THIRD JUDICIAL CIRCUIT COURT CRIMINAL DIVISION
COUNTY OF WAYNE
STATE OF MICHIGAN

STATE OF MICHIGAN

V

Eric M. Dowdy

HON. KEVIN J.COX
Case No. 1986-006219-01-FH
Case No. 1986-006250-01-FH

OPINION AND ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

At a session of Court held at the Frank Murphy Hall of Justice
in the City of Detroit, Wayne County, Michigan
on: 1/11/2018

This matter is before the Court on Defendant's motion for relief from judgment pursuant to MCR 6.500 *et. seq.* The Court has reviewed the motion and being otherwise advised in the premises it is ordered that Defendant's motion is **DENIED.**

BACKGROUND

On August 15, 1986, Defendant pleaded guilty to two counts of Second Degree Murder and two counts of Felony Firearm. On October 13, 1988 the Michigan Court of Appeals affirmed the conviction and sentence (docket number 104359). On April 25, 1989 the Michigan Supreme Court denied Defendant's application for leave to appeal the decision of the Court of Appeals (docket number 84502).

Defendant filed this motion for relief from judgment. Defendant argues that he was denied a "fair trial" when he was re-sentenced due to a lack of "subject matter jurisdiction," ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and his Due Process rights were violated when he was resentenced without the proper "subject matter jurisdiction."

ANALYSIS

The court notes that although Defendant characterizes the motion as "Motion from Relief from Judgment under MCR 2.612(C)(1)(d)" the Court is not bound by the

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choice of labels on a motion. *Johnston v. Livonia*, 177 Mich App 200, 208 (1989). MCR 6.500 *et seq* establishes the *exclusive* procedures for pursing post appellate relief from a criminal conviction and sentence. MCR 6.501. The court will only consider this Motion under MCR 6.500 *et seq*.

This Court's review of Defendant's motion for relief from judgment is governed, in part, by MCR 6.508. Under that rule, a defendant has the burden of establishing that he is entitled to the relief requested. MCR 6.508(D). Moreover, a court may not grant relief based on grounds "which could have been raised on appeal from the conviction and sentence . . . unless the defendant demonstrates good cause [for failing to raise the issues on appeal or in a prior motion] . . . and actual prejudice." MCR 6.508(D)(3)(a)-(b). MCR 6.508 provides that the court has discretion to determine whether an evidentiary hearing is necessary. MCR 6.508(B). Based on the nature of Defendant's allegations and the Court's review of the record, the Court determines that an evidentiary hearing is not necessary.

Defendant asserts that he is entitled to relief from judgment because trial counsel was ineffective. A defendant is entitled to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). However, Defendant's claims could have been brought forward on direct appeal. And in fact, Defendant did unsuccessfully raise claims of ineffective assistance of trial counsel on appeal, albeit regarding other issues. Under MCR 6.508(D), Defendant must demonstrate good cause and actual prejudice regarding these claims.

Defendant asserts that he has good cause for failing to raise these particular claims of ineffective assistance of counsel previously. He indicates that he did not raise the claims on appeal because of ineffective assistance of appellate counsel. Ineffective assistance of appellate counsel can constitute good cause under MCR 6.508. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004).

There is a presumption that appellate counsel's decisions regarding what issues to raise on appeal "constituted sound strategy." *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). An "appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance." *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995). Similarly, appellate counsel's decision not to pursue every non-frivolous claim cannot be deemed constitutionally deficient. *Id.*

In order to demonstrate good cause based on claims that appellate counsel was ineffective for failing to argue trial counsel's ineffective assistance, a defendant must show that "appellate counsel's performance fell below an objective standard of reasonableness and was constitutionally deficient." *Reed*, 449 Mich at 390. A defendant must also "show that [trial] counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *Id.* "While not insurmountable, it is clear that this burden is highly demanding." *Id.* The Court must determine whether appellate counsel's decision—not to raise the issues Defendant now raises—fell below the standard or reasonableness. In order to do this, the Court will first examine whether trial counsel was ineffective, such that Defendant's current claims should have been raised on appeal.

In determining whether trial counsel's performance was ineffective, the Court applies the test set forth in *Strickland v Washington*, 446 US 668; 100 S Ct 1932; 64 L Ed 2d 593 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 US at 687. In showing deficient performance, a defendant must demonstrate that counsel's "performance was below an objective standard of reasonableness under professional norms." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). In order to show prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

"Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the

time." *Id.* at 689. "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy." *Odom*, 276 Mich App at 415. "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 446 US at 695.

With this framework in mind, the Court will consider each of Defendant's claims to determine whether it was unreasonable for appellate counsel not to raise these claims, and whether, as a result, Defendant has demonstrated good cause.

Defendant's asserts that he was resentenced on September 4, 1987 without his presence and his due process rights were violated. The courtroom transcripts indicate that Defendant's counsel did motion the trial court to resentence Defendant, but the motion was denied. Competent counsel would not ask an appellate court to address this issue as Defendant faced no actual prejudice. Thus, Defendant's sentence was never modified by the court and any contention that Defendant's counsel was ineffective or the court lack subject matter jurisdiction to resentence Defendant is moot.

Defendant also argues that his trial counsel asked the court at sentencing to sentence Defendant to a term of "Life" rather than a specified time period, constituting "abandonment" to Defendant and ineffective assistance of counsel. The court rejected the request and sentenced Defendant to 30-45 years in the Michigan Department of Corrections. Again, competent counsel would not ask an appellate court to address this issue as Defendant faced no actual prejudice. Thus, the Court does not find that Defendant has demonstrated actual prejudice as Defendant was still sentenced to a defined period of incarceration.

ORDER

For the reasons stated above, Defendant's request for relief from judgment based on claims of ineffective assistance of counsel is **DENIED**.

Hon. Kevin J. Cox

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY _____ DEPUTY CLERK

Court of Appeals, State of Michigan

ORDER

People of MI v Eric Miguel Dowdy

Docket No. 343551

LC No. 86-006219-01-FC; 86-006250-01-FH

Karen M. Fort Hood
Presiding Judge

Kirsten Frank Kelly

Michael J. Riordan
Judges

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

The motion to waive fees is GRANTED and fees are WAIVED for this case only.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY 24 2018
Date

Chief Clerk

APPENDIX B

Court of Appeals, State of Michigan

ORDER

Karen M. Fort Hood
Presiding Judge

People of MI v Eric Miguel Dowdy

Kirsten Frank Kelly

Docket No. 343551

LC No. 86-006218-01-FC; 86-006250-01-FH

Michael J. Riordan
Judges

The Court orders that the motion for reconsideration is DENIED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUN 22 2018
Date

Chief Clerk

APPENDIX C

Order

October 11, 2019

158098

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 158098
COA: 343551
Wayne CC: 86-006219-FC;
86-006250-FH

ERIC MIGUEL DOWDY,
Defendant-Appellant.
/

By order of February 4, 2019, the prosecuting attorney was directed to answer the application for leave to appeal the May 24, 2018 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

CAVANAGH, J. (*concurring*).

I concur in the denial of leave to appeal in this case, but write separately to highlight particular circumstances I believe should be considered in future Parole Board decisions.

In 1987 defendant was sentenced for two second-degree murder convictions to terms of 30 to 45 years' imprisonment, to be served concurrently to each other and consecutively to 2-year sentences for two felony-firearm convictions. At that time, conventional thinking was that parole would be achieved earlier from a parolable life sentence than from the effective 32-year minimum term defendant had received. Defendant's attorney filed a motion for resentencing seeking a parolable life sentence. Indeed, defendant had a sentencing agreement to that effect in one of his cases. The trial court granted the motion, converting defendant's sentence to parolable life.

However, the Parole Board's practices changed before it considered defendant's case. See Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for*

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Sentencing Reform, 47 U Mich J L Reform 645, 690 (Spring 2014) (noting that, "[a]lthough many sentencing judges imposed a life sentence before 1992 with the assumption that the inmate would be eligible for parole, and presumptively released on parole after twelve to twenty years, [after 1992] this was no longer the state's practice"). Thirty-two years later, after his original 32-year minimum sentence would have ended, defendant remains in prison. The Parole Board has many factors to weigh in each of its decisions, to be sure. But when the Parole Board next considers this case, it might also consider that the trial court may have intended this defendant to have been paroled already.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Eric Miguel Dowdy,

Petitioner, Case No. 20-10744

v. Judith E. Levy
United States District Judge

Shane Jackson,

Respondent.

_____/

OPINION AND ORDER SUMMARILY DENYING PETITION FOR WRIT OF HABEAS CORPUS, DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY AND DENYING LEAVE TO APPEAL *IN FORMA PAUPERIS*

Eric Miguel Dowdy, ("Petitioner"), confined at the Brooks Correctional Facility in Muskegon Heights, Michigan, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his *pro se* application, Petitioner challenges his 1987 conviction for second-degree murder, Mich. Comp. Laws Ann. § 750.317, and felony-firearm, his 1987 conviction for second-degree murder, Mich. Comp. Laws Ann. § 750.227b.

The Court summarily dismisses the petition for writ of habeas corpus, because it was not timely filed in accordance with the statute of

APPENDIX E

limitations contained in 28 U.S.C. § 2244 (d)(1) and the late-filed petition cannot be saved by equitable or statutory tolling.

I. Background

Petitioner pleaded guilty to second-degree murder and felony-firearm.[1] On February 3, 1987, Petitioner was sentenced to thirty to forty five years in prison on the second-degree murder conviction and received a two year consecutive sentence on the felony-firearm conviction.

Petitioner's appellate counsel filed a motion for Petitioner to be re-sentenced to a parolable life sentence.[2] Petitioner argues that this was done without his knowledge. On September 4, 1987, Petitioner was re-sentenced to a parolable life sentence. (ECF No. 1, PageID. 67).

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[1] Petitioner was convicted of second-degree murder and felony-firearm in another case. *People v. Dowdy,* 1986-006250-01-FH (Wayne Cty. Cir. Ct.). This conviction is not challenged in his petition.

[2] Justice Cavanagh, in her concurrence in Petitioner's post-conviction appeal, explains appellate counsel's motion for re-sentencing by noting, "At that time, conventional thinking was that parole would be achieved earlier from a parolable life sentence than from the effective 32-year minimum term defendant had received. Defendant's attorney filed a motion for resentencing seeking a parolable life sentence. Indeed, defendant had a sentencing agreement to that effect in one of his cases. The trial court granted the motion, converting defendant's sentence to parolable life." *People v. Dowdy*, 504 Mich. 977 (2019) (Mem.) (Cavanagh, J., concurring), *reconsideration denied*, 937 N.W.2d 680 (Mich. 2020).

The Michigan Court of Appeals affirmed Petitioner's conviction. *People v. Dowdy,* No. 104359 (Mich. Ct. App. Oct. 13, 1988). Direct review of Petitioner's conviction ended on April 25, 1989, when the Michigan Supreme Court denied Petitioner leave to appeal. *People v. Dowdy,* No. 84502, 1989 Mich. LEXIS 607 (Mich. Sup. Ct. Apr. 25, 1989).

On October 3, 2017, Petitioner filed a motion for relief from judgment pursuant to Mich. Ct. R. 2.612(C)(1)(d) with the trial court.[3] The trial judge construed the motion as a post-conviction motion for relief from judgment brought pursuant to Mich. Ct. R. 6.500, *et. seq.*, and denied relief. *People v. Dowdy,* Nos. 1986-006219-01-FH, 1986-006250-01-FH (Wayne Cty. Cir. Ct., Jan. 11, 2018). The Michigan Court of Appeals denied Petitioner leave to appeal. *People v. Dowdy,* No. 343551 (Mich. Ct. App. May 24, 2018). The Michigan Supreme Court denied Petitioner leave to appeal. *People v. Dowdy*, 504 Mich. 977 (2019)

[3] The Court obtained this date from the Wayne County Circuit Court docket. https://cmspublic.3rdcc.org/CaseDetail.aspx?CaseID=3639525. Public records and government documents, including those available from reliable sources on the Internet, are subject to judicial notice. *See Daniel v. Hagel*, 17 F. Supp. 3d 680, 681, n. 1 (E.D. Mich. 2014); *United States ex. rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003).

(Cavanagh, J., concurring), *reconsideration denied*, 937 N.W.2d 680 (Mich. 2020).

The petition is signed and dated March 16, 2020.[4]

II. Discussion

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which was signed into law on April 24, 1996, amended the habeas corpus statute in several respects, one of which was to mandate a statute of limitations for habeas actions. 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;

[4] Under the prison mailbox rule, this Court will assume that Petitioner actually filed his habeas petition on March 16, 2020, the date that it was signed and dated. *See Towns v. U.S.*, 190 F. 3d 468, 469 (6th Cir. 1999).

> (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). A petition for writ of habeas corpus must be dismissed where it has not been filed within the one-year statute of limitations. *See Holloway v. Jones,* 166 F. Supp. 2d 1185, 1187 (E.D. Mich. 2001).

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts "provides that district courts 'must promptly examine' state prisoner habeas petitions and must dismiss the petition '[i]f it plainly appears ... that the petitioner is not entitled to relief.'" *Day v. McDonough,* 547 U.S. 198, 207 (2006). This Court must determine whether the one-year statute of limitations in AEDPA, *see* 28 U.S.C. § 2244(d)(1), bars substantive review of Petitioner's claims.

This Court is "permitted ... to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day v. McDonough*, 547 U.S. at 209. Before acting on its own initiative to dismiss a state prisoner's habeas petition as untimely, a federal district court must give the parties fair notice and an opportunity to present their positions regarding the timeliness issue. *Id.*, at 210. 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).

Petitioner argues in his petition that the one-year statute of limitations does not apply to his case because his claims were not adjudicated on the merits by the state courts. Petitioner also appears to argue that any untimeliness should be excused because he only learned at a later date that he had been re-sentenced to life in prison. Accordingly, Petitioner has been given an opportunity to address the limitations issue. *See Plummer v. Warren,* 463 F. App'x 501, 505 (6th Cir. 2012); *see also Stewart v. Harry*, No. 17-1494, 2017 WL 9249946, at * 1 (6th Cir. Nov. 21, 2017).

Petitioner's direct appeal of his conviction ended when the Michigan Supreme Court denied Petitioner leave to appeal on April 25, 1989. Petitioner's conviction became final, for purposes of the AEDPA's limitations period, on the date that the 90-day time period for seeking certiorari with the United States Supreme Court expired. *See Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). Petitioner's judgment therefore became final on July 24, 1989, when he failed to file a petition for writ of certiorari with the United States Supreme Court. *Holloway*, 166 F. Supp. 2d at 1188.

Because Petitioner's conviction became final prior to the April 24, 1996 enactment date of the AEDPA, Petitioner had a one-year grace period from this date to timely file a petition for habeas relief with the federal court. *See Israfil v. Russell*, 276 F. 3d 768, 771 (6th Cir. 2001). Absent state collateral review, Petitioner was required to file his petition for writ of habeas corpus with this Court no later than April 24, 1997 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 motion for relief from a void judgment pursuant to Michigan Court Rule 2.612(C)(1)(d) with the trial court on October 3,

2017. But Michigan Court Rule 2.612 applies to relief from judgment in civil actions, not in criminal proceedings. Under Michigan Court Rule 6.501, "a judgment of conviction and sentence entered" . . . in a criminal case "may be reviewed only in accordance with the provisions" of Rule 6.500 *et seq.* And under Rule 6.500, the only provision is under Michigan Court Rule 6.502, which provides for the filing of a post-conviction motion for relief from judgment. Accordingly, Petitioner's sole post-conviction remedy to challenge his conviction was to file a motion for relief from judgment pursuant to Michigan Court Rule 6.500, *et. seq.*

Moreover, Petitioner's Michigan Court Rule 2.612 motion did not toll or expand the statute of limitations. 28 U.S.C. § 2244(d)(2) expressly provides that the time during which a properly filed application for state post-conviction relief or other collateral review is pending shall not be counted towards the period of limitations contained in the statute. An application for state post-conviction relief is considered "properly filed," for purposes of triggering the tolling provisions of § 2244(d)(2), when "its delivery and acceptance are in compliance with the applicable laws and rules governing filings, e.g. requirements concerning the form of the document, the court and office in which it must be lodged, payment of a

filing fee, and applicable time limits upon its delivery." *Israfil v. Russell,* 276 F. 3d 768, 771 (6th Cir. 2001). But as set forth above, Petitioner did not file a motion under the proper court rule. Accordingly, Petitioner's motion for relief from a void judgment filed under Michigan Court Rule 2.612 was not a properly filed post-conviction motion that would toll the limitations period pursuant to 28 U.S.C. § 2244 (d)(2). *See Rideaux v. Perry*, No. 16-1458, 2017 WL 3404658, at * 1 (6th Cir. Feb. 27, 2017).

Moreover, even if Petitioner's motion for relief from a void judgment constituted a properly filed post-conviction motion, it still would not toll the limitations period because it was filed on October 3, 2017, long after the one-year limitations period expired. A state-court post-conviction motion that is filed following the expiration of the limitations period cannot toll that period pursuant to 28 U.S.C. § 2244(d)(2) because there is no period remaining 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).

Petitioner argues that he did not know that the trial judge re-sentenced him to prison on September 4, 1987. Petitioner argues he did not learn that he had been re-sentenced to life in prison "until he was

serving his sentence at Jackson Prison and received a Basic Information Sheet outlining the matter." (ECF No. 1, PageID.6–7). Petitioner states that, "It was not until I received my Basi[c] Information Sheet while housed in Jackson Prison, that I discovered that I had been re-sentenced." (ECF No. 1, PageID. 8). Petitioner later argues that it was not until the judge denied his motion to vacate sentence on January 11, 2018 that he realized that his original sentence of 30–45 years remained valid and the subsequent amended judgment of sentence of life in prison was invalid. (ECF No. 1, PageID.24). In an affidavit that Petitioner attached to his petition, he indicates that, "It was not until the modified Judgment of Sentence prepared by Appellate Counsel and received by Affiant while at the State Prison for Southern Michigan, that Affiant learned that the hearing and the re-sentencing had even taken place." (ECF No. 1, PageID. 53).

Under 28 U.S.C.§ 2244(d)(1)(D), AEDPA's one-year limitations period begins to run from the date upon which the factual predicate for a claim could have been discovered through due diligence by the habeas petitioner. *See Ali v. Tennessee Board of Pardon and Paroles*, 431 F. 3d 896, 898 (6th Cir. 2005). However, the time commences under §

2244(d)(1)(D) when the factual predicate for a habeas petitioner's claim could have been discovered through the exercise of due diligence, not when it was actually discovered by a given petitioner. *Redmond v. Jackson*, 295 F. Supp 2d 767, 771 (E.D. Mich. 2003). Moreover, the time under the AEDPA's limitations period begins to run pursuant to § 2244(d)(1)(D) when a habeas petitioner knows, or through due diligence, could have discovered, the important facts for their claims, not when the petitioner recognizes the facts' legal significance. *Id.* In addition, "§ 2244(d)(1)(D) does not convey a statutory right to an extended delay while a petitioner gathers every possible scrap of evidence that might support his claim." *Redmond,* 295 F. Supp. 2d at 771. "Rather, it is the actual or putative knowledge of the pertinent facts of a claim that starts the clock running on the date on which the factual predicate of the claim could have been discovered through due diligence, and the running of the limitations period does not await the collection of evidence which supports the facts, including supporting affidavits." *Id.* at p. 772. Lastly, newly discovered information "that merely supports or strengthens a claim that could have been properly stated without the discovery ... is not a 'factual predicate' for purposes of triggering the statute of limitations

to Petitioner in prison. To the extent that Petitioner was aware of the factual predicate of the re-sentencing at the time of his direct appeal, the commencement of the running of the statute of limitations would not be delayed pursuant to 28 U.S.C.§ 2244(d)(1)(D). *See Fleming v. Evans,* 481 F.3d 1249, 1258 (10th Cir. 2007); *Trice v. Hulick,* 558 F. Supp. 2d 818, 824–25 (N.D. Ill. 2008). The petition is therefore untimely.

Petitioner further argues that AEDPA's statute of limitations does bar review of his claims because the state courts never adjudicated his claims on the merits. (ECF No. 1, PageID. 24). Setting aside the fact that Petitioner's claims did appear to be adjudicated on the merits, at least by the trial court, a state court's failure to adjudicate a habeas petitioner's claims on the merits is not a basis for a federal court to ignore the one-year statute of limitations contained in 28 U.S.C.§ 2244(d). *See DeWild v. Raemisch,* 750 F. App'x. 703, 705 (10th Cir. 2018). Accordingly, this argument is without merit.

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)). The Sixth Circuit has observed that "the doctrine of equitable tolling is used sparingly by federal courts." *See Robertson v. Simpson*, 624 F. 3d 781, 784 (6th Cir. 2010). The burden is on the habeas petitioner to show that they are entitled to the equitable tolling of the one-year limitations period. *Id.*

Here, Petitioner is not entitled to equitable tolling of the one-year limitations period because he failed to argue or show facts to support equitable tolling. *See Giles v. Wolfenbarger,* 239 F. App'x. 145, 147 (6th Cir. 2007). First, the one-year statute of limitations may be equitably tolled based upon a credible showing of actual innocence under the standard enunciated in *Schup v. Delo,* 513 U.S. 298 (1995). *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). The Supreme Court has 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 their 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). Any actual innocence exception to AEDPA's statute of limitations is particularly inapplicable, in light of the fact that the petitioner pleaded guilty. *See Reeves v. Cason*, 380 F. Supp. 2d 883, 885 (E.D. Mich. 2005).

III. Certificate of Appealability

Petitioner is required to obtain a certificate of appealability ("COA") in order to appeal the Court's decision. *See* 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A COA 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 court evaluates relief on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable

jurists would find the Court's assessment of the claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000). "A petitioner satisfies this standard by demonstrating 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). Having conducted the requisite review, the Court concludes that reasonable jurists would not debate the correctness of the Court's ruling. Therefore, a COA is denied.

An appeal from this decision cannot be taken in good faith. *See* Fed. R. App. P. 24(a). Accordingly, the Court denies Petitioner leave to proceed in forma pauperis on appeal. *See* 28 U.S.C. § 1915(a)(3).

IV. Conclusion and Order

For the reasons set forth above, the petition is DENIED AND DISMISSED WITH PREJUDICE and a certificate of appealability is DENIED. Petitioner is DENIED leave to appeal in forma pauperis on appeal.

IT IS SO ORDERED.

Dated: November 9, 2020
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on November 9, 2020.

s/William Barkholz
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Eric Miguel Dowdy,

Petitioner, Case No. 20-10744

v. Judith E. Levy
United States District Judge

Shane Jackson,

Respondent.

_____/

JUDGMENT

For the reasons stated in the opinion and order entered on today's date, it is ordered and adjudged that the case is dismissed with prejudice.

DAVID J. WEAVER
CLERK OF THE COURT

By: s/William Barkholz
DEPUTY COURT CLERK

Date: November 9, 2020

APPROVED:

s/Judith E. Levy
JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

APPENDIX F

No. 20-2177

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 06, 2021
DEBORAH S. HUNT, Clerk

ERIC MIGUEL DOWDY,

Petitioner-Appellant,

v.

SHANE JACKSON, Warden,

Respondent-Appellee.

ORDER

Before: COOK, Circuit Judge.

Eric Miguel Dowdy, a Michigan prisoner proceeding pro se, appeals the district court's summary denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus as untimely. This court construes Dowdy's timely notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2). Dowdy also moves this court to proceed in forma pauperis.

In 1987, Dowdy pleaded guilty in two separate cases to two counts of second-degree murder and two counts of being a felon in possession of a firearm. *People v. Dowdy*, Nos. 86-006219, 86-006250 (Wayne Cnty. Cir. Ct.). The trial court sentenced him to concurrent terms of thirty to forty-five years for the murder convictions, to be served consecutively to a two-year term for the felony-firearm convictions. The Michigan Court of Appeals affirmed the trial court's judgment, *People v. Dowdy*, No. 104359 (Mich. Ct. App. Oct. 13, 1988), and, on April 25, 1989, the Michigan Supreme Court denied leave to appeal, *People v. Dowdy*, No. 84502 (Mich. Apr. 25, 1989).

During the pendency of Dowdy's direct appeal, appellate counsel filed a motion for Dowdy to be resentenced to a parolable life sentence in case number 86-006219, in accordance with the plea agreement. On September 4, 1987, Dowdy was resentenced to a parolable life sentence.

APPENDIX G

On October 3, 2017, Dowdy filed a motion for relief from judgment, pursuant to Michigan Court Rule 2.612(C)(1)(d), arguing that he was resentenced without subject-matter jurisdiction and that he received ineffective assistance of counsel. The trial court construed Dowdy's motion as a post-conviction motion for relief from judgment under Michigan Court Rule 6.500, *et seq.*, and denied relief. The Michigan Court of Appeals denied Dowdy's delayed application for leave to appeal, and the Michigan Supreme Court denied leave to appeal. *People v. Dowdy*, 933 N.W.2d 504 (Mich. 2019) (mem.).

In March 2020, Dowdy filed a § 2254 petition in the district court, raising the following grounds for relief: (1) his "liberty was taken in a manner inconsistent with due process"; (2) he was "denied a fair trial . . . when the trial court—lacking subject matter jurisdiction—re-sentenced [him]—the result of which is null and void"; (3) "trial counsel's legal representation was tantamount to abandonment"; (4) "court appointed appellate counsel abandoned legal representation of [him] on his only appeals as of right"; and (5) the prosecution allowed the trial court to amend the sentence knowing that it lacked jurisdiction to do so. Dowdy argued that, although his petition was "filed at this late date," it is not time-barred because "the [s]tate [c]ourts did not rule on the issue presented." He further contended that, because his petition challenged a "radical jurisdictional defect," it was not subject to any time limit. In an attached affidavit, Dowdy stated, "It was not until the modified Judgment of Sentence prepared by Appellate Counsel . . . was received by Affiant while at the State Prison of Southern Michigan[] that Affiant learned that the hearing and re-sentencing had even taken place." His petition also asserted that "[i]t was not until [he] received [his] Basic Information Sheet while housed in Jackson Prison[] that [he] discovered that [he] had been re-sentenced."

Pursuant to Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts, the district court conducted an initial review of the petition and concluded that it was barred by the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2244(d). The court denied the petition and declined to issue a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner 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 the district court denies a habeas petition on a procedural ground without reaching the underlying constitutional claims, a COA should issue when the petitioner demonstrates "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).

Rule 4 of the Rules Governing § 2254 Cases provides, in pertinent part:

> 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. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

A district court is authorized to consider sua sponte the timeliness of a prisoner's § 2254 petition, provided it affords the parties fair notice and an opportunity to be heard on the issue. *Day v. McDonough*, 547 U.S. 198, 209-10 (2006); *see Shelton v. United States*, 800 F.3d 292, 294 (6th Cir. 2015). Here, Dowdy addressed the time-bar issue in his petition, acknowledging that it was late and arguing that it should be deemed timely based on when he learned that he had been resentenced. The district court's sua sponte consideration of the time-bar issue was therefore not improper. *See Stewart v. Harry*, No. 17-1494, 2017 WL 9249946, at *1 (6th Cir. Nov. 21, 2017).

On April 24, 1996, AEDPA became effective. The statute amended 28 U.S.C. § 2244 to impose a one-year statute of limitations on federal habeas petitions brought by prisoners challenging state court judgments. *See* 28 U.S.C. § 2244(d)(1). The statute also provides for tolling of the limitations period while "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). The tolling affects only an unexpired period of limitations; it cannot revive a period that has already run. *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003).

Reasonable jurists would not debate the district court's determination that Dowdy's §2254 petition was untimely. Dowdy's conviction became final in 1989, but prisoners whose convictions became final before the AEDPA's effective date were given a one-year grace period in which to file their petitions. *See McClendon v. Sherman*, 329 F.3d 490, 493 (6th Cir. 2003); *see also Cook v. Stegall*, 295 F.3d 517, 519 (6th Cir. 2002); *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001). Dowdy therefore had until April 24, 1997, to file a § 2254 petition. And because the one-year limitations period had already expired by the time Dowdy filed his state post-conviction motion in 2017, that motion—assuming it was "properly filed"—had no tolling effect. *See Vroman*, 346 F.3d at 602.

Because Dowdy argued that he did not learn that he had been resentenced until a later date, the district court considered whether he was entitled to a later start of the limitations period under § 2244(d)(1)(D), which delays the start of the limitations period to the date on which the factual predicate of a claim could have been discovered through the exercise of due diligence. Dowdy asserted that he did not discover the factual predicate for his claims until he learned that he had been resentenced. At one point he stated that he did not discover this until appellate counsel provided him with the modified judgment of sentence, and at another point he claimed not to have been aware of the resentencing until he received a "Basic Information Sheet while housed in Jackson Prison." Dowdy never indicated when he received these documents, however. And, as the district court noted, Dowdy's assertion that he learned about the resentencing when appellate counsel provided him with the modified judgment suggests that this took place while his direct appeal was pending. If so, this would have no bearing on the start of the limitations period. Moreover, Dowdy failed to demonstrate that he was unable to discover information concerning his resentencing any earlier through the exercise of due diligence. Reasonable jurists would not disagree that Dowdy failed to meet his burden of showing that his resentencing was newly discovered evidence that delayed the commencement of the statute of limitations. *See DiCenzi v.*

Rose, 452 F.3d 465, 471 (6th Cir. 2006) ("[T]he petitioner bears the burden of proving that he exercised due diligence, in order for the statute of limitations to begin running from the date he discovered the factual predicate of his claim . . . .").

Dowdy also argued that AEDPA's statute of limitations does not bar review of his claims because they raised a jurisdictional defect. He cited no authority to support this argument, and indeed there is none. *See McMillan v. Woods*, No. 2:11-CV-10390, 2011 WL 6937364, at *3 (E.D. Mich. Dec. 8, 2011); *see also Briscoe v. Eppinger*, No. 18-3041, 2018 WL 3390141, at *2 (6th Cir. May 31, 2018) (order denying COA). Dowdy further contended that the statute of limitations does not bar his claims because the state courts never ruled on them. But even if true, this has no bearing on whether the statute of limitations applies to his § 2254 petition. *See DeWild v. Raemisch*, 750 F. App'x 703, 705 (10th Cir. 2018).

Finally, the district court considered whether Dowdy was entitled to equitable tolling of the statute of limitations. "[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." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (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, 386 (2013). Reasonable jurists would not disagree with the district court's determination that Dowdy failed to argue or show facts to support equitable tolling.

Accordingly, Dowdy's application for a COA is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-2177

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 17, 2021
DEBORAH S. HUNT, Clerk

ERIC MIGUEL DOWDY,

Petitioner-Appellant,

v.

SHANE JACKSON, WARDEN,

Respondent-Appellee.

ORDER

Before: ROGERS, LARSEN, and READLER, Circuit Judges.

Eric Miguel Dowdy, a Michigan prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX H

No. 20-2177

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 02, 2021
DEBORAH S. HUNT, Clerk

ERIC MIGUEL DOWDY,

Petitioner-Appellant,

v.

SHANE JACKSON, WARDEN,

Respondent-Appellee.

ORDER

Before: ROGERS, LARSEN, and READLER, Circuit Judges.

Eric Miguel Dowdy petitions for rehearing en banc of this court's order entered on May 6, 2021, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX I