

APPENDIX A

No. 16-6712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 21, 2018
DEBORAH S. HUNT, Clerk

GERALD A. SANFORD, SR.,

Petitioner-Appellant,

v.

CHERRY LINDAMOOD, Warden, South Central
Correctional Center,

Respondent-Appellee.

ORDER

Before: BATCHELDER, GRIFFIN, and LARSEN, Circuit Judges.

Gerald A. Sanford, Sr., a Tennessee prisoner proceeding pro se, petitions for rehearing of this court's July 13, 2017, order denying his application for a certificate of appealability.

On careful consideration, the court concludes that it did not overlook or misapprehend any "point of law or fact" when it issued its order. *See* Fed. R. App. P. 40(a)(2). The petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Respondent-Appellee.

ORDER

In the meantime, on November 13, 2012, Sanford filed a “motion to hold in abeyance,” requesting the district court to hold his habeas corpus case in abeyance pending exhaustion of state-court remedies. The motion was not accompanied by a habeas corpus petition. Sanford subsequently paid the filing fee. The district court granted Sanford’s abeyance motion on

December 12, 2012, and informed him that he could file a motion to reopen after exhaustion was completed.

In 2014, Sanford filed a motion to reopen. The district court granted Sanford's motion and directed him to file a habeas corpus petition within thirty days. Sanford mailed a habeas corpus petition from prison on July 16, 2014, and it is considered filed on that date. *See Houston v. Lack*, 487 U.S. 266, 276 (1988); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Sanford's petition raised twenty-eight grounds for relief. The district court dismissed Sanford's habeas corpus petition as time-barred and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a habeas corpus petition is denied on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A federal habeas habeas corpus petition is subject to a one-year statute of limitations that begins to run from the latest of four possible circumstances. 28 U.S.C. § 2244(d)(1). Here, the statute of limitations began to run from "the date on which the [state court] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). None of the other three circumstances is applicable in this case. *See* 28 U.S.C. § 2244(d)(1)(B)-(D). The ninety-day period during which a petitioner may seek review of his conviction in the United States Supreme Court is included in the direct review process, and the statute of limitations will not begin to run until that time has expired. *Lawrence v. Florida*, 549 U.S. 327, 333 (2007). The limitations period is tolled by the amount of time that "a properly filed application for State post-conviction or other collateral review with respect to

the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Unlike the direct review process set forth in § 2244(d)(1), “the filing of a petition for certiorari before [the United States Supreme] Court does not toll the statute of limitations under § 2244(d)(2).” *Lawrence*, 549 U.S. at 337.

Sanford’s conviction became final on April 20, 2009, ninety days after the Tennessee Supreme Court denied permission to appeal on January 20, 2009. *See id.* The statute of limitations began to run on April 21, 2009. *See Bronaugh v. Ohio*, 235 F.3d 280, 285 (6th Cir. 2000); Fed. R. Civ. P. 6(a)(1)(A). The statute of limitations ran for a total of 199 days, from April 21, 2009 until November 5, 2009, when Sanford filed a petition for post-conviction relief. The limitations period remained tolled until November 13, 2013, when the Tennessee Supreme Court denied permission to appeal on post-conviction review. On November 14, 2013, the statute of limitations began to run again, and it ran uninterrupted until its expiration 166 days later on April 28, 2014.

Although Sanford filed a “motion to hold in abeyance” on November 13, 2012, before expiration of the statute of limitations, that motion did not toll the statute of limitations because it was not accompanied by a habeas corpus petition. Sanford’s abeyance motion was essentially a notification of his intent to file a habeas corpus petition after he exhausted his state-court remedies, which was insufficient to initiate a federal habeas corpus case. *See Williams v. Coyle*, 167 F.3d 1036, 1037 (6th Cir. 1999). *Williams* did not address the precise question posed here—whether a preliminary motion unaccompanied by a habeas corpus petition is sufficient to initiate a federal habeas corpus proceeding in order “to comply with the AEDPA’s statute of limitations.” *See id.* at 1040 n.4. But because “a case does not become ‘pending’ until an application for habeas corpus relief is filed in federal court,” *Woodford v. Garceau*, 538 U.S. 202, 210 (2003), it follows that a notification of intent to file a habeas corpus petition unaccompanied by a habeas corpus petition is insufficient to initiate a federal habeas corpus proceeding for statute of limitations purposes. *See Lookingbill v. Cockrell*, 293 F.3d 256, 263

(5th Cir. 2002). Because Sanford's habeas corpus petition was filed on July 16, 2014, after expiration of the one-year statute of limitations period on April 28, 2014, it is time-barred.

The one-year statute of limitations set forth in § 2244(d) "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing," *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The district court concluded that Sanford failed to show a diligent pursuit of his rights and an extraordinary circumstance preventing timely filing of his habeas corpus petition that would support equitable tolling. *See id.* As discussed by the district court, Sanford filed his abeyance motion during the pendency of his state post-conviction proceedings. Because neither Sanford nor the district court could predict when those proceedings would conclude, "[t]he onus was on [Sanford] to file a timely petition upon the conclusion of post-conviction review." In fact, when the state post-conviction proceedings finally concluded on November 13, 2013, five months of the limitations period remained during which Sanford could have filed a timely habeas corpus petition. Even if, as Sanford alleged below, he did not receive notice of the Tennessee Supreme Court's decision on post-conviction review until January 2014, the district court pointed out that he "still had approximately 3 months or until April 28, 2014, to file a timely petition."

Sanford argues that equitable tolling is applicable because the district court's order granting his motion to hold in abeyance misled him. He argues that the order did not place a time limit for his return to federal court once he completed his state post-conviction proceedings and, consequently, he believed that he could return to federal court and file a habeas corpus petition "once he was ready." But Sanford's interpretation of the district court's order does not show that equitable tolling is appropriate. First, Sanford did not demonstrate diligence because he waited more than five months after the conclusion of post-conviction review to file his habeas corpus petition. Indeed, in his motion to hold in abeyance, Sanford recognized the statute of limitations and the importance of timely filing his habeas corpus petition. Second, although the

district court's order granting the abeyance motion was open ended, neither the order nor Sanford's interpretation of the order prevented Sanford from filing his habeas corpus petition before expiration of the statute of limitations.

Moreover, Sanford did not make a credible showing of actual innocence that would allow his habeas corpus petition to proceed despite its untimeliness. *See Schlup v. Delo*, 513 U.S. 298, 327 (1995) (holding that in order to support an actual-innocence claim based on new evidence, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence"). "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass" when his habeas corpus petition is time-barred. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). But the actual innocence "gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *Id.* at 1936 (quoting *Schlup*, 513 U.S. at 316). Sanford presented no new, reliable evidence demonstrating his innocence of the crime for which he was convicted. Instead, the district court noted that Sanford merely claimed to be innocent and essentially challenged evidence that was presented at trial. Reasonable jurists would not debate "whether the district court was correct in its procedural ruling" dismissing Sanford's habeas corpus petition as time-barred. *See Slack*, 529 U.S. at 484.

In his application for a certificate of appealability, Sanford argues that the district court could have treated his abeyance motion "as a deficient petition" and his habeas corpus petition "as an amended petition." But Sanford's motion could not be considered a habeas corpus petition, and it did not initiate a habeas corpus proceeding because it was not "an application for habeas corpus relief." *See Woodford*, 538 U.S. at 210.

Sanford also argues that the untimeliness of his habeas corpus petition should be excused because "he continued to hold his § 2254 [petition] in abeyance pending the outcomes" of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014). But *Trevino*, which expanded the equitable rule set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012),

and *Sutton* concern whether ineffective assistance of post-conviction counsel can serve as cause to excuse the procedural default of ineffective-assistance-of-trial-counsel claims, not whether post-conviction counsel's ineffectiveness can excuse the untimely filing of a federal habeas petition. See *Lambrix v. Sec'y, Florida Dep't of Corr.*, 756 F.3d 1246, 1249 (11th Cir. 2014).

Accordingly, the application for a certificate of appealability is **DENIED**, and the motions to proceed in forma pauperis and to expand/supplement the record are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GERALD SANFORD, SR.,

Petitioner,

No. 14-cv-1178-SHL-cgc

vs.

CHERRY LINDAMOOD,

Respondent.

ORDER TO UPDATE THE DOCKET WITH CURRENT RESPONDENT
ORDER DENYING MOTION TO EXPEDITE
(ECF No. 33)
ORDER DENYING MOTION FOR RELIEF
(ECF No. 34)
ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
(ECF No. 25)
ORDER OF DISMISSAL
ORDER DENYING CERTIFICATE OF APPEALABILITY
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On November 13, 2012, Petitioner Gerald Sanford, Sr., Tennessee Department of Correction ("TDOC") prisoner number 418871, an inmate now confined at the South Central Correctional Center ("SCCC") in Clifton, Tennessee,¹ filed a "motion to hold in abeyance" in the United States District Court for the Middle District of Tennessee. (Motion ("Mot."), ECF No. 1). On November 16, 2012, United States District Judge Todd J. Campbell directed Sanford to pay the filing fee or submit a properly completed application to proceed *in forma pauperis*. (Order, ECF No. 2.) On December 6, 2012, Sanford paid the filing fee. (Receipt, ECF No. 6.)

¹The proper Respondent to a habeas petition is the petitioner's custodian. *Rumsfield v. Padilla*, 542 U.S. 426, 434-35 (2004). Because Sanford has been transferred to the SCCC, the current Respondent is Warden Cherry Lindamood. The Clerk is directed to terminate Michael Donahue as Respondent.

On December 12, 2012, Judge Campbell entered an order granting Sanford's motion to hold the action in abeyance while Sanford attempted to fully exhaust his state court remedies. (Order, ECF No. 7.) On July 7, 2014, Sanford filed a motion to reopen proceedings. (Mot., ECF No. 10.) On July 17, 2015, Judge Campbell entered an order directing the Clerk to reopen the file and granting Sanford thirty days to file a habeas petition. (Order, ECF No. 11.) On July 21, 2014, Sanford filed a *pro se* petition pursuant to 28 U.S.C. § 2254, along with a supporting memorandum. (Petition ("Pet."), ECF No. 13, Memorandum ("Mem."), ECF No. 14.) Because Sanford was convicted in Shelby County, Judge Campbell entered an order on July 31, 2014, transferring the petition to the Western District of Tennessee. (Order, ECF No. 16.)

On November 5, 2014, this Court entered an order directing Respondent to respond to the habeas petition. (Order, ECF No. 22.) On January 20, 2015, Respondent filed a motion to dismiss. (Mot. to Dismiss, ECF No. 25.) On January 22, 2015, Respondent filed the state court record. (Record ("R."), ECF No. 26.) On February 9, 2015, Petitioner filed a response to the motion to dismiss. (Response ("Resp."), ECF No. 27.) On August 31, 2015, Sanford filed a motion to expedite these proceedings. (Mot., ECF No. 33.) Sanford will be notified of the Court's determination by a copy of this order. The motion to expedite (Mot., ECF No. 33) is DENIED as moot.

On September 14, 2015, Sanford filed a motion asking the Court to admonish the Shelby County District Attorney's office for "outrageous, unrealistic, and unreasonable fees" for copies of records and to require them to reduce the copying fees. (Mot., ECF No. 34.) The Court construes this motion as a motion for discovery or motion to expand the record. Habeas petitioners do not have an automatic right to discovery. *Johnson v. Mitchell*, 585 F.3d 923, 934 (6th Cir. 2009) (quoting *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001)). Discovery in

habeas cases is controlled by Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts (“Habeas Rules”), which states:

A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.

See *Cornwell v. Bradshaw*, 559 F.3d 398, 410 (6th Cir. 2009) (“For good cause shown, the district court has the discretion to permit discovery in a habeas proceeding”). Habeas Rule 6 is meant to be “consistent” with the Supreme Court’s decision in *Harris v. Nelson*, 394 U.S. 286 (1969). *Bracy v. Gramley*, 520 U.S. 899, 909 (1997). In *Harris*, the Court stated:

[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

Harris, 394 U.S. at 300.

“Good cause” is not demonstrated by “bald assertions” or “conclusory allegations.” *Stanford*, 266 F.3d at 460; *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004) (same). Rather, the requested discovery must be materially related to claims raised in the habeas petition and likely to “resolve any factual disputes that could entitle . . . [the petitioner] to relief.” *Williams*, 380 F.3d at 975 (quoting *Stanford*, 266 F.3d at 460); see *Bracy*, 520 U.S. at 908-909 (allowing discovery relevant to “specific allegations” of fact in support of a claim of constitutional error); *Braden v. Bagley*, No. 2:04-cv-842, 2007 WL 1026454, *2 (S.D. Ohio Mar. 30, 2007) (“Rule 6’s ‘good cause’ standard requires petitioner to at least attempt to identify what he expects to uncover through his discovery requests”); *Post v. Bradshaw*, 621 F.3d 406, 425 (6th Cir. 2010) (discovery provides petitioner “that extra evidence he . . . needs to prove or strengthen his

case.”).² Although “more liberal discovery is appropriate in capital [habeas] cases,” *see Payne*, 89 F. Supp. 2d at 971 (W.D. Tenn. 2000) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)), Rule 6(a) does not permit a “fishing expedition masquerading as discovery,” *Stanford*, 266 F.3d at 460.

Sanford has not satisfied his burden of demonstrating that it is necessary or appropriate to take discovery. No additional materials are required for a determination in this proceeding. The motion (Mot., ECF No. 34) is DENIED.

I. STATE COURT PROCEDURAL HISTORY

On August 24, 2004, Petitioner Sanford was indicted by a Shelby County grand jury on one count of first degree murder. (R., Indictment, ECF No. 26-1 at PageID 123-24.) On December 8, 2006, a Shelby County Criminal Court jury convicted Petitioner as charged. (R., Minutes (“Mins.”), ECF No. 26-1 at PageID 184.) On December 9, 2006, Petitioner was sentenced to life in prison. (Mins., ECF No. 26-1 at PageID 185.) The judgment was entered on March 9, 2007. (Judgment (“J.”), ECF No. 26-1 at PageID 186.) The Tennessee Court of Criminal Appeals affirmed the trial court’s judgment. *State v. Sanford*, No. W2007-00664-CCA-R3-CD, 2008 WL 3066828 (Tenn. Crim. App. Aug. 1, 2008), *perm app. denied* (Tenn. Jan. 20, 2009).

On November 5, 2009, Petitioner filed a *pro se* petition for post-conviction relief. (R., Petition (“Pet.”), ECF No. 26-24 at PageID 2024-63.) On September 29, 2011, the State

²A petitioner may show good cause under Habeas Rule 6 without meeting the higher standard for an evidentiary hearing in 28 U.S.C. § 2254(e)(2). *Payne v. Bell*, 89 F. Supp. 2d 967, 970 (W.D. Tenn. 2000); *see Braden*, 2007 WL 1026454, at *6 (distinguishing discovery from factual development under § 2254(e)(2)); *see also Simmons v. Simpson*, No. 3:07-CV-313-S, 2009 WL 4927679, **5-6 (W.D. Ky. Feb. 12, 2009) (noting that the distinction between good cause and § 2254(e)(2) is accepted by some courts and rejected by others).

responded. (R., Resp., ECF No. 26-24 at PageID 2066.) On March 24, 2010, Petitioner's first court-appointed post-conviction attorney was allowed to withdraw and a second attorney was appointed. (Order, ECF No. 26-24 at PageID 2068.) After conducting an evidentiary hearing, the post-conviction court entered an order on May 31, 2012, dismissing the petition. (R., Order, ECF No. 26-24 at PageID 2109-16.) The Tennessee Court of Criminal Appeals affirmed. *Sanford v. State*, No. W2012-01194-CCA-R3-PC, 2013 WL 2490563 (Tenn. Crim. App. June 7, 2013), *perm. app. denied* (Tenn. Nov. 13, 2013).

II. PETITIONER'S FEDERAL HABEAS CLAIMS

In this § 2254 petition, Sanford challenges the sufficiency of the evidence, contends that the trial court erred, maintains that the prosecutor was guilty of misconduct, and complains that he received ineffective assistance of counsel at trial and on appeal. (Pet., ECF No. 13 at PageID 26-67.) Respondent argues that the petition is time barred. (Mot. to Dismiss, ECF No. 25 at PageID 101.)

III. ANALYSIS

A. Statute of Limitations

The statutory authority for federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Twenty-eight U.S.C. § 2244(d) provides:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall begin to 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; and
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

State convictions ordinarily become “final” within the meaning of § 2244(d)(1)(A) when the time expires for filing a petition for a writ of certiorari from a decision of the highest state court on direct appeal. *Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The Tennessee Court of Criminal Appeals issued its decision on direct appeal on August 1, 2008, and the Tennessee Supreme Court denied permission to appeal on January 20, 2009. Petitioner’s conviction became final on April 20, 2009, the last date for filing a petition for a writ of certiorari with the United States Supreme Court, at which time the running of the limitations period commenced.

The limitations period was tolled, pursuant to 28 U.S.C. § 2244(d)(2), when Sanford filed his post-conviction petition on November 5, 2009. (R., Petition (“Pet.”), ECF No. 26-24 at

PageID 106.) By that time, one hundred ninety-nine (199) days of the one-year limitations period had elapsed. The Tennessee Court of Criminal Appeals affirmed the dismissal of the post-conviction petition on June 7, 2013, and the Tennessee Supreme Court denied permission to appeal on November 13, 2013. The running of the limitations period recommenced at that time and subsequently expired on April 28, 2014.

Petitioner's motion to hold proceedings in abeyance was filed on November 13, 2012, while his post-conviction appeal was pending with the TCCA. (Mot., ECF No. 1.) Petitioner stated:

[h]e wishes to raise in the Habeas Corpus petition his direct appeal issues, which has been exhausted and he wishes to raise ineffective assistance of counsel claims against his trial attorney and his appellate counsel in the federal Habeas Corpus petition, along with other errors.

(Id. at PageID 1.) Petitioner did not file a habeas petition or further identify the issues to be presented. On December 12, 2012, Judge Campbell entered an order granting the motion, stating in part:

In this case, the petitioner is attempting to fully exhaust state court remedies before the Court rules on his federal habeas corpus claims. It appears that the interests of judicial economy and timeliness would best be served by holding the instant action in abeyance rather than dismissing it now without prejudice.

Accordingly, petitioner's "Motion to Hold in Abeyance" is hereby GRANTED. The Clerk is directed to close this file administratively. The file may be reopened upon motion of the petitioner.

(Order, ECF No. 7 at PageID 14-15.) Petitioner then filed his habeas petition on July 21, 2014, in which he fully explained his claims.

In *Woodford v. Garceau*, 538 U.S. 202, 208 (2003), the Supreme Court concluded that:

Federal Rule of Civil Procedure 3 explains that "[a] civil action is commenced by filing a complaint." The Federal Rules of Civil Procedure apply in the context of

habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules. *See* 28 U.S.C. § 2254 Rule 11; Fed. Rule Civ. Proc. 81(a)(2); *Pitchess v. Davis*, 421 U.S. 482, 489, 95 S. Ct. 1748, 44 L.Ed.2d 317 (1975) (*per curiam*). Nothing in the Habeas Corpus Rules contradicts Rule 3. The logical conclusion, therefore, is that a habeas suit begins with the filing of an application for habeas corpus relief-the equivalent of a complaint in an ordinary civil case.

Id. Even before the Supreme Court addressed the issue, the Sixth Circuit had held that filing a notice of intent to file a petition and a motion for appointment of counsel did not constitute a pending habeas corpus case, stating:

In ordinary usage a case is pending when a complaint or petition is filed. *See, e.g.,* BLACK'S LAW DICTIONARY 1134 (6th ed. 1990). Under Federal Rule of Civil Procedure 3, "[a] civil action is commenced by filing a complaint with the court." The filing of an application for a writ of habeas corpus is analogous to the filing of a civil complaint, and the Federal Rules of Civil Procedure may be applied to habeas proceedings to the extent that those rules do not conflict with the specific rules governing § 2254 cases. *See* 28 U.S.C. § 2254, R. 11. The specific rules governing § 2254 cases require the applicant to file an application in the form of a petition for the writ in the district court, *see* § 2254, R. 2, 3, but they do not explicitly address the commencement of the proceedings. Accordingly, we conclude that Fed. R. Civ. P. 3 yields a presumption that a federal habeas corpus case is filed with the filing of an application for the writ.

Williams v. Coyle, 167 F.3d 1036 (6th Cir. 1999).

Because Sanford did not file this habeas petition until July 21, 2014, eighty days after the limitations period ended, it is time barred.

B. Equitable Tolling

"[T]he doctrine of equitable tolling allows federal courts to toll a statute of limitations when a litigant's failure to meet a legally mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005) (internal quotation marks omitted). The § 2244(d) limitations period is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645-49 (2010). "[T]he doctrine of equitable tolling is used sparingly by the federal courts." *Robertson v. Simpson*, 624 F.3d 781, 784 (6th

Cir. 2010); *see also* *Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003) (same); *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003) (same). “The party seeking equitable tolling bears the burden of proving he is entitled to it.” *Robertson*, 624 F.3d at 784. 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 timely filing.” *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Sanford alleges that Judge Campbell’s order granting the motion to hold in abeyance “did not direct or state that Petitioner had to have his petition in by a certain date.” (Resp., ECF No. 27-1 at PageID 2320.) This argument is disingenuous. Sanford advised Judge Campbell that his post-conviction proceedings were on direct appeal to the TCCA. (Mot., ECF No. 1 at PageID 1.) Judge Campbell had no way to predict when the TCCA would issue a decision, when or if Petitioner would file an application for permission to appeal to the Tennessee Supreme Court, and, if Petitioner did so, when the Tennessee Supreme Court would rule. Petitioner, however, was fully aware of the statute of limitations and told Judge Campbell he “ha[d] only a limited time to file his federal Habeas Corpus and [did] not want the statute of limitations to expire.” (*Id.*) The onus was on Petitioner to file a timely petition upon the conclusion of post-conviction review.

Sanford alleges that the law librarian for the legal library at the Hardeman County Correctional Facility (“HCCF”) did not perform timely updates on the computers. (Resp., ECF No. 27-1 at PageID.2318.) He contends that his receipt of mail was delayed because he had been transferred from the Turney Center Industrial Prison to the HCCF. (*Id.*) Sanford alleges that, in January 2014, he instructed his family to contact his post-conviction appellate attorney. He was informed of the state court decision by his family during the next weekly or bi-weekly call. (*Id.*)

His post-conviction appellate attorney had mailed the decision to Turney Center, but also immediately mailed a copy to Petitioner at the HCCF. (*Id.* at PageID 2319.) Petitioner still had approximately three months or until April 28, 2014, to file a timely petition.

Sanford alleges that his prison job required him to work at least eight hours a day, five days a week, that his law library time was limited, and that the library equipment was outdated. (*Id.*) Petitioner also complains of several institutional lockdowns when he was unable to leave his cell or go to the library. (*Id.*) Despite Sanford's allegations of multiple transfers from prison to prison and allegations of limited time and inadequate access to an inadequate law library, the Court takes judicial notice that Sanford actively litigated a § 1983 action in the Western District of Tennessee from August 6, 2012 until its recent dismissal. *See Sanford v. Schofield, et al.*, No. 12-2685-JDT-tmp (W.D. Tenn. April 14, 2015). Sanford has filed a notice of appeal. (*Id.*)

"[A]llegations regarding insufficient library access, standing alone, do not warrant equitable tolling." *United States v. Stone*, 68 F. App'x 563, 565-66 (6th Cir. 2003); *see also Maclin v. Robinson*, 74 F. App'x 587, 589 (6th Cir. 2003); *Tomlinson v. Lazaroff*, No. 2:07-cv-583, 2008 WL 2796549, at *7-*8 (S.D. Ohio July 16, 2008); *Williams v. Williams*, No. 5:07CV01498, 2008 WL 2121078, at *4 (N.D. Ohio Mar. 14, 2008) (report and recommendation), *adopted*, 2008 WL 2121036 (N.D. Ohio May 20, 2008); *Horton v. Warden, Ross Correctional Inst.*, No. 2:07-cv-525, 2008 WL 687136, at *3-*4 (S.D. Ohio Mar. 11, 2008); *Groomes v. Parker*, No. 3:07-0124, 2008 WL 123935, at *1, *5 (M.D. Tenn. Jan. 9, 2008); *Rucker v. Bell*, No. 1:07-cv-152, 2008 WL 56025, at *5 (E.D. Tenn. Jan. 3, 2008).

Given the extraordinary nature of equitable relief, Petitioner must make more than generalized statements and must show specific efforts to diligently pursue his federal habeas remedy which were thwarted by extraordinary circumstances beyond his control before the Court

can conclude that these circumstances prevented the timely pursuit of a federal petition. *See Wright v. Jones*, 404 F. App'x 323 (10th Cir. 2010) (generalized grievance of lack of access to legal materials is not sufficient to support equitable tolling); *Bell v. Secretary, Dept. of Corrections*, 248 F. App'x 101 (11th Cir. 2007) (equitable tolling did not apply when there was no record of evidence that petitioner requested access to prison legal materials during one year limitations period); *Gibson v. Klinger*, 232 F.3d 799 (10th Cir. 2000) (claim of insufficient access to relevant law is not sufficient to support equitable tolling); *Jones v. Gundy*, 100 F. Supp. 2d 485, 488 (W.D. Mich. 2000) (inmate's broad claim of lack of access to legal materials and failure to explain period of several years when he took no action to protect his rights warrant the denial of equitable tolling).

Petitioner Sanford has not shown that he diligently pursued his right to file a federal habeas corpus petition but could not do so because prison officials prevented him from obtaining access to legal materials, and does not otherwise allege circumstances justifying the application of equitable tolling. There is therefore no basis for finding that the one-year statute of limitations should be tolled. Respondent's motion to dismiss the petition as time barred is GRANTED. (Mot., ECF No. 25.) The petition is DISMISSED WITH PREJUDICE. Judgment shall be entered for Respondent.

IV. APPELLATE ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003); *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the

United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

— A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & 3. A “substantial showing” is made when the petitioner demonstrates that “reasonable jurists could debate whether (or, for that matter, 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.’” *Miller-El*, 537 U.S. at 336 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App’x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App’x 809, 814-15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. *Bradley*, 156 F. App’x at 773 (quoting *Miller-El*, 537 U.S. at 337).

In this case, there can be no question that the claims in this petition are barred by the statute of limitations. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court DENIES a certificate of appealability.

In this case for the reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is DENIED.³

IT IS SO ORDERED, this 2nd day of March, 2016.

³If Petitioner files a notice of appeal, he must pay the full \$505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. See Fed. R. App. P. 24(a)(5).