APPENDIX A1

Watkins v Stephenson, 2023 U.S. App. LEXIS 9344

Order of the United States Court of Appeals
for the Sixth Circuit

Judges: KETHLEDGE, READER, AND MURPHY, Circuit Judges

Judges: LARSEN and DAVIS recused themselves from participating in this ruling

Petition for Rehearing En Banc DENIED

(Apr. 19, 2023 ; # 21-2914)

No. 21-2914

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 19, 2023
DEBORAH S. HUNT, Clerk

GARY WATKINS,

Petitioner-Appellant,

v.

GEORGE STEPHENSON, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: KETHLEDGE, READLER, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judges Larsen and Davis recused themselves from participation in this ruling.

APPENDIX B1 – B11

Watkins v Stephenson, 57 F.4th 576, 2023 U.S. App. LEXIS 853

Opinion and Order of the United States Court of Appeals
for the Sixth Circuit

AFFIRMING the Judgment of the District Court

(Jan. 13, 2023 ; # 21-2914)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: January 13, 2023

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Re: Case No. 21-2914, *Gary Watkins v. George Stephenson*
Originating Case No. : 2:10-cv-13199

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's published opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Ms. Kinikia D. Essix

Enclosures

Mandate to issue.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0007p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY WATKINS,

Petitioner-Appellant,

v.

GEORGE STEPHENSON, Warden,

Respondent-Appellee.

No. 21-2914

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:10-cv-13199—Arthur J. Tarnow, District Judge.

Decided and Filed: January 13, 2023

Before: KETHLEDGE, READLER, and MURPHY, Circuit Judges.

COUNSEL

ON BRIEF: James C. Thomas, JAMES C. THOMAS P.C., Sterling Heights, Michigan, for Appellant. Jared D. Schultz, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

MURPHY, Circuit Judge. When a state prisoner seeks to amend a habeas petition filed in federal court, the prisoner often will encounter a problem: the one-year statute of limitations will have expired by the time of the amendment. *See* 28 U.S.C. § 2244(d)(1). If the prisoner timely filed the original petition, this problem may not be insurmountable. Under Federal Rule of Civil Procedure 15(c)(1)(B), the amended petition will "relate[] back to the date" of the original petition as long as the new claims arose from the same "conduct, transaction, or

occurrence" as the old ones. But sometimes a court will dismiss a prisoner's original petition on procedural grounds, and the prisoner will seek to file a new petition in a later suit. Can the petition in the new suit "relate back to the date" of the petition in the dismissed suit, such that Rule 15 allows the prisoner to rely on that earlier date to determine the new suit's timeliness?

Gary Watkins's appeal in this habeas case raises that question. Like every other circuit court to address it, we hold that Rule 15 does not apply across cases in this fashion. And our prior decision in this case forecloses Watkins's other attempts to establish the timeliness of his amended petition. *See Watkins v. Deangelo-Kipp*, 854 F.3d 846, 849–52 (6th Cir. 2017). We thus affirm the district court's dismissal of his petition.

I

Watkins lived next door to Quincey Varner and Varner's girlfriend in Ypsilanti, Michigan. In January 2006, Watkins reneged on a deal to sell his car to Varner, triggering a feud between them. On January 9, Varner's girlfriend spoke with Watkins and thought they had resolved their differences. Around 7:00 p.m. the next day, Varner dropped her off at her job as a nurse at a nearby hospital.

A half hour later, police received reports of shots fired at Watkins's house. Officers arrived to find a bleeding Varner lying unconscious in Watkins's driveway. Standing nearby, Watkins told the officers to call an ambulance because he had shot Varner. The paramedics who treated Varner spotted no weapons on or around him, but he had two gunshot wounds in his chest, one in his thigh, one in his posterior, one in his shin, and one in his arm. A trail of blood led from Varner's location back to Watkins's house. Officers discovered a handgun just inside Watkins's home and a double-barreled shotgun in his living room. Varner died hours later at the hospital where his girlfriend worked.

During interrogation, Watkins confessed to shooting Varner. According to Watkins, the two argued in his house and wrestled over his shotgun. After regaining control of the shotgun, Watkins shot Varner with each barrel in quick succession. He then retrieved his handgun as an injured Varner fled to the yard. Catching up to Varner outside, Watkins continued to shoot at him while screaming "die mother fucker, die." Tr., R.15-10, PageID 496.

The State of Michigan charged Watkins with several crimes. He began to engage in concerning behavior in jail, such as refusing to eat and urinating on himself. This behavior led to four pretrial psychological evaluations. The first evaluator found Watkins incompetent to stand trial but opined that he could become competent in a hospital setting. A second evaluator reversed course, concluding that Watkins had been acting bizarrely to fake incompetence. A third agreed that his odd behavior resulted from "malingering" rather than "mental illness." Eval., R.17-1, PageID 1157. And a fourth found insufficient evidence to conclude that Watkins lacked criminal responsibility for his actions.

Watkins's problematic behavior continued at trial. After he flipped over a counsel table, the judge removed him to a secured room to watch the trial. While there, he spat on an officer and "managed to urinate on the television and the" cart on which it sat. Tr., R.15-9, PageID 455. When Watkins testified, he admitted that he had shot Varner but claimed that the shooting had occurred at a different time and location.

The jury convicted Watkins of second-degree murder, assault with intent to murder, and two counts of using a firearm in commission of a felony. The court sentenced him to a prison term of 2 years for the firearm offenses to run consecutively to a prison term of 25 to 50 years for the murder and assault convictions.

In 2008, Watkins filed a pro se habeas petition under 28 U.S.C. § 2254. The district court ordered Watkins to pay the filing fee or apply for leave to proceed *in forma pauperis*. Watkins did neither. The court thus dismissed his petition without prejudice for failure to prosecute.

In 2010, Watkins returned to federal court. He filed a pro se document captioned a "motion for equitable tolling to allow petitioner's pro se petition for writ of habeas corpus to proceed timely." Pet., R.1, PageID 1. This filing alleged four claims: that the trial court committed two sentencing errors, that his counsel provided ineffective assistance by failing "to investigate and raise a defense," and that the prosecutor committed misconduct. *Id.*, PageID 11. The district court construed this motion as a second habeas petition and stayed this new federal case to allow Watkins to exhaust his claims in state court.

In 2014, after the state courts rejected his claims, Watkins filed a "supplemental" petition in the stayed federal case. Now assisted by counsel, he raised six amended claims: (1) that counsel provided ineffective assistance by failing to seek a fifth competency evaluation at trial; (2) that counsel provided ineffective assistance by failing to request self-defense jury instructions; (3) that the trial court's verdict form violated his jury-trial right; (4) that the court violated his right to represent himself; (5) that a communication breakdown between Watkins and his counsel deprived him of the assistance of counsel; and (6) that the trial court and defense counsel wrongly allowed a biased juror to sit.

The district court reopened the case. The court construed Watkins's supplemental petition as a motion to amend his 2010 petition, and it granted the motion. It later awarded habeas relief to Watkins. The court agreed with his first claim that his counsel had wrongly failed to request another competency evaluation after his trial outbursts. In the process, it rejected the Warden's argument that this claim was untimely. It reasoned that the claim related back to the date of Watkins's 2010 petition under Rule 15 because both petitions raised ineffective-assistance claims. It also equitably tolled the limitations period due to Watkins's mental-health struggles.

The Warden appealed. We reversed on statute-of-limitations grounds. *Watkins*, 854 F.3d at 849–52. The parties agreed that Watkins had filed his amended petition outside the limitations period. *Id.* at 849. And we held that Watkins's successful ineffective-assistance claim in the amended petition did not "relate back" to the generic ineffective-assistance claim in his 2010 petition. *Id.* at 850–51. We next held that Watkins had not shown an entitlement to equitable tolling. *Id.* at 851–52. We reasoned that he had introduced no evidence about his mental health after his conviction became final. *Id.* And we added that his ability to seek timely relief in state court showed that his mental-health problems had not prevented timely litigation. *Id.* at 852.

On remand, the district court held that the statute of limitations barred Watkins's five remaining claims. Watkins argued, for the first time, that his amended petition actually related back to the 2008 petition that the court had previously dismissed, but the court rejected this argument. It also held that the remaining claims lacked a connection to any claim in the 2010

petition. This time, Watkins appealed. He raises legal issues that we review de novo. *See Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 246–47 (6th Cir. 2000).

II

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "1-year period of limitation" on state prisoners who seek to challenge their state convictions in federal court under 28 U.S.C. § 2254. *Id.* § 2244(d)(1). The parties agree that Watkins filed his 2008 and 2010 petitions within this statute of limitations. The federal habeas laws also allowed Watkins to amend a habeas petition "as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242; *see Mayle v. Felix*, 545 U.S. 644, 654–55 (2005).

Federal Rule of Civil Procedure 15 sets forth those procedural rules. It permits a party to amend a complaint in a typical civil case or a petition in a habeas case with "leave" of a district court and directs the court to "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *see Mayle*, 545 U.S. at 655. Here, the district court allowed Watson to file six claims in an amended petition that replaced the four claims in his 2010 petition. But the decision to grant Watkins's motion to amend did not automatically render his six new claims timely. Their timeliness presumptively depended on whether Watkins had filed the amendment within the one-year statute of limitations. *See Hill v. Mitchell*, 842 F.3d 910, 922 (6th Cir. 2016). And the parties agree that Watkins did not do so. *See Watkins*, 854 F.3d at 849.

That said, Rule 15 sometimes allows a prisoner to invoke the original petition's filing date when considering the timeliness of an amended petition that would otherwise fall outside the statute of limitations. *See Cowan v. Stovall*, 645 F.3d 815, 818 (6th Cir. 2011). It indicates: "An amendment to a pleading relates back to the date of the original pleading when," as relevant here, "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]" Fed. R. Civ. P. 15(c)(1)(B).

Watkins contends that this relation-back rule renders his amended claims timely. Specifically, Watkins argues that all six claims relate back to the claims in his *2008 petition*. When discussing this argument, even the Warden concedes that the 2008 petition raised at least

one of the claims (the juror-bias claim) that Watkins asserted in his amended petition. Alternatively, Watkins argues that the five amended claims that we did not consider in our prior decision relate back to the *2010 petition*. We thus must address two questions: Can an "amendment" under Rule 15 relate back to a dismissed petition from a separate case? And did any amended claim arise from the same "conduct, transaction, or occurrence" as the claims in the 2010 petition?

Question 1: Can an "amendment" under Rule 15 relate back to a dismissed petition? No. Both text and precedent foreclose Watkins's attempt to tie his amended petition to the date of a pleading in a different case. To begin with, Rule 15's text contemplates that the relevant filings will arise in the same case. It does not say that an amendment can "relate[] back to the date" of any pleading filed anywhere. Fed. R. Civ. P. 15(c)(1). It says that the amendment can "relate[] back to the date of *the original* pleading[.]" *Id.* (emphasis added). The use of the definite article ("the") shows that Rule 15 refers to one specific document. *See Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004). The adjective "original" identifies that document: the initial complaint (or petition) in the case in which the amendment occurs. *See Mayle*, 545 U.S. at 655. No reasonable person versed in legal language would describe a habeas petition in a different case as the "original" pleading in a case currently pending in the court.

Watkins's contrary interpretation could effectively eliminate AEDPA's statute of limitations. *Cf. Mayle*, 545 U.S. at 662. The Federal Rules of Civil Procedure permit plaintiffs to voluntarily dismiss a case without a court order or a defendant's approval if they do so early enough in the suit. Fed. R. Civ. P. 41(a)(1)(A)(i). Suppose a prisoner files a habeas petition and then voluntarily dismisses it. That tactic could allow the prisoner to file a second (otherwise untimely) petition decades later by relying on the date of the dismissed petition for statute-of-limitations purposes. *See Graham v. Johnson*, 168 F.3d 762, 779–80 (5th Cir. 1999).

For these reasons, every circuit court to address this issue (nine, by our count) has interpreted Rule 15 to bar prisoners from relying on the date of a dismissed petition. *See Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001); *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000); *Jones v. Morton*, 195 F.3d 153, 160–61 (3d Cir. 1999); *Graham*, 168 F.3d at

779–80; *Tucker v. Kingston*, 538 F.3d 732, 734 (7th Cir. 2008); *White v. Dingle*, 616 F.3d 844, 847 (8th Cir. 2010); *Rasberry v. Garcia*, 448 F.3d 1150, 1155 (9th Cir. 2006); *Marsh v. Soares*, 223 F.3d 1217, 1219–20 (10th Cir. 2000); *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000) (per curiam). Outside this habeas context, we have also rejected the argument that the initial complaint in a new case can "relate back" to another complaint in a dismissed case. *See State Bank of Coloma v. Nat'l Flood Ins. Program*, 851 F.2d 817, 820 (6th Cir. 1988); *see also Velez-Diaz v. United States*, 507 F.3d 717, 719 (1st Cir. 2007) (citing cases); *Carter v. Tex. Dep't of Health*, 119 F. App'x 577, 581 (5th Cir. 2004) (per curiam) (same). We now extend this rule to the habeas context. Watkins cannot rely on his dismissed 2008 petition to save the untimely claims in his amended petition.

Question 2: Did any amended claim arise from the same "conduct, transaction, or occurrence" as the claims in the 2010 petition? No. Our prior decision in Watkins's case largely disposes of this argument that his amended claims "arose out of the conduct, transaction, or occurrence" as the claims in his 2010 petition. Fed. R. Civ. P. 15(c)(1)(B); *see Watkins*, 854 F.3d at 849–51. The Supreme Court has narrowly interpreted the phrase "conduct, transaction, or occurrence" in this habeas context. *See Pinchon v. Myers*, 615 F.3d 631, 642 (6th Cir. 2010) (discussing *Mayle*, 545 U.S. at 656–64). A prisoner cannot assert merely that the claims in the original and amended petitions all relate to the same trial or conviction. *Mayle*, 545 U.S. at 662. To relate back, the amended claims must "share a 'common core of operative facts'" with the original claims. *Cowan*, 645 F.3d at 818 (quoting *Mayle*, 545 U.S. at 664). So any "new" facts generally may differ only in specificity (not in kind) from those originally alleged. *Id.* at 819.

Our decisions in *Cowan* and *Watkins* demonstrate what this rule requires. In *Cowan*, we held that an amended ineffective-assistance claim alleging that counsel had failed to interview specific witnesses related back to an original ineffective-assistance claim alleging that counsel had "failed to investigate" and find "witnesses [who] would have supported" the defense. *Id.* (emphasis omitted). The new claim "merely added more detail" to the original. *Id.* In *Watkins*, by contrast, we held that Watkins's amended ineffective-assistance claim that counsel wrongly failed to request another competency evaluation did not relate back to the original ineffective-

assistance claim that counsel failed "to investigate and raise a defense." 854 F.3d at 850. The two allegations challenged different "episodes" in that one concerned a defense on the merits and the other concerned Watkins's competency. *Id.* at 850–51; *see also Hill*, 842 F.3d at 924–25.

Like the claim that we already rejected, Watkins's five remaining claims in his amended petition are different in "kind" (not just "specificity") from the four that he raised in the original 2010 petition. *Cowan*, 645 F.3d at 819. Watkins does not even attempt to show that three of the amended claims—that the trial court's verdict form violated his jury-trial right, that the trial court violated his right to represent himself at trial, and that the trial court allowed a biased juror—have any factual connection to his original claims whatsoever. Recall that his original petition alleged two sentencing errors, a generic ineffective-assistance claim, and a prosecutorial-misconduct claim. So these three amended claims alleged errors in the way that the trial court managed the trial procedure, whereas the original claims alleged errors at the later sentencing, by Watkin's trial counsel, or by the prosecutor. *See Mayle*, 545 U.S. at 651–52, 657; *Pinchon*, 615 F.3d at 643; *Wiedbrauk v. Lavigne*, 174 F. App'x 993, 1002 (6th Cir. 2006).

The remaining ineffective-assistance claims in Watkins's amended petition fare no better. Those claims criticized trial counsel for failing to request self-defense jury instructions, failing to object to the allegedly biased juror, and failing to communicate with Watkins before trial. As noted, his original ineffective-assistance claim alleged that his attorney failed "to investigate and raise a defense." *Watkins*, 854 F.3d at 850. The amended claims do not relate back to this assertion because it was "completely bereft of specific fact allegations[.]" *Hill*, 842 F.3d at 924. The original claim failed to allege any facts, to identify counsel's investigatory failures, or to specify the defense that counsel failed to raise. *See Watkins*, 854 F.3d at 850. In addition, to the extent that the original claim had any substance, it concerned counsel's failure to introduce evidence of an unspecified defense. But his amended claims concerned other matters. Two raised objections about trial procedure (allowing a biased juror and failing to request jury instructions), and the other objected to counsel's communications with Watkins. His new claims thus go well beyond merely adding "more detail" to what Watkins previously alleged. *Cowen*, 645 F.3d at 819.

In response, Watkins cites our caselaw recognizing that a district court should freely grant a motion to amend a habeas petition as long as it will not prejudice the other side. *See Coe v. Bell*, 161 F.3d 320, 341 (6th Cir. 1998). He notes further that the Warden has not shown prejudice. Watkins overlooks that the district court here *did* grant his motion to amend. But that decision does not establish the timeliness of the amended claims. *See Hill*, 842 F.3d at 922–23.

Watkins next argues that we should equitably toll AEDPA's limitations period because of his mental-health struggles. *See Holland v. Florida*, 560 U.S. 631, 645–49 (2010). In our last appeal, however, we rejected his argument that these same mental-health struggles qualified as the type of extraordinary circumstance that would justify equitable tolling. *See Watkins*, 854 F.3d at 851–52. Watkins did not present evidence of his mental health since his conviction, and his mental health did not prevent him from timely pursuing his claims in state court. *Id.* Watkins offers no grounds to reassess this analysis. *Cf. Thomas v. Mahoning Cnty. Jail*, 2017 WL 3597428, at *3 (6th Cir. Mar. 21, 2017) (order) (citing *United States v. Haynes*, 468 F.3d 422, 426 (6th Cir. 2006)).

Watkins lastly asks us to reconsider our prior decisions in *Watkins* and *Hill*. But a panel of this court cannot overrule our prior published precedent. *See Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

We affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-2914

GARY WATKINS,

Petitioner-Appellant,

v.

GEORGE STEPHENSON, Warden,

Respondent - Appellee.

Before: KETHLEDGE, READLER, and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C1 – C8

Watkins v Haas, 2021 U.S. Dist. LEXIS 165679

Opinion and Order on Remand and on Reconsideration of the U.S. Dist. Ct. - E.D. Mich.

Hon. Arthur J. Tarnow, United States District Judge

DENYING the Petition for Writ of Habeas Corpus with Prejudice and

GRANTING a Certificate of Appealability and Leave to Appeal in Forma Pauperis

(Sept. 1, 2021 ; # 2:10-cv-13199)

Watkins v. Haas

United States District Court for the Eastern District of Michigan, Southern Division

September 1, 2021, Decided; September 1, 2021, Filed

Civil No. 2:10-CV-13199

Reporter
2021 U.S. Dist. LEXIS 165679 *; 2021 WL 3912754

GARY EUGENE WATKINS, Petitioner, v. RANDALL HAAS, Respondent,

Subsequent History: Affirmed by *Watkins v. Stephenson, 2023 U.S. App. LEXIS 853, 2023 FED App. 7P (6th Cir.) (6th Cir. Mich., Jan. 13, 2023)*

Prior History: *Watkins v. DeAngelo-Kipp, 2020 U.S. Dist. LEXIS 107299, 2020 WL 3286794 (E.D. Mich., June 19, 2020)*

Core Terms

habeas petition, relates back, original petition, amended petition, trial counsel, limitations period, statute of limitations, equitable tolling, ineffective assistance of counsel claim, one year, ineffective, supplemental brief, habeas corpus, writ petition, certificate, juror, mental illness, tolled, dismissal without prejudice, state court, innocence, jurists, constitutional right, habeas petitioner, in forma pauperis, district court, investigate, law of the case doctrine, ineffective assistance, remaining claim

Counsel: **[*1]** For Gary Watkins, Petitioner: James C. Thomas, James C. Thomas, P.C., Sterling Heights, MI USA; Phillip D. Comorski, Detroit, MI USA.

For Randall Haas, Respondent: John S. Pallas, Michigan Department of Attorney General, Lansing, MI USA.

Judges: HONORABLE ARTHUR J. TARNOW, UNITED STATES DISTRICT JUDGE.

Opinion by: ARTHUR J. TARNOW

Opinion

OPINION AND ORDER ON REMAND AND ON RECONSIDERATION SUMMARILY DENYING THE PETITION FOR WRIT OF HABEAS CORPUS AND GRANTING A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. In his petition, filed through attorneys James C. Thomas and Phillip D. Comorski, petitioner challenges his convictions for second-degree murder, *M.C.L.A. 750.317*; assault with intent to commit murder, *M.C.L.A. 750.83*; and two counts of felony-firearm, *M.C.L.A. 750.227b*. For the reasons that follow, the petition for writ of habeas corpus is SUMMARILY DENIED pursuant to *28 U.S.C. § 2244(d)*.

I. Background

Petitioner was convicted of second-degree murder, assault with intent to commit murder, and two counts of felony-firearm following a jury trial in the Washtenaw County Circuit Court.

While direct review of petitioner's case was pending in the state courts, petitioner **[*2]** filed a petition for writ of habeas corpus, challenging his convictions. The petition was dismissed without prejudice because petitioner failed to pay the filing fee or file an application to proceed *in forma pauperis* and also because he failed to submit a habeas petition on an approved court form. *Watkins v. McKee*, No. 08-CV-14507 (E.D. Mich. Jan. 14, 2009)(Rosen, J.).

Direct review of petitioner's conviction ended in the Michigan courts on May 27, 2009, when the Michigan Supreme Court denied Petitioner leave to appeal following the affirmance of his conviction by the Michigan Court of Appeals. *People v. Watkins, 483 Mich. 1016, 765 N.W. 2d 320 (2009)*.

On May 27, 2010, Petitioner filed his first post-conviction

motion for relief from judgment with the state trial court.

While Petitioner's motion for relief from judgment was pending in the trial court, petitioner filed a *pro se* motion for equitable tolling, a brief in support of equitable tolling, and an affidavit with this Court on July 28, 2010.[1] Petitioner in his brief indicated that he wished to return to the state courts to exhaust the following claims in his post-conviction motion: (1) petitioner is entitled to re-sentencing due to the fact that inaccurate information was used to evaluate the offense variables of the sentencing guidelines, (2) **[*3]** petitioner is entitled to re-sentencing because his sentence was based on inaccurate information, (3) petitioner was denied his right to the effective assistance of trial counsel because trial counsel failed to investigate and present a defense and appellate counsel was ineffective for failing to raise meritorious issues, and (4) prosecutorial misconduct. (ECF No. 1, PageID. 11).

The motion for equitable tolling was denied as moot, because the judgment of conviction became final not on May 27, 2009, the date that the Michigan Supreme Court denied petitioner leave to appeal, but on August 25, 2009, when petitioner failed to file a petition for writ of certiorari with the U.S. Supreme Court. Petitioner had until August 25, 2010, and not May 27, 2010, as he believed, to file his habeas application in conformance with the AEDPA's statute of limitations. Petitioner's application had been filed on July 28, 2010. The petition was timely filed, thus, any equitable tolling arguments were moot. *Watkins v. McKee, No. 2:10-CV-13199, 2010 U.S. Dist. LEXIS 85802, 2010 WL 3324979, at * 2 (E.D.Mich. Aug. 20, 2010)*. The petition was held in abeyance so that Petitioner could return to the state courts and exhaust additional claims. *2010 U.S. Dist. LEXIS 85802, [WL] at *2-3*.

Petitioner's post-conviction **[*4]** motion for relief from judgment was denied. *People v. Watkins*, No. 06-70-FC (Washtenaw Cty. Cir.Ct., Oct. 28, 2010); *reconsideration den.* No. 06-70-FC (Washtenaw Cty. Cir.Ct., Dec. 28, 2010).

Petitioner filed a second motion for relief from judgment, which was also denied. *People v. Watkins*, No. 06-70-FC (Washtenaw Cty. Cir.Ct., June 11, 2013). The Michigan appellate courts denied leave to appeal. *People v. Watkins, No. 318199, 2013 Mich. App. LEXIS 2557 (Mich.Ct.App. Oct. 28, 2013)*; *lv. den. 495 Mich. 1006, 846 N.W.2d 563 (2014).*

On July 25, 2014, Petitioner, through counsel, filed a supplemental petition for writ of habeas corpus, raising the following claims:

> I. Defense trial counsel was constitutionally ineffective in failing at trial to challenge Watkins's competency to stand trial, in view of his bizarre behavior.
>
> II. Defense trial counsel was constitutionally ineffective in failing to request a jury instruction on imperfect self-defense reducing second-degree murder to voluntary manslaughter, and in failing to request a jury instruction that Watkins had no duty to retreat from the enclosed porch at Watkins's residence before using deadly force in self-defense.
>
> III. Where a flawed jury form did not provide an opportunity for a general verdict of not guilty, Watkins was deprived of his constitutional right **[*5]** to a jury trial.
>
> IV. The trial court denied Watkins his constitutional right to self-representation when it refused his request for self-representation and foreclosed any further discussion of the issue by telling Watkins that he could only be represented by the attorney he sought to have removed previously.
>
> V. Watkins was denied counsel was defense counsel informed the court before trial that there was a breakdown in the attorney/client relationship, due to the fact that defense counsel had no idea what witnesses to call, claiming ongoing communication problems between him and Watkins.
>
> VI. The court violated Watkins's constitutional right to a trial by a fair and impartial jury by allowing a juror to serve, even after the juror informed the court that she personally knew Watkins from college, and Watkins was denied his right to the effective assistance of counsel at trial where counsel failed to remove this juror from the jury.

This Court reopened the petition to the Court's active docket, amended the caption, and permitted Petitioner to file an amended habeas petition. The Court directed respondent to file an answer to the amended petition. *Watkins v. Romanowski, No. 2:10-CV-13199, 2014 U.S. Dist. LEXIS 109586, 2014 WL 3894370 (E.D. Mich. Aug. 7, 2014)*.

This Court granted habeas relief to Petitioner **[*6]** on

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[1] Under the prison mailbox rule, the Court deemed these pleadings filed on July 28, 2010, the date that they were signed and dated. *See Towns v. U.S., 190 F. 3d 468, 469 (6th Cir. 1999)*.

his first claim, finding that he was denied the effective assistance of trial counsel when his attorney failed to request an additional or independent evaluation as to Petitioner's mental competency to stand trial after Petitioner continued to exhibit signs of mental illness and an inability to understand the proceedings. *Watkins v. Haas, 143 F. Supp. 3d 632, 633-34 (E.D. Mich. 2015)*. In so ruling, this Court rejected respondent's argument that the amended habeas petition was time-barred under the AEDPA's one year statute of limitations for two reasons. First, the Court found that Petitioner's ineffective assistance of trial counsel claim related back to the ineffective assistance of trial and appellate counsel claims that Petitioner raised in his initial timely filed petition. *Watkins v. Haas, 143 F. Supp. 3d at 640*. Secondly, assuming that the amended petition was untimely, this Court concluded that the statute of limitations should be equitably tolled based on Petitioner's lengthy history of serious mental illnesses. *Id.* The Court ruled that Petitioner was entitled to habeas relief on his first claim because trial counsel was ineffective for failing to seek an additional psychiatric evaluation to determine Petitioner's competency to stand trial, in light of his manifestations **[*7]** of psychotic behavior at trial. *Id. at 640-43*. This Court declined to address Petitioner's remaining claims. *Id. at 644*.

The Sixth Circuit Court of Appeals reversed the grant, holding that the amended petition was untimely because Petitioner was unable to establish that his amended petition related back to his original petition or that he was entitled to equitable tolling of the limitations period. *Watkins v. Deangelo-Kipp, 854 F.3d 846, 847 (6th Cir. 2017)*. The Sixth Circuit first noted that the parties "do not dispute that Watkins' supplemental habeas petition was filed after the expiration of the statute of limitations." *Id., at 849*. The Sixth Circuit ruled that Petitioner's claim that trial counsel was ineffective for failing to request an additional competency evaluation which he raised in his amended petition did not relate back to the ineffective assistance of counsel claims raised in the initial petition because this claim did not share a common core of operative facts with the claims raised in the first petition. *Id., at 850-51*. The Sixth Circuit further held that Petitioner was not entitled to equitable tolling of the limitations period based on his alleged mental incompetency because Petitioner's mental illness did not equate with mental incompetency, that Petitioner failed to **[*8]** present any evidence that he was mentally incompetent during the limitations period, and that Petitioner failed to show that any alleged mental incompetency caused his untimely filing in light of the fact that he was able to file various motions in the state courts even though he was suffering from mental illness. *Id. at 851-52*. The Sixth Circuit reversed this Court's decision to grant habeas relief on Petitioner's first claim and remanded the matter to this Court "to determine the timeliness—and if timely, the merits—of Watkins' remaining claims consistent with the analysis we have employed in this opinion." *Id.*

The United States Supreme Court denied the petition for writ of certiorari on October 2, 2017. *Watkins v. DeAngelo-Kipp, 138 S. Ct. 101, 199 L. Ed. 2d 28 (2017)*.

This Court reopened the case to the Court's active docket and gave the parties time to file supplemental briefs. (ECF No. 40). The parties did not file supplemental briefs within the time period allotted to do so.

This Court determined that the case was ripe for adjudication and proceeded to review the pleadings already filed and the state court record. On June 19, 2020, this Court summarily dismissed the case with prejudice, pursuant to the one year statute of limitations contained in *28 U.S.C. § 2244(d)*. *Watkins v. DeAngelo-Kipp, No. 2:10-CV-13199, 2020 U.S. Dist. LEXIS 107299, 2020 WL 3402025 (E.D. Mich. June 19, 2020)*.

Petitioner's **[*9]** counsel subsequently moved for reconsideration, which this Court granted in part. Petitioner's counsel argued that this Court prematurely adjudicated the remaining issues in the petition. Petitioner's counsel argued that there was some confusion regarding when to file a supplemental brief because he had sent a letter to this Court suggesting that a status conference and evidentiary hearing be set prior to the filing of any briefs. Petitioner's counsel pointed to the ongoing health crisis caused by the Coronavirus pandemic and its effect on the operations of this Court. Petitioner's counsel also argued that this Court failed to consider certain evidence that had previously been submitted by counsel regarding Petitioner's mental health status when determining that Petitioner's remaining claims were barred by the statute of limitations.

This Court granted the motion in part and gave the parties time to file supplemental briefs. (ECF No. 47). Petitioner has now filed a supplemental brief (ECF No. 48) and respondent filed a supplemental answer. (ECF No. 49).

The case is now ripe for adjudication.

II. Discussion

Respondent argues that all of the claims contained in Petitioner's amended petition **[*10]** are barred by the one year statute of limitations. (ECF No. 14, PageID. 229-38, ECF No. 49, PageID. 1606-11).

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 (2d Cir.1999)*; *See also Cooey v. Strickland, 479 F. 3d 412, 415-16 (6th Cir. 2007)*.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a one (1) year statute of limitations shall apply to an application for writ of habeas corpus by a person in custody pursuant to a judgment of a state court. The one year statute of limitation 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 **[*11]** due diligence.

28 U.S.C. § 2244(d)(1).

Petitioner's direct appeal of his conviction ended when the Michigan Supreme Court denied him leave to appeal on May 27, 2009, following the affirmance of his conviction by the Michigan Court of Appeals on direct review. Petitioner's conviction became final, for the purposes of the AEDPA's limitations period, on the date that the 90 day time period for seeking certiorari with the U.S. Supreme Court expired. *See Jimenez v. Quarterman, 555 U.S. 113, 119, 129 S. Ct. 681, 172 L. Ed. 2d 475 (2009)*. Petitioner's judgment therefore became final on August 25, 2009, when he failed to file a petition for writ of certiorari with the U.S. Supreme Court. *Holloway v. Jones, 166 F. Supp. 2d 1185, 1188 (E.D. Mich. 2001)*. Petitioner had until August 25, 2010 to file his habeas petition in compliance with the one year limitations period unless the limitations period was tolled.

Petitioner filed his post-conviction motion for relief from judgment on May 27, 2010, after 274 days had elapsed on the one year 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. *See McClendon v. Sherman, 329 F.3d 490, 493-94 (6th Cir. 2003)*. Petitioner had ninety one days remaining under the statute of limitations. **[*12]**

Petitioner in his supplemental brief argues that the current petition, filed in 2010, and the claims in his amended petition, which was filed on July 25, 2014, should relate back to the initial petition that Petitioner filed with the federal court in 2008 and which was dismissed without prejudice by Judge Gerald E. Rosen. (ECF No. 48, PageID. 1590-91).

The Court cannot accept Petitioner's argument. Every circuit that has considered the matter has held that a new habeas petition cannot relate back to a prior habeas petition that was dismissed because that prior case was no longer pending when the subsequent petition was filed. *White v. Dingle, 616 F.3d 844, 847 (8th Cir. 2010)*(amended habeas petition could not relate back to date of original petition that was dismissed without prejudice because it contained claims that were not fully exhausted in state court); *Tucker v. Kingston, 538 F. 3d 732, 734 (7th Cir. 2008)*(second petition for writ of habeas corpus would not be treated as amendment to first habeas petition, for statute of limitations purposes, since first petition was no longer pending when proposed amendments were offered, so there was nothing to amend when second petition was filed); *Rasberry v. Garcia, 448 F.3d 1150, 1155 (9th Cir. 2006)*("the relation back doctrine does not apply where the previous habeas petition was dismissed because **[*13]** there is nothing to which the new petition could relate back"); *Neverson v. Bissonnette, 261 F.3d 120, 126 (1st Cir. 2001)*(Rule governing relation back of amendments did not apply to petition for writ of habeas corpus dismissed without prejudice by district court, and thus state inmate's subsequent petition did not "relate back" to earlier petition for limitations purposes, since dismissal left petitioner in same situation as if his first petition had never been filed); *Warren v. Garvin, 219 F.3d 111, 114 (2d Cir.2000)*("[T]he 'relation back'

doctrine is inapplicable when the initial habeas petition was dismissed, because there is no pleading to which to relate back."); *Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir.2000)*("We therefore join with all the circuit courts which have addressed this issue, and hold that a habeas petition filed after a previous petition has been dismissed without prejudice for failure to exhaust state remedies does not relate back to the earlier petition."); *Nyland v. Moore, 216 F.3d 1264, 1266 (11th Cir. 2000)*(holding that an untimely *§ 2254* petition cannot relate back to a previously filed petition that was dismissed without prejudice). Petitioner's current petition, filed in 2010, and his amended habeas petition, filed in 2014, cannot relate back to the 2008 habeas petition, for purposes of the statute of limitations.

Petitioner filed the original petition in this case **[*14]** with this Court on July 28, 2010, which was within the one year limitation period. Petitioner, however, did not file his amended petition until July 25, 2014, which the parties agree was beyond the one year limitations period, which expired on August 25, 2010.

When a habeas petitioner files an original petition within the one-year deadline, and later presents new claims in an amended petition that is filed after the deadline passes, the new claims will relate back to the date of the original petition only if the new claims share a "common core of operative facts" with the original petition. *Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)*.

Although this Court again reiterates, as it did in the prior dismissal order, that it believes that Petitioner's ineffective assistance of trial counsel claim involving trial counsel's failure to seek an additional competency evaluation related back to the ineffective assistance of counsel claims that Petitioner raised in his initial timely filed petition, the Sixth Circuit did not agree. The Sixth Circuit concluded that Petitioner's ineffective assistance of counsel claim that he raised in his amended petition did not share a common core of facts with the claims raised by Petitioner in his initial **[*15]** petition:

> As an initial matter, Watkins' original petition does not raise any facts supporting the underlying ineffective assistance of counsel claim. The only portion of the petition relating to ineffective assistance of counsel reads as follows: "Defendant was denied his state and federal constitutional right to effective assistance of trial counsel, by counsels [sic] failure to investigate and raise a defense, and also ineffective assistance of appellate, by counsel [sic] failure to raise meritorios [sic] issues, and failure to perfect a competent appeal." Original Habeas Petition 11, ECF No. 1, Page ID 11. It says nothing of counsel's failure to request another psychiatric evaluation. It alleges only that trial counsel failed "to investigate and raise a defense." *Id.* Counsel's conduct in investigating before trial and presenting a defense to the jury during trial is a distinct "episode" from counsel's conduct in not requesting that the judge order a fifth psychiatric evaluation during trial. To read the original petition's language more expansively would contravene the Supreme Court's warning against construing "conduct, transaction, or occurrence" so broadly as to render meaningless **[*16]** AEDPA's statute of limitations. *See Mayle, 545 U.S. at 662-64, 125 S. Ct. 2562*. Watkins' amended petition, therefore, does not relate back to the original petition.
>
> *Watkins v. Deangelo-Kipp, 854 F.3d at 850-51*.

Under the law of the case doctrine, a court is ordinarily precluded from re-examining an issue previously decided by the same court, or by a higher court in the same case. *Consolidation Coal Co. v. McMahon, 77 F. 3d 898, 905 (6th Cir. 1996)*. The law of the case doctrine has been applied to habeas cases in various contexts. *See Crick v. Smith, 729 F. 2d 1038, 1039 (6th Cir. 1984)*. "Under the doctrine of law of the case, findings made at one point of the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994)*. The law of the case doctrine "generally bars the district court from reconsidering those issues that the court of appeals has already explicitly or impliedly resolved." *Keith v. Bobby, 618 F.3d 594, 599 (6th Cir. 2010)*; *See also In re Kenneth Allen Knight Trust, 303 F.3d 671, 676 (6th Cir. 2002)*("Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case.")(internal quotation marks and citations omitted).

This Court is once again constrained by the Sixth Circuit's somewhat restrictive language regarding the *Mayle* case to find that none of Petitioner's remaining claims that he raised in his amended habeas petition relate back to the ineffective assistance of counsel claims **[*17]** that he raised in his 2010 petition.

Under the rationale employed by the Sixth Circuit, Petitioner's claims that he raised for the first time in his amended habeas petition do not share a "common core

of operative facts" with the ineffective assistance of counsel claims that he raised in his initial petition. Petitioner's jury verdict form and self-representation claims certainly do not relate back to the claims that Petitioner raised in his 2010 petition. Petitioner's other ineffective assistance of trial counsel claims that he raised in his amended petition likewise suffer the same fate that his first ineffective assistance of counsel claim involving the failure to seek an additional competency evaluation faced, namely, that Petitioner in his original habeas petition did not allege that he was denied the effective assistance of counsel because counsel failed to request certain jury instructions, that there had been a breakdown in the relationship between counsel, that a biased juror sat on the jury, or that trial counsel was ineffective for failing to move to remove this juror. Under the Sixth Circuit's somewhat restrictive analysis, which this Court is bound to follow, both by the **[*18]** law of the case doctrine and the Sixth Circuit's explicit directive, this Court is constrained to find that none of Petitioner's remaining claims are timely because they do not share a common core of operative facts with the claims raised in the original petition and are thus barred by the one year limitations period. *See* Pinchon v. Myers, 615 F.3d 631, 643 (6th Cir. 2010).

Petitioner's counsel in his supplemental brief argues that the ineffective assistance of counsel claims raised in the amended petition should relate back to the initial ineffective assistance of counsel claim raised in the 2010 petition because the claims merely augment or amplify the original ineffective assistance of counsel claim raised by Petitioner in the 2010 petition. (ECF No. 48, PageID. 1593-96).

The Sixth Circuit has permitted an amended claim to relate back to a claim filed in an earlier petition, "when a motion to amend under Rule 15(c) expands on the facts supporting a claim in the original petition." Hill v. Mitchell, 842 F.3d 910, 924 (6th Cir. 2016). A claim in an amended petition, however, does not relate back to a claim filed in an original petition when the claim in the original petition "was completely bereft of specific fact allegations or evidentiary support and was not tied to any particular theory of **[*19]** relief." *Id.*

Petitioner in his original petition filed in 2010 alleged that trial counsel was ineffective for failing to investigate or present a defense but did not support that claim with any factual allegations or evidentiary support or even connect it to any particular theory of relief. Petitioner certainly did not allege in his original petition that he was denied the effective assistance of counsel because counsel failed to request certain jury instructions, that there had been a breakdown in the relationship between counsel, that a biased juror sat on the jury, or that trial counsel was ineffective for failing to move to remove this juror. The Sixth Circuit, in reversing this Court, apparently employed the same rationale in concluding that Petitioner's claim involving counsel's ineffectiveness in failing to seek a fifth competency evaluation did not relate back to his claim that trial counsel was ineffective for failing to investigate or present a defense. The Sixth Circuit specifically noted that Petitioner's original petition did "not raise any facts supporting the underlying ineffective assistance of counsel claim." Watkins v. Deangelo-Kipp, 854 F.3d at 850.

Based on the Sixth Circuit's holding in *Hill* and the Sixth **[*20]** Circuit's similarly restrictive language in this case, this Court is constrained to rule that none of Petitioner's claims contained in his amended petition relate back to the ineffective assistance of counsel claim that he raised in his 2010 petition.

Finally, although Petitioner did raise a biased juror claim in his 2008 petition, as mentioned above, Petitioner's current petition cannot relate back to his 2008 petition because that petition was dismissed without prejudice before the current petition was filed.

The AEDPA's statute of limitations "is subject to equitable tolling in appropriate cases." Holland v. Florida, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (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 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (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 a habeas petitioner to show that he or she is entitled to the equitable tolling of the one year limitations period. *Id.*

Petitioner in his motion for reconsideration and in his supplemental brief again urges **[*21]** this Court to equitably toll the limitations period based on Petitioner's extensive history of well documented mental illness. (ECF No. 45, PageID. 1545-46, ECF No. 48, PageID. 1597).

This Court in its original opinion and order granting habeas relief, discussed in great detail Petitioner's

extensive and well-documented history of serious mental illness as well as his psychotic behavior during the pre-trial period and at trial. Watkins v. Haas, 143 F. Supp. 3d at 634-637. This Court concluded that Petitioner was entitled to equitable tolling because of this history of mental incapacity. Id., at 640. The Sixth Circuit disagreed with this Court's determination and ruled that Petitioner's mental illness did not provide a basis for equitable tolling because Petitioner failed to show that his mental illness prevented him from timely filing his habeas petition. Watkins v. Deangelo-Kipp, 854 F.3d at 851-52. As with the relation back issue, this Court under the law of the case doctrine is constrained to follow the Sixth Circuit's ruling. Petitioner is not entitled to equitable tolling on this basis.

The one year statute of limitations may be equitably tolled based upon a credible showing of actual innocence under the standard enunciated in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). McQuiggin v. Perkins, 569 U.S. 383, 386, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). The Supreme Court has cautioned that "tenable **[*22]** 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 his or her 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). Petitioner's claim that he acted in self-defense amounts to a claim of legal innocence, as opposed to factual innocence, and would therefore not toll the limitations period. *See e.g.* Harvey v. Jones, 179 Fed. Appx. 294, 298-99 (6th Cir. 2006)(collecting cases). Because Petitioner has presented no new evidence that he is factually innocent of these charges, he is not entitled to tolling of the limitations period.

III. CONCLUSION

The Court **[*23]** summarily DENIES the petition for writ of habeas corpus with prejudice.

The Court will, however, grant a certificate of appealability. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner 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. *Id.* "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. **[*24]** § 2254.

In order to obtain a certificate of appealability, a habeas petitioner need not show that his or her appeal will succeed. Miller-El v. Cockrell, 537 U.S. 322, 337, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). The Supreme Court's holding in *Slack v. McDaniel* "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* A habeas petitioner is not required to prove, before obtaining a COA, that some jurists would grant the petition for habeas corpus. Id. at 338. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail". *Id.*

As this Court has previously indicated: "[T]he Court's ego tells it that all reasonable jurists would agree with its resolution of the issues raised by Petitioner. The Court's experience, however, is to the contrary. Thus, the Court's belief in the correctness of its decision should not insulate that decision from further review." Hargrave v. McKee, 2005 U.S. Dist. LEXIS 9111, 2005 WL

1028183, * 1 (E.D. Mich. April 25, 2005)(citing Taylor v. Howes, 26 F. App'x 397, 399 (6th Cir. 2001)). "[B]ecause the Court is not infallible and does not believe that **[*25]** its decision should be insulated from further review," *Id.*, a certificate of appealability shall issue in this case.

This Court also believes that the Sixth Circuit should reconsider its decision in this case and in *Hill* and its progeny which, in this Court's opinion, employ a far too restrictive standard in determining whether a claim in an amended petition relates back to a claim that was filed in an original petition, particularly if that petition was filed *pro se* by a petitioner with a history of mental illness like Petitioner. The Sixth Circuit should also address the argument raised by Petitioner in his supplemental brief, namely, whether the current petition should relate back to his previously dismissed 2008 petition. Lastly, in light of the extensive history of Petitioner's mental illness, jurists of reason could disagree over whether the limitations period should be equitably tolled on this basis.

Petitioner is also granted leave to proceed on appeal *in forma pauperis*, as any appeal would not be frivolous. A court may grant *in forma pauperis status* if the court finds that an appeal is being taken in good faith. *See* 28 U.S.C. § 1915(a)(3); *Fed. R.App.24 (a)*; Foster v. Ludwick, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002). Because this Court granted a certificate of appealability, **[*26]** any appeal would be undertaken in good faith; Petitioner is thus granted leave to appeal *in forma pauperis*. *See* Brown v. United States, 187 F. Supp. 2d 887, 893 (E.D. Mich. 2002).

IV. ORDER

IT IS ORDERED that:

(1) the petition for a writ of habeas corpus on remand is **DENIED WITH PREJUDICE** .

(2) **IT IS FURTHER ORDERED** That a certificate of appealability is **GRANTED.**

(3) Petitioner will be **GRANTED** leave to appeal *in forma pauperis.*

/s/ Arthur J. Tarnow

HON. ARTHUR J. TARNOW

UNITED STATES DISTRICT JUDGE

Dated: September 1, 2021

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APPENDIX D1 – D2

Watkins v Haas, 2020 U.S. Dist. LEXIS 154515

Opinion and Order of the U.S. Dist. Ct. - E.D. Mich.
Hon. Arthur J. Tarnow, United States District Judge

GRANTING in Part the Motion for Reconsideration (ECF No. 45), and

Reopening the Case to the Active Docket, and

Requiring Supplemental Briefs Be Filed

(Aug. 26, 2020 ; # 2:10-cv-13199)

Neutral
As of: June 3, 2023 12:42 PM Z

Watkins v. Haas

United States District Court for the Eastern District of Michigan, Southern Division

August 26, 2020, Decided; August 26, 2020, Filed

Civil No. 2:10-CV-13199

Reporter
2020 U.S. Dist. LEXIS 154515 *; 2020 WL 8765937

GARY EUGENE WATKINS, Petitioner, v. RANDALL HAAS, Respondent,

Prior History: *Watkins v. DeAngelo-Kipp, 2020 U.S. Dist. LEXIS 107299 (E.D. Mich., June 19, 2020)*

Core Terms

supplemental brief, parties, reconsideration motion, status conference, reopen a case, adjudicate, deadlines, supplemental pleading, remaining issue, reconsideration, statute of limitations, evidentiary hearing, supplemental answer, habeas petition, district judge, thirty days, pleadings, allotted, confused, pandemic, argues

Counsel: **[*1]** For Gary Watkins, Petitioner: James C. Thomas, James C. Thomas, P.C., Sterling Heights, MI USA; Phillip D. Comorski, Detroit, MI USA.

For Randall Haas, Respondent: John S. Pallas, Michigan Department of Attorney General, Appellate Division, Lansing, MI USA.

Judges: HONORABLE ARTHUR J. TARNOW, UNITED STATES DISTRICT JUDGE.

Opinion by: ARTHUR J. TARNOW

Opinion

OPINION AND ORDER (1) GRANTING IN PART THE MOTION FOR RECONSIDERATION (ECF No. 45), (2) DIRECTING THE CLERK OF THE COURT TO REOPEN THE CASE TO THE COURT'S ACTIVE DOCKET, AND (3) REQUIRING SUPPLEMENTAL BRIEFS FROM THE PARTIES AND SETTING DEADLINES

Before the Court is petitioner's motion for reconsideration. For the reasons that follow, the motion is GRANTED IN PART. The Clerk of the Court shall reopen the case to the Court's active docket. The parties are directed to file supplemental briefs within the time allotted below.

This Court granted petitioner a writ of habeas corpus, finding that he had been denied the effective assistance of trial counsel. *Watkins v. Haas, 143 F. Supp. 3d 632, 634 (E.D. Mich. 2015)*. The Sixth Circuit reversed this Court's decision and remanded the case to this Court to adjudicate the remaining issues. *Watkins v. Deangelo-Kipp, 854 F.3d 846 (6th Cir. 2017)*; *cert. Den. 138 S. Ct. 101, 199 L. Ed. 2d 28 (2017)*.

On remand, the Court reopened the case to the Court's active docket and set deadlines **[*2]** for the parties to file supplemental briefs. (ECF No. 40). The parties did not file supplemental briefs within the time period allotted to do so.

This Court determined that the case was ripe for adjudication and proceeded to review the pleadings already filed and the state court record. On June 19, 2020, this Court summarily dismissed the case with prejudice, pursuant to the one year statute of limitations contained in *28 U.S.C. § 2244(d)*. *Watkins v. DeAngelo-Kipp, No. 2:10-CV-13199, 2020 U.S. Dist. LEXIS 107299, 2020 WL 3402025 (E.D. Mich. June 19, 2020)*.

Petitioner's counsel has now filed a motion for reconsideration. *U.S. Dist.Ct. Rules, E.D. Mich. 7.1 (h)* allows a party to file a motion for reconsideration. A motion for reconsideration should be granted if the movant demonstrates a palpable defect by which the court and the parties have been misled and that a different disposition of the case must result from a correction thereof. *Ward v. Wolfenbarger, 340 F. Supp. 2d 773, 774 (E.D. Mich. 2004)*; *Hence v. Smith, 49 F. Supp. 2d 547, 550-51* (E.D. Mich. 1999 (*citing L.R. 7.1(g)(3)*). A motion for reconsideration which merely presents "the same issues ruled upon by the Court,

either expressly or by reasonable implication," shall be denied. *Ward, 340 F. Supp. 2d at 774*.

Petitioner's counsel argues in his motion for reconsideration that this Court prematurely adjudicated the remaining issues in the petition. Petitioner's counsel **[*3]** appears to argue that there was some confusion regarding when to file a supplemental brief because he had sent a letter to this Court suggesting that a status conference and evidentiary hearing be set prior to the filing of any briefs. Petitioner's counsel also points to the ongoing health crisis caused by the Coronavirus pandemic and its effect on the operations of this Court. Chief Judge Denise Page Hood, in fact, issued Administrative Order 20-AO-021, which gives district judges flexibility in setting deadlines. Petitioner's counsel also argues that this Court failed to consider certain evidence that had previously been submitted by counsel regarding petitioner's mental health status when determining that petitioner's remaining claims were barred by the statute of limitations. Counsel finally requests a status conference.

The Court will grant the motion for reconsideration in part. The language in the Court's order on remand setting deadlines for supplemental briefs made it optional for the parties to file supplemental briefs. This may have confused petitioner's counsel over when to file a supplemental brief. Counsel may also have been confused after sending letters to the Court **[*4]** that a status conference would be conducted before supplemental pleadings would be ordered. Lastly, the unique circumstances of the Coronavirus pandemic have understandably caused delays in the filing of pleadings by various litigants. Accordingly, the Court will reopen the case the Court's active docket and will require the parties to file supplemental briefs.

Federal courts have the power to order that a habeas petition be reinstated when necessary to adjudicate further issues. *See e.g. Rodriguez v. Jones, 625 F.Supp.2d 552, 559 (E.D.Mich.2009)*. The Court will order that the original habeas petition be reopened on the Court's active docket to direct the parties to file supplemental pleadings.

The Court will further order the parties to file supplemental pleadings. Petitioner shall file a supplemental brief and any supporting documentation within **sixty days** of this order. Respondent has **thirty days** from the time that petitioner files his supplemental brief to file a supplemental answer. Petitioner may file a reply brief, if he wishes, within **thirty days** of the supplemental answer.

Once the parties have submitted their supplemental briefs, the Court will adjudicate the remaining issues in this case. The Court will consider whether it is necessary **[*5]** to have a status conference or an evidentiary hearing after receiving the supplemental briefs.

The Court at this time will deny the motion for reconsideration regarding the Court's alleged failure to review the evidence of petitioner's mental history without prejudice to petitioner advancing any arguments or evidence in support of any equitable tolling arguments.

/s/ Arthur J. Tarnow

HONORABLE ARTHUR J. TARNOW

UNITED STATES DISTRICT JUDGE

Date: August 26, 2020

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APPENDIX E1 – E6

Watkins v DeAngelo-Kipp, 2020 U.S. Dist. LEXIS 107299

Opinion and Order on Remand of the U.S. Dist. Ct. - E.D. Mich.
Hon. Arthur J. Tarnow, United States District Judge

DENYING the Petition for Writ of Habeas Corpus with Prejudice and

DENYING a Certificate of Appealability and

GRANTING Leave to Appeal in Forma Pauperis

(June 19, 2020 ; # 2:10-cv-13199)

Watkins v. DeAngelo-Kipp

United States District Court for the Eastern District of Michigan, Southern Division

June 19, 2020, Decided; June 19, 2020, Filed

Civil No. 2:10-CV-13199

Reporter
2020 U.S. Dist. LEXIS 107299 *; 2020 WL 3286794

GARY EUGENE WATKINS, Petitioner, v. JODI DEANGELO-KIPP, Respondent,

Subsequent History: Reconsideration granted by, in part *Watkins v. Haas, 2020 U.S. Dist. LEXIS 154515, 2020 WL 8765937 (E.D. Mich., Aug. 26, 2020)*

On reconsideration by, Writ of habeas corpus denied, Certificate of appealability granted, On remand at *Watkins v. Haas, 2021 U.S. Dist. LEXIS 165679, 2021 WL 3912754 (E.D. Mich., Sept. 1, 2021)*

Prior History: *Watkins v. McKee, 2010 U.S. Dist. LEXIS 85802 (E.D. Mich., Aug. 20, 2010)*

Core Terms

limitations period, trial counsel, equitable tolling, statute of limitations, habeas petition, amended petition, one year, ineffective, original petition, district court, habeas corpus, writ petition, certificate, innocence, constitutional right, jurists, courts, tolled, juror, ineffective assistance of counsel claim, law of the case doctrine, ineffective assistance, initial petition, mental illness, relates back, common core, post-conviction

Counsel: **[*1]** For Gary Watkins, Petitioner: James C. Thomas, James C. Thomas, P.C., Sterling Heights, MI USA; Phillip D. Comorski, Detroit, MI USA.

For Randall Haas, Respondent: John S. Pallas, Michigan Department of Attorney General, Lansing, MI USA.

Judges: HON. ARTHUR J. TARNOW, UNITED STATES DISTRICT JUDGE.

Opinion by: ARTHUR J. TARNOW

Opinion

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

This Court granted petitioner a writ of habeas corpus, finding that he had been denied the effective assistance of trial counsel because petitioner's attorney failed to seek an additional mental competency examination when petitioner continued to manifest psychotic behavior. The Sixth Circuit reversed this Court's decision and remanded the case to this Court to adjudicate the remaining issues.

For the reasons that follow, the petition for writ of habeas corpus is SUMMARILY DENIED pursuant to *28 U.S.C. § 2244(d)*.

I. Background

Petitioner was convicted of second-degree murder, assault with intent to commit murder, and two counts of felony-firearm following a jury trial in the Washtenaw County Circuit Court.

Direct review of petitioner's **[*2]** conviction ended in the Michigan courts on May 27, 2009, when the Michigan Supreme Court denied petitioner leave to appeal following the affirmance of his conviction by the Michigan Court of Appeals. *People v. Watkins, 483 Mich. 1016, 765 N.W. 2d 320 (2009)*.

On May 27, 2010, petitioner filed his first post-conviction motion for relief from judgment with the state trial court.

While petitioner's motion for relief from judgment was pending in the trial court, petitioner filed a *pro se* motion for equitable tolling, a brief in support of equitable

tolling, and an affidavit with this Court on July 28, 2010.[1] Petitioner within his brief indicated that he wished to return to the state courts to exhaust the following claims in his post-conviction motion: (1) petitioner is entitled to re-sentencing due to the fact that inaccurate information was used to evaluate the offense variables of the sentencing guidelines, (2) petitioner is entitled to re-sentencing because his sentence was based on inaccurate information, (3) petitioner was denied his right to the effective assistance of trial counsel because trial counsel failed to investigate and present a defense and appellate counsel was ineffective for failing to raise meritorious issues, and (4) prosecutorial **[*3]** misconduct. (ECF No. 1, PageID. 11).

The motion for equitable tolling was denied as moot, because, as mentioned in greater detail below, the judgment of conviction became final not on May 27, 2009, the date that the Michigan Supreme Court denied petitioner leave to appeal, but on August 25, 2009, when petitioner failed to file a petition for writ of certiorari with the U.S. Supreme Court. Petitioner had until August 25, 2010, and not May 27, 2010, as he believed, to file his habeas application in conformance with the AEDPA's statute of limitations. Because petitioner's application had been filed on July 28, 2010, the petition was timely filed, thus, any equitable tolling arguments were moot. *Watkins v. McKee, No. 2:10-CV-13199, 2010 U.S. Dist. LEXIS 85802, 2010 WL 3324979, at *2 (E.D. Mich. Aug. 20, 2010)*. The Court further held the petition in abeyance so that petitioner could return to the state courts and exhaust additional claims. *2010 U.S. Dist. LEXIS 85802, [WL] at * 2-3*.

Petitioner's post-conviction motion for relief from judgment was denied. *People v. Watkins*, No. 06-70-FC (Washtenaw Cty. Cir.Ct., Oct. 28, 2010); *reconsideration den.* No. 06-70-FC (Washtenaw Cty. Cir.Ct., Dec. 28, 2010).

Petitioner filed a second motion for relief from judgment, which was also denied. **[*4]** *People v. Watkins*, No. 06-70-FC (Washtenaw Cty. Cir.Ct., June 11, 2013). The Michigan appellate courts denied petitioner leave to appeal. *People v. Watkins, No. 318199, 2013 Mich. App. LEXIS 2557 (Mich.Ct.App. Oct. 28, 2013); lv. den. 495 Mich. 1006, 846 N.W.2d 563 (2014).*

On July 25, 2014, petitioner, through counsel, filed a supplemental petition for writ of habeas corpus, raising the following claims:

> I. Defense trial counsel was constitutionally ineffective in failing at trial to challenge Watkins's competency to stand trial, in view of his bizarre behavior.
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> II. Defense trial counsel was constitutionally ineffective in failing to request a jury instruction on imperfect self-defense reducing second-degree murder to voluntary manslaughter, and in failing to request a jury instruction that Watkins had no duty to retreat from the enclosed porch at Watkins's residence before using deadly force in self-defense.
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> III. Where a flawed jury form did not provide an opportunity for a general verdict of not guilty, Watkins was deprived of his constitutional right to a jury trial.
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> IV. The trial court denied Watkins his constitutional right to self-representation when it refused his request for self-representation and foreclosed any further discussion of the issue by telling Watkins that **[*5]** he could only be represented by the attorney he sought to have removed previously.
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> V. Watkins was denied counsel was defense counsel informed the court before trial that there was a breakdown in the attorney/client relationship, due to the fact that defense counsel had no idea what witnesses to call, claiming ongoing communication problems between him and Watkins.
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> VI. The court violated Watkins's constitutional righto a trial by a fair and impartial jury by allowing a juror to serve, even after the juror informed the court that she personally knew Watkins from college, and Watkins was denied his right to the effective assistance of counsel at trial where counsel failed to remove this juror from the jury.

This Court reopened the petition to the Court's active docket, amended the caption, and permitted petitioner to file an amended habeas petition. The Court directed respondent to file an answer to the amended petition. *Watkins v. Romanowski, No. 2:10-CV-13199, 2014 U.S. Dist. LEXIS 109586, 2014 WL 3894370 (E.D. Mich. Aug. 7, 2014)*.

This Court granted habeas relief to petitioner on his first claim, finding that he was denied the effective assistance of trial counsel when his attorney failed to request an additional or independent evaluation as to petitioner's **[*6]** mental competency to stand trial after

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[1] Under the prison mailbox rule, the Court deemed these pleadings filed on July 28, 2010, the date that they were signed and dated. *See Towns v. U.S., 190 F. 3d 468, 469 (6th Cir. 1999)*.

petitioner continued to exhibit signs of mental illness and an inability to understand the proceedings. Watkins v. Haas, 143 F. Supp. 3d 632, 633-34 (E.D. Mich. 2015). In so ruling, this Court rejected respondent's argument that the amended habeas petition was time-barred under the AEDPA's one year statute of limitations for two reasons. First, the Court found that petitioner's ineffective assistance of trial counsel claim related back to the ineffective assistance of trial and appellate counsel claims that petitioner raised in his initial timely filed petition. Watkins v. Haas, 143 F. Supp. 3d at 640. Secondly, assuming that the amended petition was untimely, this Court concluded that the statute of limitations should be equitably tolled based on petitioner's lengthy history of serious mental illnesses. *Id.* The Court concluded that petitioner was entitled to habeas relief on his first claim because trial counsel was ineffective for failing to seek an additional psychiatric evaluation to determine petitioner's competency to stand trial, in light of his manifestations of psychotic behavior at trial. *Id. at 640-43*. This Court declined to address petitioner's remaining claims. *Id. at 644*.

The Sixth Circuit Court of Appeals reversed the grant, finding that petitioner's **[*7]** amended petition was untimely because petitioner was unable to establish that his amended petition related back to his original petition or that he was entitled to equitable tolling of the limitations period. Watkins v. Deangelo-Kipp, 854 F.3d 846, 847 (6th Cir. 2017). The Sixth Circuit first noted that the parties "do not dispute that Watkins' supplemental habeas petition was filed after the expiration of the statute of limitations." *Id., at 849*. The Sixth Circuit ruled that petitioner's claim that trial counsel was ineffective for failing to request an additional competency evaluation which he raised in his amended petition did not relate back to the ineffective assistance of counsel claims raised in the initial petition because this claim did not share a common core of operative facts with the claims raised in the first petition. *Id., at 850-51*. The Sixth Circuit further held that petitioner was not entitled to equitable tolling of the limitations period based on his alleged mental incompetency because petitioner's mental illness did not equate with mental incompetency, that petitioner failed to present any evidence that he was mentally incompetent during the limitations period, and that petitioner failed to show that any alleged mental incompetency caused his **[*8]** untimely filing in light of the fact that petitioner was able to file various motions in the state courts even though he was suffering from mental illness. *Id. at 851-52*. The Sixth Circuit reversed this Court's decision to grant habeas relief on petitioner's first claim and remanded the matter to this Court "to determine the timeliness—and if timely, the merits—of Watkins' remaining claims consistent with the analysis we have employed in this opinion." *Id.*

The United States Supreme Court denied the petition for writ of certiorari on October 2, 2017. *Watkins v. DeAngelo-Kipp, 138 S. Ct. 101, 199 L. Ed. 2d 28 (2017)*.

This Court reopened the case to the Court's active docket and gave the parties time to file supplemental briefs, which neither side chose to do. (ECF No. 40). The case is now ripe for adjudication.

II. Discussion

Respondent argues that all of the claims contained in petitioner's amended petition are barred by the one year statute of limitations. (ECF No. 14, PageID. 229-38).

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 (2d Cir.1999); *See also* Cooey v. Strickland, 479 F. 3d 412, 415-16 (6th Cir. 2007).

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a one (1) year statute of limitations shall apply to an application for writ of **[*9]** habeas corpus by a person in custody pursuant to a judgment of a state court. The one year statute of limitation 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;
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> (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).

Petitioner's direct appeal of his conviction ended when

the Michigan Supreme Court denied petitioner leave to appeal on May 27, 2009, following the affirmance of his conviction by the Michigan Court of Appeals on direct review. Petitioner's conviction became final, for the purposes of the AEDPA's limitations period, on the **[*10]** date that the 90 day time period for seeking certiorari with the U.S. Supreme Court expired. *See Jimenez v. Quarterman, 555 U.S. 113, 119, 129 S. Ct. 681, 172 L. Ed. 2d 475 (2009)*. Petitioner's judgment therefore became final on August 25, 2009, when he failed to file a petition for writ of certiorari with the U.S. Supreme Court. *Holloway v. Jones, 166 F. Supp. 2d 1185, 1188 (E.D. Mich. 2001)*. Petitioner had until August 25, 2010 to file his habeas petition in compliance with the one year limitations period unless the limitations period was tolled.

Petitioner filed his post-conviction motion for relief from judgment on May 27, 2010, after 274 days had elapsed on the one year 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. *See McClendon v. Sherman, 329 F.3d 490, 493-94 (6th Cir. 2003)*. Petitioner had ninety one days remaining under the statute of limitations.

Petitioner filed his original petition with this Court on July 28, 2010, which was within the one year limitation period. Petitioner, however, did not file his amended petition until July 25, 2014, which the parties agree was beyond the one year limitations period, which expired on August 25, 2010.

When a habeas petitioner files **[*11]** an original petition within the one-year deadline, and later presents new claims in an amended petition that is filed after the deadline passes, the new claims will relate back to the date of the original petition only if the new claims share a "common core of operative facts" with the original petition. *Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)*.

Although this Court believed that petitioner's ineffective assistance of trial counsel claim involving trial counsel's failure to seek an additional competency evaluation related back to the ineffective assistance of counsel claims that petitioner raised in his initial timely filed petition, the Sixth Circuit did not agree. The Sixth Circuit concluded that petitioner's ineffective assistance of counsel claim that he raised in his amended petition did not share a common core of facts with the claims raised by petitioner in his initial petition:

> As an initial matter, Watkins' original petition does not raise any facts supporting the underlying ineffective assistance of counsel claim. The only portion of the petition relating to ineffective assistance of counsel reads as follows: "Defendant was denied his state and federal constitutional right to effective assistance of trial counsel, **[*12]** by counsels [sic] failure to investigate and raise a defense, and also ineffective assistance of appellate, by counsel [sic] failure to raise meritorios [sic] issues, and failure to perfect a competent appeal." Original Habeas Petition 11, ECF No. 1, Page ID 11. It says nothing of counsel's failure to request another psychiatric evaluation. It alleges only that trial counsel failed "to investigate and raise a defense." *Id.* Counsel's conduct in investigating before trial and presenting a defense to the jury during trial is a distinct "episode" from counsel's conduct in not requesting that the judge order a fifth psychiatric evaluation during trial. To read the original petition's language more expansively would contravene the Supreme Court's warning against construing "conduct, transaction, or occurrence" so broadly as to render meaningless AEDPA's statute of limitations. *See Mayle, 545 U.S. at 662-64, 125 S. Ct. 2562*. Watkins' amended petition, therefore, does not relate back to the original petition.
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> *Watkins v. Deangelo-Kipp, 854 F.3d at 850-51*.

Under the law of the case doctrine, a court is ordinarily precluded from re-examining an issue previously decided by the same court, or by a higher court in the same case. *Consolidation Coal Co. v. McMahon, 77 F. 3d 898, 905 (6th Cir. 1996)*. The law of the case doctrine has been applied to habeas **[*13]** cases in various contexts. *See Crick v. Smith, 729 F. 2d 1038, 1039 (6th Cir. 1984)*. "Under the doctrine of law of the case, findings made at one point of the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994)*. The law of the case doctrine "generally bars the district court from reconsidering those issues that the court of appeals has already explicitly or impliedly resolved." *Keith v. Bobby, 618 F.3d 594, 599 (6th Cir. 2010)*; *See also In re Kenneth Allen Knight Trust, 303 F.3d 671, 676 (6th Cir. 2002)*("Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case.")(internal quotation marks and citations omitted).

This Court is constrained by the Sixth Circuit's somewhat restrictive language regarding the Mayle case to find that none of petitioner's remaining claims that he raised in his amended habeas petition relate back to the ineffective assistance of counsel or sentencing claims that he raised in his initial petition.

Under the rationale employed by the Sixth Circuit, petitioner's claims that he raised for the first time in his amended habeas petition do not share a "common core of operative facts" with the ineffective assistance of counsel or sentencing claims that he raised in his initial petition. Petitioner's jury verdict **[*14]** form and self-representation claims certainly do not relate back to the claims that petitioner raised in his initial petition. Petitioner's other ineffective assistance of trial counsel claims that he raised in his amended petition suffer the same fate that his first ineffective assistance of counsel claim involving the failure to seek an additional competency evaluation faced, namely, that petitioner in his original habeas petition did not allege that he was denied the effective assistance of counsel because counsel failed to request certain jury instructions, that there had been a breakdown in the relationship between counsel, that a biased juror sat on the jury, or that trial counsel was ineffective for failing to move to remove this juror. Under the Sixth Circuit's somewhat restrictive analysis, which this Court is required to follow, both by the law of the case doctrine and the Sixth Circuit's explicit directive in its remand order, this Court is constrained to find that none of petitioner's remaining claims are timely because they do not share a common core of operative facts with the claims raised in the original petition and are thus barred by the one year limitations period. **[*15]** *See* Pinchon v. Myers, 615 F.3d 631, 643 (6th Cir. 2010).

The AEDPA's statute of limitations "is subject to equitable tolling in appropriate cases." Holland v. Florida, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (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 2562* (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (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 a habeas petitioner to show that he or she is entitled to the equitable tolling of the one year limitations period. *Id.*

This Court in its original opinion and order granting habeas relief, discussed in great detail petitioner's extensive and well-documented history of serious mental illness as well as his psychotic behavior during the pre-trial period and at trial. Watkins v. Haas, 143 F. Supp. 3d at 634-637. This Court concluded that petitioner was entitled to equitable tolling because of this history of mental incapacity. *Id., at 640*. The Sixth Circuit disagreed with this Court's determination and concluded that petitioner's mental illness did not provide a basis for equitable tolling because petitioner failed to show that his mental illness prevented him **[*16]** from timely filing his habeas petition. Watkins v. Deangelo-Kipp, 854 F.3d at 851-52. As with the relation back issue, this Court under the law of the case doctrine is constrained to follow the Sixth Circuit's ruling. Petitioner is not entitled to equitable tolling on this basis.

The one year statute of limitations may be equitably tolled based upon a credible showing of actual innocence under the standard enunciated in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). McQuiggin v. Perkins, 569 U.S. 383, 386, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (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 his or her 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 **[*17]** actually innocent of the crime charged. *See* Ross v. Berghuis, 417 F. 3d 552, 556 (6th Cir. 2005). Petitioner's claim that he acted in self-defense amounts to a claim of legal innocence, as opposed to factual innocence, and would therefore not toll the limitations period. *See e.g.* Harvey v. Jones, 179 Fed. Appx. 294, 298-99 (6th Cir. 2006)(collecting cases). Because petitioner has presented no new evidence that he is factually innocent of these charges, he is not entitled to tolling of the limitations period.

III. CONCLUSION

The Court summarily DENIES the petition for writ of habeas corpus with prejudice.

The Court will also deny a certificate of appealability. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. *28 U.S.C. § 2253(c)(2)*. To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, **[*18]** if the petitioner shows that jurists of reason would find it debatable whether the petitioner 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. *Id.* When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. *Id.* "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254*.

The Court denies petitioner a certificate of appealability, because reasonable jurists would not find it debatable whether the Court was correct in determining that petitioner filed his habeas petition outside of the one year limitations period. *See Grayson v. Grayson, 185 F. Supp. 2d 747, 753 (E.D. Mich. 2002)*. However, although jurists of reason would not debate this Court's resolution of petitioner's claims, the issues are not frivolous; therefore, an appeal could be taken in good faith and petitioner may **[*19]** proceed *in forma pauperis* on appeal. *See Foster v. Ludwick, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002)*.

IV. ORDER

Based upon the foregoing, IT IS ORDERED that:

(1) the petition for writ of habeas corpus is **DENIED WITH PREJUDICE.**

(2) A certificate of appealability is **DENIED.**

(3) Petitioner will be granted leave to appeal *in forma pauperis.*

/s/ Arthur J. Tarnow

HON. ARTHUR J. TARNOW

UNITED STATES DISTRICT JUDGE

Dated: June 19, 2020

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