NOT RECOMMENDED FOR PUBLICATION

No. 24-5145

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARAMIS LEE SHARKEY,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
JAMES M. HOLLOWAY, Warden,	)	TENNESSEE
	)	
Respondent-Appellee.	)	

ORDER

Before: STRANCH, BUSH, and MATHIS, Circuit Judges.

Daramis Lee Sharkey appeals the judgment of the district court dismissing his habeas petition. "Every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction." *Alston v. Advanced Brands & Importing Co.*, 494 F.3d 562, 564 (6th Cir. 2007) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998)). Generally, in a civil case where the United States, a United States agency, or a United States officer or employee is not a party, a notice of appeal must be filed within 30 days after the judgment or order appealed from is entered. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

The district court dismissed Sharkey's petition on August 25, 2023. Any notice of appeal was due to be filed on or before September 25, 2023. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a), 26(a). Sharkey filed his notice of appeal on February 15, 2024.

Because the notice of appeal was late and no motion to reopen the time to appeal had been granted, *see* Fed. R. App. P. 4(a)(6), this court issued an order directing Sharkey to show cause why the appeal should not be dismissed. Sharkey has filed a response seeking a reprieve from the filing deadline because he is serving his sentence in a maximum-security facility, making it

difficult for him to access the law library, and because he experienced a period of depression that caused him to "fall behind even more" in his responsibilities. He also states that he is proving his actual innocence, which serves as a gateway through any procedural barriers. He asserts that his constitutional rights have been violated and his appeal should be heard by this court. In a supplemental response, Sharkey also asserts that he was unsure about whether to proceed with a notice of appeal because Sharkey's mother spoke with his habeas counsel who allegedly told her that the judge would not accept a notice of appeal.

Notwithstanding Sharkey's explanations, his failure to timely file a notice of appeal deprives this court of jurisdiction. Compliance with the statutory deadline in § 2107(a) is a mandatory jurisdictional prerequisite that this court may not waive. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 19 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

Accordingly, it is ordered that the appeal is **DISMISSED** for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5145

DARAMIS LEE SHARKEY,

Petitioner-Appellant,

v.

JAMES M. HOLLOWAY, Warden,

Respondent-Appellee.

Before: STRANCH, BUSH, and MATHIS, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon consideration of appellate jurisdiction.

IN CONSIDERATION THEREOF, it is ORDERED that the appeal is **DISMISSED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 05/06/2024.

Case Name: Daramis Sharkey v. James Holloway
Case Number: 24-5145

Docket Text:
ORDER filed to dismiss case for lack of jurisdiction. No mandate to issue, decision not for publication. Jane Branstetter Stranch, Circuit Judge; John K. Bush, Circuit Judge and Andre B. Mathis, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Daramis Lee Sharkey
Lois M. DeBerry Special Needs Facility
7575 Cockrill Bend Boulevard
Nashville, TN 37209

A copy of this notice will be issued to:

Ms. Wendy R. Oliver
Ms. Sarah J. Stone

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

DARAMIS SHARKEY,	)	
	)	
Petitioner,	)	
	)	No. 2:22-cv-02306-TLP-cgc
v.	)	
	)	
JAMES M. HOLLOWAY,	)	
	)	
Respondent.	)	

ORDER GRANTING MOTION TO DISMISS, DISMISSING PETITION WITH PREJUDICE, DENYING A CERTIFICATE OF APPEALABILITY, CERTIFYING AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH, AND DENYING LEAVE TO APPEAL INFORMA PAUPERIS

Petitioner Daramis Sharkey[1] petitions, through counsel, for a writ of habeas corpus under 28 U.S.C. § 2254. (ECF No. 1.) Respondent moves to dismiss the habeas corpus petition as untimely. (ECF No. 15). Petitioner responded. (ECF No. 16.) Respondent then replied. (ECF No. 17.)

For the reasons below, this Court **GRANTS** Respondent's motion to dismiss, **DISMISSES WITH PREJUDICE** the § 2254 Petition, **DENIES** a certificate of appealability, **CERTIFIES** that any appeal of this matter would not be taken in good faith, and **DENIES** leave to proceed in forma pauperis on appeal.

[1] Petitioner is an inmate incarcerated at the Lois M. DeBerry Special Needs Facility in Nashville, Tennessee. His Tennessee Department of Correction prisoner number is 00539048.

BACKGROUND

I. Petitioner's Criminal Cases

In May 2012, a Shelby County grand jury issued three indictments charging Petitioner with aggravated burglary and aggravated rape. (ECF No. 14-4 at PageID 79–87.) That grand jury also indicted him for aggravated burglary in a fourth indictment. (*Id.*) A little more than two years later, Petitioner pleaded guilty to aggravated rape and aggravated burglary in one of those cases. (*See* ECF No. 14-1 at PageID 54.) In November 2014, Petitioner pleaded guilty to the charges in the other three cases. (ECF No. 14-4 at PageID 91–94.)

At the November hearing, the State presented a factual basis for Petitioner's plea including evidence of DNA matches from the rape kits, statements, and identifications from the victims.[2] (*Id.* at PageID 57–58, 68.) Petitioner's counsel stipulated to the factual basis for the pleas and asked the sentencing court to accept the plea agreement. (*Id.* at PageID 58.) The trial court then entered the guilty pleas. (ECF No. 14-4 at PageID 95–98.)

The trial court also sentenced him on all charges in November hearing. (ECF No. 14-1 at PageID 55.) The parties sought a total term of sixty years[3] served at 100% on all charges and registration as a sex offender under community supervision for life after release from prison. (*Id.* at PageID 56.) That court entered judgments in those cases on November 12, 2014. (ECF No. 14-1 at PageID 99–105.) Petitioner did not appeal.

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[2] Petitioner's DNA was found in all three aggravated rape cases. (ECF No. 14-4 at PageID 130–31.) He confessed in detail on two of the rape counts, and his confessions matched the victim's statements. (*Id.*)

[3] The total sentence was based on three consecutive twenty-year sentences on the aggravated rape charges with four three-year sentences on the aggravated burglaries running concurrent to those sentences. (ECF No. 14-1 at PageID 58–59.)

II. Post-Conviction Procedural History

In December 2014, Petitioner sent a letter to the sentencing court, including a handwritten motion. (*See* ECF No. 14-4 at PageID 124.) This letter and motion did not include an indictment number, and it was styled as a "Pro se request motion to withdraw plea agreement." (*See id.*) Petitioner also argued that his attorney coerced Petitioner's plea. (*Id.*)

The sentencing court interpreted Petitioner's letter as a motion to withdraw his guilty plea for all four indictments. (*Id.*; *see also* ECF No. 14-2.) That court also appointed Petitioner new counsel to represent him on the motion because of the alleged conflict with his counsel when he pleaded guilty. (*Id.*; *see also* ECF No. 14-2.) With the advice of new counsel, Petitioner withdrew his motion in open court in April 2015. (ECF No. 14-3 at PageID 74–75.) And the sentencing court advised him three times that he had until December 2015 to petition for post-conviction relief. (*Id.* at PageID 75; see ECF No. 14-2 at PageID 73.)[4]

Petitioner then filed his "Petition for Relief from Sentence or Conviction" pro se. (ECF No. 14-4 at PageID 106–13.) That petition was stamped with the date, June 23, 2015. (*See id.*) But it was signed before a notary public nearly two months earlier, on April 27, 2015. (*See id.* at PageID 113.) And the post-conviction court found that Petitioner petitioned on May 5, 2015. (*Id.* at PageID 124.) Still, Petitioner did not reveal when he placed his post-conviction petition in the mail at his institution.

[4] The trial court initially said that the post-conviction petition would not be due later than December 21, 2015, based on the pleas not becoming final until 30 days after the entry of judgment. (ECF No. 14-2 at PageID 73.) In the order accepting withdrawal of Petitioner's motion, that court found that Petitioner has "been advised by this attorney and this court that he has until December 14, 2015, to file a petition for post-conviction relief as to either or both pleas." (ECF No. 14-3 at PageID 75.)

The post-conviction court then appointed counsel for Petitioner. (*Id.* at PageID 115–20.) And that counsel amended Petitioner's post-conviction petition, alleging ineffective assistance of trial counsel. (*Id.*) In a thorough ten-page ruling entered in September 2017, the post-conviction court denied Petitioner relief. (*Id.* at PageID 122–32.)

III. Motion to Reopen and Later Appeals

Less than a month after the post-conviction court entered its order denying relief, Petitioner appealed that decision to the Tennessee Court of Criminal Appeals ("TCCA"). (ECF No. 14-4 at PageID 133.) The TCCA affirmed the post-conviction court on August 17, 2018. *See Sharkey v. State*, No. W2017-01961-CCA-R3-PC, 2018 WL 3993319 (Tenn. Crim. App Aug. 17, 2018), *perm. app. denied* (Tenn. Dec. 6, 2018).

In May 2021, over two years after the Tennessee Supreme Court denied permission to appeal, Petitioner applied pro se for "Writ/Motion to Reopen and/or Post Conviction Relief" in the Shelby County Criminal Court. (ECF No. 14-14.) There, he alleged that: (1) there was no factual bases for his pleas; (2) the prosecutor falsified records; (3) he received ineffective assistance of counsel; and (4) the trial court and prosecutor failed to inform him of the statute of limitations for petitioning for post-conviction relief. (*See* ECF No. 14-16 at PageID 334.) Four days later, that court denied Petitioner's motion to reopen without a hearing because "the grounds alleged in [the] instant petition [did] not satisfy any of the criteria set out in Tenn. Code Ann. § 40-30-117 as grounds to reopen, have also been previously waived as not having been raised in any previous petitions, and have clearly been raised outside the statute of limitations of one year for post-conviction petitions." (*Id.* at PageID 335.) In addition, that court mentioned, that Petitioner had been advised of the statute of limitations for petitioning for post-conviction relief. (*Id.*)

Over thirty days later, Petitioner applied to the TCCA for permission to appeal the lower court's denial of his motion to reopen. (ECF No. 14-15.) The TCCA denied that application because "Petitioner filed his application . . . more than thirty days after the trial court issued its order denying his motion to reopen on May 18, 2021." (ECF No. 14-18 at PageID 346.) On the same day of Petitioner's application, the TCCA also held that it lacked jurisdiction because Petitioner "failed to comply with the strict statutory requirements of Tennessee Code Annotated § 40-30-117(c)." (*Id.*)

Petitioner then petitioned the TCCA for a rehearing. (ECF No. 14-19.) On September 15, 2021, the TCCA denied that petition for rehearing because: (1) it was untimely under Tenn. R. App. P. 39(b); (2) the application for permission to appeal was untimely under Tenn. Code Ann. §40-30-117(c); and (3) "even if this Court had jurisdiction," the trial court's finding that Petitioner did not present a ground for granting a motion to reopen is correct. (ECF No. 14-20 at PageID 390.)

More than one month later, Petitioner filed a "Revised Petition," arguing that he had new scientific evidence of actual innocence under Tenn. Code Ann. § 40-30-117(a)(2). (ECF No. 14-21.) That is, he argued that his claim that the prosecutor had violated his due process rights and committed perjury by misstating a victim's name when presenting the factual basis for the plea amounted to new scientific evidence of his actual innocence. (*Id.*) The TCCA denied his Revised Petition on November 3, 2021, explaining:

> Not only is the Petitioner's claim completely meritless, but his "Revised Petition" is untimely if construed as a petition for rehearing. *See* Tenn. R. App. P. 39(b) (stating that a petition for rehearing must be filed within 10 days unless an extension is granted by the court). Moreover, his original application for permission to appeal was not timely filed. *See* T.C.A. § 40-30-117(c) (stating that an application for permission to appeal must be filed within 30 days). This Court does not have the authority to suspend or waive the statutory procedural requirements. *Timothy Roberson v. State*, No. W2007-00230-CCA-R3-PC, 2007

WL 3286681, at *9 (Tenn. Crim. App. Nov. 7, 2007).

(ECF No. 14-22 at PageID 444.)

V. The § 2254 Petition

Over six months after the TCCA denied his Revised Petition, Petitioner petitioned in this Court under 28 U.S.C. § 2254. (ECF No. 1.) He raises one ground for relief—the ineffective assistance of his trial counsel for failure to advise him of the plea consequences. (*Id.* at PageID 6; *see* ECF No. 1-1 at PageID 24–25.) In response, Respondent filed the state court record and moved to dismiss the § 2254 Petition as untimely. (ECF Nos. 14, 15.) Petitioner responded, and Respondent replied. (ECF Nos. 16, 17.)

LEGAL STANDARD AND ANALYSIS

Federal courts may issue habeas corpus relief for persons in state custody under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). But a federal court has limited authority and 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).

The statute of limitation for § 2254 petitions is found in 28 U.S.C. § 2244(d). Section 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)(1)–(2).

Still, courts will sometimes apply equitable tolling to extend a statute of limitations. "[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), *abrogated on other grounds as recognized in Johnson v. United States*, 457 F. App'x 462, 470 (6th Cir. 2012). The § 2254 limitations period is subject to equitable tolling. *Holland v. Fla.*, 560 U.S. 631, 645–49 (2010).

Respondent argues that the § 2254 Petition here is untimely and that the Court should not apply equitable tolling. (*See* ECF No. 15-1 at PageID 450–55.) Petitioner asserts that he filed his § 2254 Petition within one year of the motion to reopen his state post-conviction petition. (*See* ECF No. 1 at PageID 14.) And to justify the timing of his filing, Petitioner argues three main points. First under § 2244(d)(1)(D) the statute of limitations runs one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." (ECF No. 16 at PageID 458–59.) Second, § 2244(d)(2)

applies and that he should receive statutory "tolling for the time that he could have, but did not timely file, an appeal of the denial of his motion in the state courts." (*Id.* at PageID 459.) And third, he is entitled to equitable tolling based on actual innocence because he demonstrated his actual innocence in state court proceedings. (*Id.* at PageID 460–62.) The Court first explains below why the § 2254 Petition was untimely before explaining why equitable tolling does not apply.

I. Statute of Limitations

In Tennessee, a judgment of conviction entered upon a guilty plea becomes final 30 days after acceptance of the plea agreement and imposition of sentence. *State v. Green*, 106 S.W.3d 646, 649 (Tenn. 2003). And that is when the running of the limitations period began. *Id.* So a state conviction becomes "final" under § 2244(d)(1)(A) as explained in *Green*.

In Petitioner's case, the trial court entered judgments on November 12, 2014. Petitioner timely moved to withdraw his guilty pleas, and then withdrew it on April 24, 2015, based on the advice of counsel. (*See* ECF No. 14-3.) Under Tenn. R. App. 4(c), the time to appeal after a timely motion to withdraw a guilty plea typically runs from the entry of an order denying that motion, giving the defendant thirty days to appeal. *See* Tenn. R. App. P. 4(a). But here, Petitioner withdrew his motion to withdraw his guilty plea in April 2015.

By the time Petitioner withdrew his state post-judgment motion, the thirty-day period to appeal had long since run. Respondent therefore asserts that the statute of limitations began to run on April 25, 2015, the day after Petitioner asked the trial court to allow him to withdraw his motion to withdraw the plea agreement.[5] (ECF No. 15-1 at PageID 450.) Respondent argues

[5] Respondent argues that, because Petitioner withdrew the motion to withdraw the guilty pleas, he does not get the extra time for appeal because there was no order denying the motion. (ECF No. 15-1 at PageID 450–51 n.3.) But Respondent also contends that the Court need not address

that the limitations period ran for fifty-nine days until Petitioner petitioned for post-conviction relief on June 23, 2015. (*Id.*) He contends that the statute restarted on December 7, 2018, the day after the Tennessee Supreme Court denied permission to appeal. (*Id.* at PageID 451–52.) And so he asserts the statute expired 306 days later, on October 8, 2019. (*Id.* at PageID 452.)

By contrast, Petitioner seeks to toll the time that he could have petitioned for writ of certiorari under the statute. (ECF No. 16 at PageID 459.) "State review ends when the state courts have finally resolved an application for state postconviction relief" and does not carry over to the period for petitioning for writ of certiorari before the United States Supreme Court. *See Lawrence v. Florida*, 549 U.S. 327, 332 (2007). Petitioner's argument for additional statutory tolling during this period therefore fails.

Petitioner did not petition here under § 2254 until May 18, 2022, more than two years after the state courts' denial of post-conviction relief. Petitioner does not claim that the § 2254 Petition is timely, but he notes that he filed it one year from his motion to reopen the post-conviction proceedings. (*See* ECF No. 1-1 at PageID 19.) But by the time that he moved to reopen his post-conviction petition in May 2021, the statute of limitations for petitioning under § 2254 had expired. These attempts to seek other state-court collateral relief did not toll the running of the limitations period. *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) ("'The tolling provision does not . . . "revive" the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations.'") (quoting *Rashid v.*

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this issue because, even considering the thirty days, the § 2254 Petition would have been untimely. (*Id.* at PageID 451 n.3.)

Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)); *Owens v. Stine*, 27 F. App'x 351, 353 (6th Cir. 2001) ("A state court post-conviction motion that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled.").

Petitioner also argues that he should get the benefit of § 2244(d)(1)(D). (ECF No. 16 at PageID 459.) But the reference to this statute stops there. Petitioner failed to reveal what factual predicate he is talking about. (See *id.*) Respondent correctly argues that "[w]ithout knowing what this alleged new scientific evidence is, how this affected Petitioner's ability to timely raise his ineffective assistance of trial counsel claim here, and what steps he took to remain diligent following the conclusion of his state-court proceedings, it is unclear how the instant petition would now be timely." (*See* ECF No. 17 at PageID 467.) The Court agrees with Respondent and finds that Petitioner has not shown that 28 U.S.C. § 2244(d)(1)(D) applies.

Considering all these reasons, the Court finds that the § 2254 Petition here is untimely.

II. Equitable Tolling

Federal courts use the doctrine of equitable tolling sparingly. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *see also Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003). "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)).

Additionally, equitable tolling may be appropriate "based on a credible showing of actual innocence." *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005). The Supreme Court has held that "[t]o establish actual innocence,

petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. . . ." *Bousley v. United States*, 523 U.S. 614, 623 (1998). "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Id.* (internal quotation marks omitted). A credible claim of actual innocence requires the petitioner to support his 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 v. Delo*, 513 U.S. 298, 324 (1995).

Petitioner has argued that, after his post-conviction appeal, he had trouble obtaining counsel in Tennessee. (ECF No. 1-1 at PageID 19, 25.) And he asserts that his counsel and this Court failed to "successfully inform" him of AEDPA's statute of limitations. (*Id.*) Petitioner further claims on the one hand that he has been prevented from raising actual innocence. On the other hand, he argues that he demonstrated his actual innocence in the state court proceedings, despite not having been granted a hearing on the merits because of ineffective assistance of counsel. (*Id.* at PageID 26; ECF No. 16 at PageID 462.)

Petitioner's lack of legal knowledge about the AEDPA limitations period does not warrant equitable tolling. *Thomas v. Romanowski*, 362 F. App'x 452, 455 (6th Cir. 2010); *Miller v. Cason*, 49 F. App'x 495, 497 (6th Cir. 2002) ("Miller's lack of knowledge of the law does not excuse his failure to timely file a habeas corpus petition."); *Brown v. United States*, 20 F. App'x 373, 374 (6th Cir. 2001). Even an attorney's misunderstanding of a filing deadline is not grounds for equitable tolling. *Giles v. Beckstrom*, 826 F.3d 321, 325–26 (6th Cir. 2016). What is more, equitable tolling is not appropriate when a timely petition could have been filed *pro se*. *See Dixon v. Ohio*, 81 F. App'x 851 (6th Cir. 2003); *see Franklin v. Bagley*, 27 F. App'x 541, 542-43 (6th Cir. 2001) (*Pro se* status did not weight in favor of equitable tolling); *see Sinclair v.*

Cason, No. 03-10024-BC, 2004 WL 539226, at *3 (E.D. Mich. Mar. 16, 2004) ("The fact that the petitioner is untrained in the law, may have been proceeding without a lawyer, or may have been unaware of the statute of limitations does not warrant tolling.").

So Petitioner cannot his inability to obtain counsel or the courts for his ignorance of the limitations period. Petitioner has not shown that he pursued his rights diligently or that an extraordinary circumstance precluded him from timely filing his § 2254 Petition.

Petitioner claims actual innocence here to establish equitable tolling. But he offers no evidence of factual innocence to support his claim. He relies on information presented in the state court. Petitioner raised ineffective assistance of counsel claims in those post-conviction proceedings. (*See* ECF No. 14-9 at PageID 285.) He raised a claim of actual innocence in the Revised Petition. He did not, however, present any evidence in support of that claim. Petitioner has presented no evidence showing his factual innocence.

In sum, Petitioner has not met his burden of proving that the Court should apply equitable tolling here. Petitioner's § 2254 Petition is therefore untimely. And so, the Court **GRANTS** Respondent's motion to dismiss the petition as time-barred (ECF No. 15) and **DISMISSES WITH PREJUDICE** the § 2254 Petition. The Court will enter a judgment for Respondent by separate docket entry.

APPEALLATE 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 court may issue a COA only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must point to the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2)–(3). A petitioner makes a "substantial showing" when the petitioner shows 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 routinely. *Bradley*, 156 F. App'x at 773 (quoting *Miller-El*, 537 U.S. at 337).

There is no question here that the claims in the claims in the § 2254 Petition are barred by the statute of limitations. Because any appeal by Petitioner on the issues raised in his petition are time-barred, the Court **DENIES** a COA.

For the same reasons the Court denies a COA, the Court determines that any appeal would not be taken in good faith. The Court therefore **CERTIFIES** under Fed. R. App. P. 24(a), that any appeal here would not be taken in good faith and **DENIES** leave to appeal in forma pauperis.[6]

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

CONCLUSION

For the reasons described above, the Court **GRANTS** Respondent's motion to dismiss the petition as time-barred (ECF No. 15) and **DISMISSES WITH PREJUDICE** the § 2254 Petition. The Court also **DENIES** Petitioner a COA, **CERTIFIES** that any appeal would not be taken in good faith, and **DENIES** Petitioner leave to appeal in in forma pauperis.

SO ORDERED, this 25th day of August, 2023.

s/Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

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

DARAMIS SHARKEY, Petitioner, v. JAMES M. HOLLOWAY, Respondent.	)))))))))	No. 2:22-cv-02306-TLP-cgc

ORDER GRANTING MOTION TO DISMISS, DISMISSING PETITION WITH PREJUDICE, DENYING A CERTIFICATE OF APPEALABILITY, CERTIFYING AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH, AND DENYING LEAVE TO APPEAL INFORMA PAUPERIS

Petitioner Daramis Sharkey[1] petitions, through counsel, for a writ of habeas corpus under 28 U.S.C. § 2254. (ECF No. 1.) Respondent moves to dismiss the habeas corpus petition as untimely. (ECF No. 15). Petitioner responded. (ECF No. 16.) Respondent then replied. (ECF No. 17.)

For the reasons below, this Court **GRANTS** Respondent's motion to dismiss, **DISMISSES WITH PREJUDICE** the § 2254 Petition, **DENIES** a certificate of appealability, **CERTIFIES** that any appeal of this matter would not be taken in good faith, and **DENIES** leave to proceed in forma pauperis on appeal.

[1] Petitioner is an inmate incarcerated at the Lois M. DeBerry Special Needs Facility in Nashville, Tennessee. His Tennessee Department of Correction prisoner number is 00539048.

BACKGROUND

I. Petitioner's Criminal Cases

In May 2012, a Shelby County grand jury issued three indictments charging Petitioner with aggravated burglary and aggravated rape. (ECF No. 14-4 at PageID 79–87.) That grand jury also indicted him for aggravated burglary in a fourth indictment. (*Id.*) A little more than two years later, Petitioner pleaded guilty to aggravated rape and aggravated burglary in one of those cases. (*See* ECF No. 14-1 at PageID 54.) In November 2014, Petitioner pleaded guilty to the charges in the other three cases. (ECF No. 14-4 at PageID 91–94.)

At the November hearing, the State presented a factual basis for Petitioner's plea including evidence of DNA matches from the rape kits, statements, and identifications from the victims.[2] (*Id.* at PageID 57–58, 68.) Petitioner's counsel stipulated to the factual basis for the pleas and asked the sentencing court to accept the plea agreement. (*Id.* at PageID 58.) The trial court then entered the guilty pleas. (ECF No. 14-4 at PageID 95–98.)

The trial court also sentenced him on all charges in November hearing. (ECF No. 14-1 at PageID 55.) The parties sought a total term of sixty years[3] served at 100% on all charges and registration as a sex offender under community supervision for life after release from prison. (*Id.* at PageID 56.) That court entered judgments in those cases on November 12, 2014. (ECF No. 14-1 at PageID 99–105.) Petitioner did not appeal.

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[2] Petitioner's DNA was found in all three aggravated rape cases. (ECF No. 14-4 at PageID 130–31.) He confessed in detail on two of the rape counts, and his confessions matched the victim's statements. (*Id.*)

[3] The total sentence was based on three consecutive twenty-year sentences on the aggravated rape charges with four three-year sentences on the aggravated burglaries running concurrent to those sentences. (ECF No. 14-1 at PageID 58–59.)

II. Post-Conviction Procedural History

In December 2014, Petitioner sent a letter to the sentencing court, including a handwritten motion. (*See* ECF No. 14-4 at PageID 124.) This letter and motion did not include an indictment number, and it was styled as a "Pro se request motion to withdraw plea agreement." (*See id.*) Petitioner also argued that his attorney coerced Petitioner's plea. (*Id.*)

The sentencing court interpreted Petitioner's letter as a motion to withdraw his guilty plea for all four indictments. (*Id.*; *see also* ECF No. 14-2.) That court also appointed Petitioner new counsel to represent him on the motion because of the alleged conflict with his counsel when he pleaded guilty. (*Id.*; *see also* ECF No. 14-2.) With the advice of new counsel, Petitioner withdrew his motion in open court in April 2015. (ECF No. 14-3 at PageID 74–75.) And the sentencing court advised him three times that he had until December 2015 to petition for post-conviction relief. (*Id.* at PageID 75; see ECF No. 14-2 at PageID 73.)[4]

Petitioner then filed his "Petition for Relief from Sentence or Conviction" pro se. (ECF No. 14-4 at PageID 106–13.) That petition was stamped with the date, June 23, 2015. (*See id.*) But it was signed before a notary public nearly two months earlier, on April 27, 2015. (*See id.* at PageID 113.) And the post-conviction court found that Petitioner petitioned on May 5, 2015. (*Id.* at PageID 124.) Still, Petitioner did not reveal when he placed his post-conviction petition in the mail at his institution.

[4] The trial court initially said that the post-conviction petition would not be due later than December 21, 2015, based on the pleas not becoming final until 30 days after the entry of judgment. (ECF No. 14-2 at PageID 73.) In the order accepting withdrawal of Petitioner's motion, that court found that Petitioner has "been advised by this attorney and this court that he has until December 14, 2015, to file a petition for post-conviction relief as to either or both pleas." (ECF No. 14-3 at PageID 75.)

The post-conviction court then appointed counsel for Petitioner. (*Id.* at PageID 115–20.) And that counsel amended Petitioner's post-conviction petition, alleging ineffective assistance of trial counsel. (*Id.*) In a thorough ten-page ruling entered in September 2017, the post-conviction court denied Petitioner relief. (*Id.* at PageID 122–32.)

III. Motion to Reopen and Later Appeals

Less than a month after the post-conviction court entered its order denying relief, Petitioner appealed that decision to the Tennessee Court of Criminal Appeals ("TCCA"). (ECF No. 14-4 at PageID 133.) The TCCA affirmed the post-conviction court on August 17, 2018. *See Sharkey v. State*, No. W2017-01961-CCA-R3-PC, 2018 WL 3993319 (Tenn. Crim. App Aug. 17, 2018), *perm. app. denied* (Tenn. Dec. 6, 2018).

In May 2021, over two years after the Tennessee Supreme Court denied permission to appeal, Petitioner applied pro se for "Writ/Motion to Reopen and/or Post Conviction Relief" in the Shelby County Criminal Court. (ECF No. 14-14.) There, he alleged that: (1) there was no factual bases for his pleas; (2) the prosecutor falsified records; (3) he received ineffective assistance of counsel; and (4) the trial court and prosecutor failed to inform him of the statute of limitations for petitioning for post-conviction relief. (*See* ECF No. 14-16 at PageID 334.) Four days later, that court denied Petitioner's motion to reopen without a hearing because "the grounds alleged in [the] instant petition [did] not satisfy any of the criteria set out in Tenn. Code Ann. § 40-30-117 as grounds to reopen, have also been previously waived as not having been raised in any previous petitions, and have clearly been raised outside the statute of limitations of one year for post-conviction petitions." (*Id.* at PageID 335.) In addition, that court mentioned, that Petitioner had been advised of the statute of limitations for petitioning for post-conviction relief. (*Id.*)

Over thirty days later, Petitioner applied to the TCCA for permission to appeal the lower court's denial of his motion to reopen. (ECF No. 14-15.) The TCCA denied that application because "Petitioner filed his application . . . more than thirty days after the trial court issued its order denying his motion to reopen on May 18, 2021." (ECF No. 14-18 at PageID 346.) On the same day of Petitioner's application, the TCCA also held that it lacked jurisdiction because Petitioner "failed to comply with the strict statutory requirements of Tennessee Code Annotated § 40-30-117(c)." (*Id.*)

Petitioner then petitioned the TCCA for a rehearing. (ECF No. 14-19.) On September 15, 2021, the TCCA denied that petition for rehearing because: (1) it was untimely under Tenn. R. App. P. 39(b); (2) the application for permission to appeal was untimely under Tenn. Code Ann. §40-30-117(c); and (3) "even if this Court had jurisdiction," the trial court's finding that Petitioner did not present a ground for granting a motion to reopen is correct. (ECF No. 14-20 at PageID 390.)

More than one month later, Petitioner filed a "Revised Petition," arguing that he had new scientific evidence of actual innocence under Tenn. Code Ann. § 40-30-117(a)(2). (ECF No. 14-21.) That is, he argued that his claim that the prosecutor had violated his due process rights and committed perjury by misstating a victim's name when presenting the factual basis for the plea amounted to new scientific evidence of his actual innocence. (*Id.*) The TCCA denied his Revised Petition on November 3, 2021, explaining:

> Not only is the Petitioner's claim completely meritless, but his "Revised Petition" is untimely if construed as a petition for rehearing. *See* Tenn. R. App. P. 39(b) (stating that a petition for rehearing must be filed within 10 days unless an extension is granted by the court). Moreover, his original application for permission to appeal was not timely filed. *See* T.C.A. § 40-30-117(c) (stating that an application for permission to appeal must be filed within 30 days). This Court does not have the authority to suspend or waive the statutory procedural requirements. *Timothy Roberson v. State*, No. W2007-00230-CCA-R3-PC, 2007

WL 3286681, at *9 (Tenn. Crim. App. Nov. 7, 2007).

(ECF No. 14-22 at PageID 444.)

V. The § 2254 Petition

Over six months after the TCCA denied his Revised Petition, Petitioner petitioned in this Court under 28 U.S.C. § 2254. (ECF No. 1.) He raises one ground for relief—the ineffective assistance of his trial counsel for failure to advise him of the plea consequences. (*Id.* at PageID 6; *see* ECF No. 1-1 at PageID 24–25.) In response, Respondent filed the state court record and moved to dismiss the § 2254 Petition as untimely. (ECF Nos. 14, 15.) Petitioner responded, and Respondent replied. (ECF Nos. 16, 17.)

LEGAL STANDARD AND ANALYSIS

Federal courts may issue habeas corpus relief for persons in state custody under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). But a federal court has limited authority and 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).

The statute of limitation for § 2254 petitions is found in 28 U.S.C. § 2244(d). Section 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)(1)–(2).

Still, courts will sometimes apply equitable tolling to extend a statute of limitations. "[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), *abrogated on other grounds as recognized in Johnson v. United States*, 457 F. App'x 462, 470 (6th Cir. 2012). The § 2254 limitations period is subject to equitable tolling. *Holland v. Fla.*, 560 U.S. 631, 645–49 (2010).

Respondent argues that the § 2254 Petition here is untimely and that the Court should not apply equitable tolling. (*See* ECF No. 15-1 at PageID 450–55.) Petitioner asserts that he filed his § 2254 Petition within one year of the motion to reopen his state post-conviction petition. (*See* ECF No. 1 at PageID 14.) And to justify the timing of his filing, Petitioner argues three main points. First under § 2244(d)(1)(D) the statute of limitations runs one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." (ECF No. 16 at PageID 458–59.) Second, § 2244(d)(2)

applies and that he should receive statutory "tolling for the time that he could have, but did not timely file, an appeal of the denial of his motion in the state courts." (*Id.* at PageID 459.) And third, he is entitled to equitable tolling based on actual innocence because he demonstrated his actual innocence in state court proceedings. (*Id.* at PageID 460–62.) The Court first explains below why the § 2254 Petition was untimely before explaining why equitable tolling does not apply.

I. Statute of Limitations

In Tennessee, a judgment of conviction entered upon a guilty plea becomes final 30 days after acceptance of the plea agreement and imposition of sentence. *State v. Green*, 106 S.W.3d 646, 649 (Tenn. 2003). And that is when the running of the limitations period began. *Id.* So a state conviction becomes "final" under § 2244(d)(1)(A) as explained in *Green*.

In Petitioner's case, the trial court entered judgments on November 12, 2014. Petitioner timely moved to withdraw his guilty pleas, and then withdrew it on April 24, 2015, based on the advice of counsel. (*See* ECF No. 14-3.) Under Tenn. R. App. 4(c), the time to appeal after a timely motion to withdraw a guilty plea typically runs from the entry of an order denying that motion, giving the defendant thirty days to appeal. *See* Tenn. R. App. P. 4(a). But here, Petitioner withdrew his motion to withdraw his guilty plea in April 2015.

By the time Petitioner withdrew his state post-judgment motion, the thirty-day period to appeal had long since run. Respondent therefore asserts that the statute of limitations began to run on April 25, 2015, the day after Petitioner asked the trial court to allow him to withdraw his motion to withdraw the plea agreement.[5] (ECF No. 15-1 at PageID 450.) Respondent argues

[5] Respondent argues that, because Petitioner withdrew the motion to withdraw the guilty pleas, he does not get the extra time for appeal because there was no order denying the motion. (ECF No. 15-1 at PageID 450–51 n.3.) But Respondent also contends that the Court need not address

that the limitations period ran for fifty-nine days until Petitioner petitioned for post-conviction relief on June 23, 2015. (*Id.*) He contends that the statute restarted on December 7, 2018, the day after the Tennessee Supreme Court denied permission to appeal. (*Id.* at PageID 451–52.) And so he asserts the statute expired 306 days later, on October 8, 2019. (*Id.* at PageID 452.)

By contrast, Petitioner seeks to toll the time that he could have petitioned for writ of certiorari under the statute. (ECF No. 16 at PageID 459.) "State review ends when the state courts have finally resolved an application for state postconviction relief" and does not carry over to the period for petitioning for writ of certiorari before the United States Supreme Court. *See Lawrence v. Florida*, 549 U.S. 327, 332 (2007). Petitioner's argument for additional statutory tolling during this period therefore fails.

Petitioner did not petition here under § 2254 until May 18, 2022, more than two years after the state courts' denial of post-conviction relief. Petitioner does not claim that the § 2254 Petition is timely, but he notes that he filed it one year from his motion to reopen the post-conviction proceedings. (*See* ECF No. 1-1 at PageID 19.) But by the time that he moved to reopen his post-conviction petition in May 2021, the statute of limitations for petitioning under § 2254 had expired. These attempts to seek other state-court collateral relief did not toll the running of the limitations period. *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) ("'The tolling provision does not . . . "revive" the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations.'") (quoting *Rashid v.*

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this issue because, even considering the thirty days, the § 2254 Petition would have been untimely. (*Id.* at PageID 451 n.3.)

Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)); *Owens v. Stine*, 27 F. App'x 351, 353 (6th Cir. 2001) ("A state court post-conviction motion that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled.").

Petitioner also argues that he should get the benefit of § 2244(d)(1)(D). (ECF No. 16 at PageID 459.) But the reference to this statute stops there. Petitioner failed to reveal what factual predicate he is talking about. (See *id.*) Respondent correctly argues that "[w]ithout knowing what this alleged new scientific evidence is, how this affected Petitioner's ability to timely raise his ineffective assistance of trial counsel claim here, and what steps he took to remain diligent following the conclusion of his state-court proceedings, it is unclear how the instant petition would now be timely." (*See* ECF No. 17 at PageID 467.) The Court agrees with Respondent and finds that Petitioner has not shown that 28 U.S.C. § 2244(d)(1)(D) applies.

Considering all these reasons, the Court finds that the § 2254 Petition here is untimely.

II. Equitable Tolling

Federal courts use the doctrine of equitable tolling sparingly. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *see also Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003). "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)).

Additionally, equitable tolling may be appropriate "based on a credible showing of actual innocence." *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005). The Supreme Court has held that "[t]o establish actual innocence,

petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. . . ." *Bousley v. United States*, 523 U.S. 614, 623 (1998). "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Id.* (internal quotation marks omitted). A credible claim of actual innocence requires the petitioner to support his 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 v. Delo*, 513 U.S. 298, 324 (1995).

Petitioner has argued that, after his post-conviction appeal, he had trouble obtaining counsel in Tennessee. (ECF No. 1-1 at PageID 19, 25.) And he asserts that his counsel and this Court failed to "successfully inform" him of AEDPA's statute of limitations. (*Id.*) Petitioner further claims on the one hand that he has been prevented from raising actual innocence. On the other hand, he argues that he demonstrated his actual innocence in the state court proceedings, despite not having been granted a hearing on the merits because of ineffective assistance of counsel. (*Id.* at PageID 26; ECF No. 16 at PageID 462.)

Petitioner's lack of legal knowledge about the AEDPA limitations period does not warrant equitable tolling. *Thomas v. Romanowski*, 362 F. App'x 452, 455 (6th Cir. 2010); *Miller v. Cason*, 49 F. App'x 495, 497 (6th Cir. 2002) ("Miller's lack of knowledge of the law does not excuse his failure to timely file a habeas corpus petition."); *Brown v. United States*, 20 F. App'x 373, 374 (6th Cir. 2001). Even an attorney's misunderstanding of a filing deadline is not grounds for equitable tolling. *Giles v. Beckstrom*, 826 F.3d 321, 325–26 (6th Cir. 2016). What is more, equitable tolling is not appropriate when a timely petition could have been filed *pro se*. *See Dixon v. Ohio*, 81 F. App'x 851 (6th Cir. 2003); *see Franklin v. Bagley*, 27 F. App'x 541, 542-43 (6th Cir. 2001) (*Pro se* status did not weight in favor of equitable tolling); *see Sinclair v.*

Cason, No. 03-10024-BC, 2004 WL 539226, at *3 (E.D. Mich. Mar. 16, 2004) ("The fact that the petitioner is untrained in the law, may have been proceeding without a lawyer, or may have been unaware of the statute of limitations does not warrant tolling.").

So Petitioner cannot his inability to obtain counsel or the courts for his ignorance of the limitations period. Petitioner has not shown that he pursued his rights diligently or that an extraordinary circumstance precluded him from timely filing his § 2254 Petition.

Petitioner claims actual innocence here to establish equitable tolling. But he offers no evidence of factual innocence to support his claim. He relies on information presented in the state court. Petitioner raised ineffective assistance of counsel claims in those post-conviction proceedings. (*See* ECF No. 14-9 at PageID 285.) He raised a claim of actual innocence in the Revised Petition. He did not, however, present any evidence in support of that claim. Petitioner has presented no evidence showing his factual innocence.

In sum, Petitioner has not met his burden of proving that the Court should apply equitable tolling here. Petitioner's § 2254 Petition is therefore untimely. And so, the Court **GRANTS** Respondent's motion to dismiss the petition as time-barred (ECF No. 15) and **DISMISSES WITH PREJUDICE** the § 2254 Petition. The Court will enter a judgment for Respondent by separate docket entry.

APPEALLATE 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 court may issue a COA only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must point to the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2)–(3). A petitioner makes a "substantial showing" when the petitioner shows 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 routinely. *Bradley*, 156 F. App'x at 773 (quoting *Miller-El*, 537 U.S. at 337).

There is no question here that the claims in the claims in the § 2254 Petition are barred by the statute of limitations. Because any appeal by Petitioner on the issues raised in his petition are time-barred, the Court **DENIES** a COA.

For the same reasons the Court denies a COA, the Court determines that any appeal would not be taken in good faith. The Court therefore **CERTIFIES** under Fed. R. App. P. 24(a), that any appeal here would not be taken in good faith and **DENIES** leave to appeal in forma pauperis.[6]

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

CONCLUSION

For the reasons described above, the Court **GRANTS** Respondent's motion to dismiss the petition as time-barred (ECF No. 15) and **DISMISSES WITH PREJUDICE** the § 2254 Petition. The Court also **DENIES** Petitioner a COA, **CERTIFIES** that any appeal would not be taken in good faith, and **DENIES** Petitioner leave to appeal in in forma pauperis.

SO ORDERED, this 25th day of August, 2023.

s/Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

Case No. 24-5145

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

DARAMIS LEE SHARKEY

Petitioner - Appellant

v.

JAMES M. HOLLOWAY, Warden

Respondent - Appellee

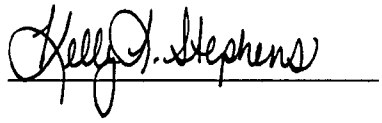
BEFORE: STRANCH, BUSH, and MATHIS, Circuit Judges

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens, Clerk

Issued: July 03, 2024



United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 07/03/2024.

Case Name: Daramis Sharkey v. James Holloway
Case Number: 24-5145

Docket Text:
ORDER filed denying motion for panel rehearing [7171147-2] filed by Daramis Lee Sharkey. Jane Branstetter Stranch, Circuit Judge; John K. Bush, Circuit Judge and Andre B. Mathis, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Daramis Lee Sharkey
Lois M. DeBerry Special Needs Facility
7575 Cockrill Bend Boulevard
Nashville, TN 37209

A copy of this notice will be issued to:

Ms. Wendy R. Oliver
Ms. Sarah J. Stone

Additional material from this filing is available in the Clerk's Office.