

No. 21-5609

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

Nov 10, 2021

DEBORAH S. HUNT, Clerk

In re: MARK ANTHONY TAYLOR,

Movant.

ORDER

Before: MOORE, GILMAN, and KETHLEDGE, Circuit Judges.

Mark Anthony Taylor, a Kentucky prisoner proceeding pro se, moves the court, pursuant to 28 U.S.C. § 2244(b)(3)(A), for an order authorizing the district court to consider a second or successive habeas corpus petition to be filed under 28 U.S.C. § 2254.

In 2013, a jury found Taylor guilty of murder, kidnapping, and tampering with physical evidence. He was sentenced to serve life in prison without parole. The Kentucky Supreme Court affirmed Taylor's convictions. Taylor's pursuit of state post-conviction relief was unsuccessful.

In 2020, Taylor filed a § 2254 habeas corpus petition. Taylor's petition asserted various ineffective-assistance-of-counsel claims. The district court denied the petition as time-barred and denied a certificate of appealability. Taylor filed a Federal Rule of Civil Procedure 60(b) motion for relief from judgment, which the district court denied. Taylor filed a timely appeal; his application for a certificate of appealability is currently pending before this court. *See Taylor v. Valentine*, No. 21-5616.

Taylor then filed this motion, seeking authorization to file a second or successive habeas corpus petition. If authorized, Taylor intends to assert that the State committed fraud "by submitting false evidence" to the Kentucky Supreme Court in its appellate brief filed during state post-conviction review.

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We may grant permission to file a second or successive habeas corpus petition only if the petitioner makes a prima facie showing that it contains a claim based on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (2) new facts that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the [petitioner] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C).

Taylor's motion does not satisfy the statutory criteria for filing a second or successive habeas corpus petition. Taylor admits that his proposed claim does not rely on a new constitutional rule. Taylor suggests that it relies on new evidence because purported false evidence was submitted to the Kentucky Supreme Court in the State's brief filed in response to his motion for discretionary review, which was denied on August 21, 2019. But Taylor fails to show that he exercised due diligence to discover the facts underlying his proposed claim before filing his first § 2254 petition, given that the State's brief was filed before August 21, 2019, and his first petition was filed in 2020. See § 2244(b)(2)(B)(i). Moreover, the Kentucky Supreme Court's denial of Taylor's motion for discretionary review is a judicial opinion; it is not new evidence establishing that a reasonable factfinder would not have found Taylor guilty of the crimes of conviction. See § 2244(b)(2)(B)(ii).

Accordingly, we **DENY** Taylor's motion for authorization to file a second or successive habeas corpus petition.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 21-5616

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Dec 28, 2021

DEBORAH S. HUNT, Clerk

MARK ANTHONY TAYLOR,

Petitioner-Appellant,

v.

ANNA VALENTINE, Warden,

Respondent-Appellee.

ORDER

Before: ROGERS, Circuit Judge.

Mark Anthony Taylor, a Kentucky prisoner proceeding pro se, appeals a district court order denying his Federal Rule of Civil Procedure 60(b) motion for relief from a judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Taylor requests a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He also requests leave to proceed in forma pauperis.

In 2013, a jury found Taylor guilty of murder, kidnapping, and tampering with physical evidence. He was sentenced to serve life in prison without parole. The Kentucky Supreme Court affirmed Taylor's convictions on September 24, 2015. Taylor filed a state post-conviction motion to vacate, set aside, or correct his sentence on August 24, 2016. The trial court denied Taylor's motion. The Kentucky Court of Appeals affirmed the denial of post-conviction relief, and the Kentucky Supreme Court denied discretionary review on August 21, 2019.

Taylor mailed his habeas corpus petition from prison on August 14, 2020, and it is considered filed on that date. See *Houston v. Lack*, 487 U.S. 266, 276 (1988); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 456 (6th Cir. 2012).

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In response, the State argued that the petition should be dismissed as time-barred. Taylor conceded the untimeliness of his habeas corpus petition but asserted that he was entitled to equitable tolling. On March 8, 2021, the district court denied Taylor's habeas corpus petition as time-barred and denied a certificate of appealability.

On March 16, 2021, Taylor filed a motion for relief from judgment under Rule 60(b)(3) and (6). Taylor asserted that he is entitled to equitable tolling of the statute of limitations based on the extraordinary circumstances. He asserted that the State committed fraud on the state courts by including false facts and evidence in its response to his motion for discretionary review before the Kentucky Supreme Court on post-conviction review. The district court denied Taylor's Rule 60(b) motion.

Because Taylor filed his Rule 60(b) motion within twenty-eight days of the district court's judgment, the time for filing a notice of appeal was tolled until the district court ruled on the Rule 60(b) motion. See Fed. R. App. P. 4(a)(4)(A)(vi). Thus, Taylor's notice of appeal is timely with respect to both the district court's underlying judgment and the order denying his motion for relief from judgment.

A certificate of appealability may issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a habeas corpus petition 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 v. McDaniel*, 529 U.S. 473, 484 (2000).

In his application for a certificate of appealability, Taylor does not challenge the district court's conclusion that his habeas corpus petition is time-barred. But, in any event, reasonable jurists would not debate the district court's determination that Taylor's habeas corpus petition is time-barred. Taylor's convictions became final on December 23, 2015, on expiration of the ninety-day period during which he could have filed a petition for a writ of certiorari to the Supreme Court

from the Kentucky Supreme Court's September 24, 2015, opinion affirming his convictions. *See Lawrence v. Florida*, 549 U.S. 327, 332-33 (2007). The statute of limitations ran for 245 days, from December 24, 2015, until August 24, 2016, when Taylor filed a post-conviction motion to vacate his sentence. The limitations period remained tolled until August 21, 2019, when the Kentucky Supreme Court denied discretionary post-conviction review. On August 22, 2019, the statute of limitations began to run again, and it ran uninterrupted until its expiration 120 days later on December 19, 2019. Because Taylor's habeas corpus petition was filed on August 14, 2020, it is untimely under 28 U.S.C. § 2244(d)(1)(A).

In his application for a certificate of appealability, Taylor argues, as he did in his Rule 60(b) motion, that fraud committed by the State during his state post-conviction proceedings entitles him to equitable tolling of the statute of limitations. Equitable tolling applies only when a 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) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

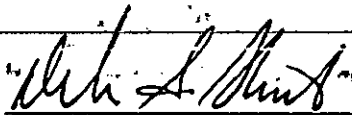
Reasonable jurists would not debate the district court's determination that Taylor is not entitled to equitable tolling based on his claim that the State committed fraud during his state post-conviction proceedings. Even if the State committed fraud during Taylor's state post-conviction proceedings, Taylor did not show that any such fraud prevented him from timely filing his federal habeas corpus petition. *See Keeling*, 673 F.3d at 463 (rejecting an equitable tolling argument where the petitioner did not show "that an extraordinary circumstance prevented him from filing a timely habeas petition"). Taylor did not show that the State's allegedly false statements in his state post-conviction proceedings had any bearing on the district court's denial of his federal habeas corpus petition as time barred.

Moreover, Taylor did not make a credible showing of actual innocence that would allow his habeas corpus petition to proceed despite its untimeliness. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (holding that "actual innocence, if proved, serves as a gateway through which a petitioner may pass" when his habeas corpus petition is time-barred); *Schlup v. Delo*, 513 U.S.

298, 327 (1995) (holding that in order to support an actual-innocence claim based on new evidence, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence").

Accordingly, the application for a certificate of appealability is **DENIED** and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

ORIGINAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:20-cv-00139-TBR

MARK ANTHONY TAYLOR

PETITIONER

v.

ANA VALENTINE, Warden

Respondent

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon Petitioner Mark Taylor's ("Taylor") Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. [DN 1]. A response limited to the issue of statute of limitations was filed by Respondent. [DN 11]. Taylor filed a reply. [DN 13]. The Magistrate Judge filed Findings of Fact and Conclusions of Law and Recommendation. [DN 14]. Taylor filed objections. [DN 15]. This matter is now ripe for adjudication. Having conducted a *de novo* review of the Magistrate Judge's report, the Court **ADOPTS** the Magistrate Judge's Report and Recommendations [DN 14].

I. Background

On December 23, 2010, a grand jury in McCracken Circuit Court indicted Taylor on murder, kidnapping, and tampering with physical evidence. [DN 11-1 at PageID 131]. Taylor was convicted on all three charges. [*Id.*] He was sentenced to life for murder, life without parole on the kidnapping conviction, and five years for the tampering charge on August 9, 2013. [*Id.* at PageID 133]. Taylor appealed his conviction to the Kentucky Supreme Court and his conviction was affirmed on September 24, 2015. [*Id.* at PageID 239]. Taylor was entitled to file a petition for writ of certiorari to the Supreme Court within 90 days. However, Taylor did not file a petition and the time to do so expired on December 23, 2015.

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Taylor filed a Motion to Vacate in the McCracken Circuit Court on August 24, 2016. [DN 11-2 at PageID 262]. The Court denied that motion on September 21, 2016. [*Id.* at PageID 313]. Taylor appealed the Court's ruling to the Kentucky Court of Appeals. The Appellate Court affirmed the trial court's ruling on November 16, 2018. [*Id.* at PageID 364]. Taylor then appealed to the Kentucky Supreme Court for discretionary review. However, the Court denied discretionary review on August 21, 2019. [*Id.* at PageID 376]. Taylor filed the present petition on August 20, 2020. [DN 1].

II. Discussion

A. Equitable Tolling

Due to Taylor's petition being filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the provisions of the AEDPA apply. *Washington v. Hofbauer*, 228 F.3d 689, 698 (6th Cir. 2000). The AEDPA sets forth a statute of limitations for state prisoners seeking release from custody. The statute provides, in relevant part, as follows:

(d)(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;

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)(A) and (2).

The Sixth Circuit has repeatedly cautioned that equitable tolling should be applied "sparingly." *Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001). A litigant "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)). "The [movant] bears the burden of demonstrating that he is entitled to equitable tolling." *McClendon v. Sherman*, 329 F.3d 490, 494-95 (6th Cir. 2003) (citing *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002)).

Here, the Magistrate Judge found that Taylor filed his petition approximately 8 months late. Taylor agrees that his petition was filed more than one year after his judgment became final. However, he argues he is entitled to equitable tolling.

Once the Kentucky Supreme Court affirmed Taylor's conviction on direct appeal, Taylor was entitled to file a writ of certiorari with the Supreme Court within 90 days pursuant to Supreme Court Rule 13. U.S. Sup. Ct. R. 13 ("[A] petition for a writ of certiorari to review a judgment in any case...entered by a state court of last resort...is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.") Taylor failed to file a writ, so his one-year period of limitation began running on December 23, 2015.

Taylor's time was tolled on August 24, 2016 when he filed a motion to vacate. However, 245 days of Taylor's one-year limitation had passed. Taylor's time was tolled from August 24, 2016 to August 21, 2019 when the Kentucky Supreme Court denied discretionary review of his motion to vacate. On August 21, 2019, Taylor had 120 days to file his petition within the one-year limitation. Taylor's remaining 120 days expired on December 19, 2019. He did not file his petition with this Court until August 20, 2020—almost 8 months later.

Taylor argues he is entitled to equitable tolling because the law library/legal services office at Kentucky State Reformatory had an "erratic" schedule, "the I.T. Department interfered with he availability of computer access", and the Covid-19 pandemic has resulted in lockdowns and

limited library access. Taylor does not object to the Magistrate Judge's finding that Taylor's attorney wrongly advising him on the limitations does not entitle Taylor to equitable tolling.

Taylor correctly cites a recent opinion that stated, "[t]he COVID-19 pandemic may very well qualify as an 'extraordinary' circumstance that warrants equitable tolling for the purposes of § 2255." *United States v. Smith*, 2020 U.S. Dist. LEXIS 125560, at *5 (D. Md. July 16, 2020). However, the pandemic cannot serve as a qualifying circumstance here. The vast majority of Taylor's time expired from December 23, 2015 to August 24, 2016. This was prior to the pandemic and the issues with library availability began. Taylor states the issues with availability of the law library began August 2019. Shutdowns due to the Covid-19 pandemic did not begin until March 2020. Therefore, neither of these reasons can excuse the 245 days expired prior to August 2019. Further, neither of these reasons can toll Taylor's remaining 120 days. The Court in *Smith* was considering a § 2255 petition. Here, Taylor filed under § 2254.

In *Maclin v. Robinson*, Maclin alleged he was entitled to equitable tolling because "he was not allowed as many weekly hours in the prison law library as prison policy dictated he should be" and the prison interfered with his access to the courts. 74 Fed. Appx. 587, 588 (6th Cir. 2003). The district court found Maclin filed an untimely petition and was not entitled to equitable tolling. *Id.* The Sixth Circuit affirmed the district court's holding. *Id.* at 589. "Maclin estimated that he had access to the law library for approximately 1.5 hours a week. While it was not the six hours to which he claims he was entitled under prison policy, Maclin has not pointed to any authority for the proposition that being permitted only 1.5 hours of library access a week constitutes a state-created impediment to his access to the courts". *Id.*

Here, Taylor states library access was limited to one day a week with a two-hour time period. [DN 15 at 4]. "[R]estrictions of prisoner library time are constitutional so long as those

restrictions do not deny a prisoner's access to the courts." *Id.* (citing *Walker v. Mintzes*, 771 F.2d 920, 932 (6th Cir. 1985)). Though access to the law library was limited, Taylor was not denied complete access to the court. Taylor also has not provided any evidence of the I.T. Department interfering with the computers. Taylor's bare assertions are not enough.

Taylor's one-year limitation expired on December 19, 2019—months before the Covid-19 virus spread across the country.¹ The virus cannot serve as an extraordinary circumstance when the virus was not present in this country prior to Taylor's filing deadline. Due to Taylor's failure to establish extraordinary circumstances, this Court need not determine if Taylor exercised due diligence.

B. Certificate of Appealability

In the event that Taylor appeals this Court's decision, he is required to obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). A district court must issue or deny a certificate of appealability and can do so even though the petitioner has yet to make a request for such a certificate. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002).

When a district court denies a petition on procedural grounds without addressing the merits of the petition, a certificate of appealability should issue if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a plain procedural bar is present, and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the court erred in dismissing the motion or that the petitioner should be allowed to proceed further. *Id.* In such a case, no appeal is warranted. *Id.* This

¹A Timeline of COVID-19 Developments in 2020, <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> (last accessed March 5, 2021).

Court is satisfied that no jurists of reason could find its procedural ruling to be debatable. Thus, no certificate of appealability is warranted in this case.

III. Conclusion

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, objections having been filed thereto, and the Court having considered the same,

IT IS HEREBY ORDERED that the Court adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge. [DN 14].

IT IS FURTHER ORDERED that Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 [DN 1] is **DENIED**.

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED** as to each claim asserted in the petition.

The signature of Thomas B. Russell is written in a cursive, handwritten style. It is positioned above the official title and the court seal.

Thomas B. Russell, Senior Judge
United States District Court

March 8, 2021

cc: Mark Anthony Taylor
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Kentucky State Reformatory
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LaGrange, KY 40032
PRO SE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:20-cv-00139-TBR

MARK ANTHONY TAYLOR

PETITIONER

v.

ANNA VALENTINE, Warden

RESPONDENT

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon Mark Taylor's *pro se* Motion for Relief of Procedural Time Bar. [DN 18]. Respondent Anna Valentine has responded. [DN 21]. Taylor has replied. [DN 22]. As such, this matter is ripe for adjudication. For the reasons that follow, **IT IS HEREBY ORDERED** that Taylor's Motion for Relief of Procedural Time Bar [DN 18] is **DENIED**.

I. Background

Taylor filed a petition for writ of habeas corpus on August 20, 2020. [DN 1]. The Court referred the matter to Magistrate Judge Lanny King for a report and recommendation. [DN 5]. Judge King recommended Taylor's petition be denied due to his claim being procedurally barred. [DN 14]. Taylor objected. [DN 15]. The Court addressed Taylor's objections and adopted Judge King's Recommendation [DN 16]. Taylor now seeks relief from this Court's judgment under Fed. R. Civ. P. 60(b)(3) and (6).

II. Discussion

Fed. R. Civ. P. 60(b)(3) provides relief from a judgment due to "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party". Fed. R. Civ. P. 60(b)(6) provides relief for "any other reason that justifies relief." In his motion, Taylor stated, "[t]he motion before the Court challenged only the district courts prior adverse ruling on the

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limitations period under another AEDPA provision. The Petitioner asserting that the district court's prior limitations ruling, was in error." [DN 18 at PageID 434]. However, Taylor never argues why the Court's previous ruling was in error. Instead, he argues the merits of his petition.

Taylor does not argue counsel committed fraud in the present action. [DN 22 at PageID 709]. He argues officers from the Attorney General's office committed such fraud during his trial and his state post-conviction actions. [Id.] This argument goes to the merits of his petition and does not address the Court's prior ruling that his petition is time barred.

Taylor has not presented the Court with any other reason that justifies relief from the previous ruling. Taylor filed his petition outside of the one-year statute of limitations and is not entitled to equitable tolling. The Court cannot reach the merits of Taylor's petition due to it being filed untimely. Therefore, the Court will deny Taylor's motion.

III. Conclusion

For the above stated reasons, **IT IS HEREBY ORDERED** that Taylor's Motion for Relief of Procedural Time Bar [DN 18] is **DENIED**.

IT IS SO ORDERED.

The image shows a handwritten signature in black ink that reads "Thomas B. Russell". The signature is written in a cursive, flowing style. To the right of the signature is a circular official seal of the United States District Court for the Eastern District of Kentucky. The seal features an eagle with spread wings, a shield on its chest, and the words "UNITED STATES DISTRICT COURT" and "EASTERN DISTRICT OF KENTUCKY" around the perimeter.

Thomas B. Russell, Senior Judge
United States District Court

May 21, 2021

cc: Mark Taylor
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PRO SE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:20-cv-00139-TBR-LLK

MARK ANTHONY TAYLOR

PETITIONER

v.

ANNA VALENTINE, Warden

RESPONDENT

FINDINGS OF FACT AND RECOMMENDATION

Petitioner filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. [Docket Number (“DN”) 1]. Respondent filed a limited response in opposition, arguing that the petition is subject to dismissal due to the running of the 1-year period of limitation for filing a petition established by 28 U.S.C. § 2244(d),¹ and Petitioner filed a reply. [DN 11, 13]. The Court referred the matter to the undersigned Magistrate Judge “pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matter.” [DN 5].

Because Petitioner filed his petition outside the 1-year period of limitation established by Section 2244(d) and Petitioner is not entitled to equitable tolling, the RECOMMENDATION will be that the Court DENY Petitioner’s petition, [DN 1].

Procedural history

A McCracken Circuit Court jury convicted Petitioner of first-degree murder, kidnapping, and tampering with physical evidence, and the Court sentenced Petitioner to life imprisonment without parole. *Taylor v. Commonwealth*, No. 2013-SC-000604-MR, 2015 WL 5626433 (Ky. Sept. 24, 2015). The Kentucky Supreme Court affirmed on direct appeal. *Id.*

¹ In the alternative, in the event the Court finds that the petition was timely, Respondents asks for an extension of 30 days in which to respond to Petitioner’s claims on the merits.

On August 24, 2016, Petitioner filed a motion to vacate, set aside or correct his conviction and sentence pursuant to Kentucky Rules of Criminal Procedure (“RCr”) 11.42. [DN 11-2 at 1]. The trial court denied the motion, and the Kentucky Court of Appeals affirmed. *Taylor v. Commonwealth*, No. 2016-CA-001706-MR, 2018 WL 6016669 (Ky. Ct. App. Nov. 16, 2018). On August 21, 2019, the Kentucky Supreme Court denied discretionary review. *Id.*

Petitioner filed the present petition on or about August 20, 2020. [DN 1].

Petitioner filed his Section 2254 petition approximately 8 months late.

28 U.S.C. § 2244(d) provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

In this case, the only viable candidate for triggering the running of the 1-year period of limitation is Section 2244(d)(1)(A). Petitioner’s “judgment became final by the conclusion of direct review,” Section 2244(d)(1)(A), on December 23, 2015, or 90 days after the Kentucky Supreme Court affirmed his convictions on direct appeal on September 24, 2015.

This date of December 23, 2015 is dictated by *Giles v. Beckstrom*, 826 F.3d 321 (6th Cir. 2016). Like Petitioner, Giles' convictions were affirmed on direct appeal by the Kentucky Supreme Court, and, like Petitioner, Giles did not file a petition for writ of certiorari in the United States Supreme Court within 90 days as allowed by Supreme Court Rule 13.3. *Id.* at 323. In that circumstance, the "conclusion of direct review," Section 2244(d)(1)(A), occurred 90 days after the "Kentucky Supreme Court issued its opinion and order affirming [Petitioner's] conviction." *Id.* In this case, the "conclusion of direct review" occurred 90 days after September 24, 2015, or on December 23, 2015.

On August 24, 2016, the running of Petitioner's 1-year period of limitation was tolled pursuant to Section 2244(d)(2), when Petitioner filed his 11.42 motion. [DN 11-2 at 1]. 245 days elapsed between December 23, 2015, when Petitioner's period began to run, and August 24, 2016, when the running was tolled (with 120 days remaining).

On August 21, 2019, tolling ceased when the Kentucky Supreme Court denied discretionary review of the Kentucky Court of Appeals' affirmance of the trial court's denial of Petitioner's motion to vacate pursuant to RCr 11.42.

This date of August 21, 2019 is also dictated by *Giles v. Beckstrom*, 826 F.3d 321 (6th Cir. 2016). Like Petitioner, Giles filed an 11.42 motion to vacate after the conclusion of direct review, which tolled the running of his 1-year period of limitation, and, like Petitioner, Giles filed a motion for discretionary review of the Kentucky Court of Appeals' affirmance of the trial court's denial of his 11.42 motion. *Giles v. Beckstrom*, No. 5:14-CV-00085-TBR, 2014 WL 5782571, at *5 (W.D. Ky. Nov. 6, 2014). The Kentucky Supreme Court denied Giles' motion for discretionary review on May 15, 2013, and, "[o]n May 16, 2013, the limitations period began to run again." 826 F.3d at 324. While the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," Section 2244(d)(1)(A), takes into account the time during which a petitioner could have sought review by the United States Supreme Court, "State post-conviction or other collateral review" is no longer

“pending,” Section 2244(d)(2), when it is finally denied by the State courts. *Lawrence v. Florida*, 549 U.S. 327, 331-32 (2007). In other words, such review does not include the period “while this [Supreme] Court considers [or could have considered] a certiorari petition.” *Id.*

Petitioner’s 1-year period of limitation expired on December 19, 2019, or 120 days after August 21, 2019. Petitioner filed the present petition on or about August 20, 2020, [DN 1] -- approximately 8 months late.

Petitioner is not entitled to equitable tolling.

Petitioner argues that he is entitled to equitable tolling of the 1-year period of limitation because the attorney who assisted him in prosecuting the appeal of the denial of his 11.42 motion advised him that “the 1-year statute of limitations to file habeas corpus did not begin until the final post-conviction [11.42] state action became final.” [DN 13 at 5]. As noted above, petitioner’s 11.42 action became final on August 21, 2019, and the present petition was filed exactly a year later on or about August 20, 2020.

Assuming for the sake of argument that counsel did misadvise Petitioner as alleged, Petitioner is still not entitled to equitable tolling. This result is also dictated by *Giles v. Beckstrom*, 826 F.3d 321 (6th Cir. 2016). Like Petitioner, the attorney who assisted Giles in prosecuting the appeal of the denial of his 11.42 motion misadvised him that he had longer to file his Section 2254 petition than he, in fact, had. This same attorney represented Giles in connection with his petition and filed his petition 21 days late, based on the official position of the Kentucky Department of Public Advocacy’s (ultimately found to be erroneous) that Giles’ conviction did not become “final by the conclusion of direct review or the expiration of the time for seeking such review,” Section 2244(d)(1)(A), until 90 days after 21 days after issuance of the Kentucky Supreme Court’s affirmance. *Id.* at 323 (citing Kentucky Rule of Civil Procedure 76.30(2)(a), which makes a Kentucky Supreme Court order or opinion “final” 21 days after it is issued, in order to allow time for a possible petition to rehear.”). Giles was not entitled to equitable tolling because such “simple ‘miscalculation’ that leads a lawyer to miss a filing deadline” does not warrant equitable tolling. *Id.* at 325

(quoting *Holland v. Florida*, 560 U.S. 631, 651-52 (2010)). More recently, this Court rejected a claim of entitlement to equitable tolling based on a disbarred attorney's erroneous advice regarding the period of limitation, which may have been related to counsel's cocaine abuse. *Robertson v. Simpson*, No. 5:05CV-239-R, 2011 WL 3880940 (W.D. Ky. Sept. 2, 2011).

The Court should decline to issue a certificate of appealability.

Before Petitioner may appeal this Court's decision, a certificate of appealability (COA) must issue. 28 U.S.C. § 2253(c)(1)(B); 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); *Sack v. McDaniel*, 529 U.S. 473, 483 (2000). "When the district court denies a habeas petition on procedural grounds [e.g., the 1-year period of limitation established by Section 2244(d)] without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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." 529 U.S. at 484.

The undersigned is satisfied that no jurists of reason would find it debatable that the petition was filed past the applicable 1-year period and that Petitioner is not entitled to equitable tolling. Therefore, a COA is unwarranted.

RECOMMENDATION

Because Petitioner filed his petition outside the 1-year period of limitation established by 28 U.S.C. § 2244(d) and Petitioner is not entitled to equitable tolling, the Magistrate Judge RECOMMENDS that the Court DENY Petitioner's petition, [DN 1], and DENY a certificate of appealability.

January 26, 2021


Lanny King, Magistrate Judge
United States District Court

NOTICE

Under the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Fed. R. Civ. P. 72(b), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984).

January 26, 2021


Lanny King, Magistrate Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:20-cv-00139-TBR-LLK

MARK ANTHONY TAYLOR

PETITIONER

v.

ANNA VALENTINE, Warden

RESPONDENT

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, objections having been filed thereto, and the Court having considered the same,

IT IS HEREBY ORDERED that the Court adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket # 1) is DENIED.

IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED as to each claim asserted in the petition.

c: pro-se Petitioner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:20-cv-00139-TBR-LLK

MARK ANTHONY TAYLOR

PETITIONER

v.

ANNA VALENTINE, Warden

RESPONDENT

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, no objections having been filed thereto, and the Court having considered the same,

IT IS HEREBY ORDERED that the Court adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket # 1) is DENIED.

IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED as to each claim asserted in the petition.

c: pro-se Petitioner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:20-cv-00139-TBR-LLK

MARK ANTHONY TAYLOR

PETITIONER

v.

ANNA VALENTINE, Warden

RESPONDENT

JUDGMENT

In accordance with the Order of the Court, it is hereby ORDERED AND ADJUDGED as follows:

- (1) Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket # 1) is
DISMISSED with prejudice, and judgment is entered in favor of Respondent;
- (2) A Certificate of Appealability is DENIED; and
- (3) This is a FINAL judgment, and the matter is STRICKEN from the active docket of the Court.

c: pro-se Petitioner