jurists of reason” would not find it debatable whether the Court is correct in its procedural ruling.⁴
3. With respect to any application by petitioner to proceed on appeal *in forma pauperis*, the Court should certify pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of any Order adopting this Report and Recommendation would not be taken in “good faith,” and therefore **DENY** petitioner leave to appeal *in forma pauperis* upon a showing of financial necessity. *See* Fed. R. App. P. 24(a); *Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997).

Date: 1/13/20


Karen L. Litkovitz
United States Magistrate Judge

⁴ Because the first prong of the *Slack* test has not been met, the Court need not address the second prong of *Slack* as to whether “jurists of reason” would find it debatable whether petitioner has stated a viable constitutional claim in his time-barred grounds for relief. *See Slack*, 529 U.S. at 484.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES SCOTT, JR.,
Petitioner,

vs.

Case No. 1:19-cv-22

Cole, J.
Litkovitz, M.J.

WARDEN, LONDON
CORRECTIONAL INSTITUTION,
Respondent.

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. 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. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 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 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).