No. 25-5054

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS A. KRUSLEY,

Petitioner-Appellant,

v.

ABIGAIL CAUDILL, Warden,

Respondent-Appellee.

ORDER

Before: MURPHY, Circuit Judge.

Douglas A. Krusley, a pro se Kentucky prisoner, appeals a district-court judgment denying as untimely his petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. He has filed a motion to remand the case to the district court for development of the record. This document will be construed as an application for a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1)-(2). He also moves for appointment of counsel. For the reasons discussed below, all his requests are denied.

Krusley was convicted of first-degree rape and sentenced to 15 years in prison. He took a direct appeal to the court of appeals, which affirmed. *See Krusley v. Commonwealth*, No. 2014-CA-001223-MR, 2015 WL 8528398 (Ky. Ct. App. Dec. 11, 2015). But he did not seek the state supreme court's discretionary review. He did seek postconviction relief in August 2016, but a state court denied this request. *Krusley v. Commonwealth*, No. 2020-CA-0653-MR, 2022 WL 4390504 (Ky. Ct. App. Sept. 23, 2022), *perm. app. denied*, (Ky. Mar 15, 2023).

Krusley next filed his § 2254 petition. He signed this petition in May 2024, and it was postmarked for mailing in June 2024. The magistrate judge recommended denying the petition as untimely. *See* 28 U.S.C. § 2244(d). Krusley objected. The district court found his objections "unavailing," adopted the magistrate judge's report and recommendation, denied the petition, and

denied a COA. Krusley filed a motion for equitable tolling due to a prison lockdown. The district court held that, whether viewed as a motion to alter or amend judgment or as a motion for relief from judgment, the motion failed. The court thus denied this request.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the § 2254 petition on procedural grounds without reaching a petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Krusley fails to meet this standard.

It is undisputed that, absent equitable tolling, Krusley did not file a timely § 2254 petition under 28 U.S.C. § 2244(d). Indeed, he argues only that he is entitled to equitable tolling—which, of course, is an admission that he *needs* that tolling for his petition to be timely.

Equitable tolling applies to § 2244(d)'s statute of limitations. *See Griffin v. Rogers*, 399 F.3d 626, 631 (6th Cir. 2005). But Krusley has the burden of demonstrating entitlement to it. *See Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Krusley argues that we should equitably toll the statute of limitations because he could not access the prison law library due to the COVID-19 lockdown, which made it impossible for him to file his § 2254 petition by the deadline. This allegation falls short. "Courts have consistently held that general allegations of . . . lack of access to legal materials are not exceptional circumstances warranting equitable tolling, especially where a petitioner does not sufficiently explain why the circumstances he describes prevented him from timely filing a habeas petition." *Andrews v. United States*, No. 17-1693, 2017 WL 6376401, at *2 (6th Cir. Dec. 12, 2017).

Krusley provides no details: no mention of roughly when he began trying to prepare his petition, no rough estimate of when the lockdown occurred, nothing to show that the lockdown prevented timely filing, and nothing to show that he had been diligently pursuing his rights. He does contend that he "wrote the courts asking for his case file, but it was missing pages after it finally arrived at the prison," so he "had to throw his petition together quickly." But there is no mention of *when* he wrote the courts or how far before the deadline it was or even if it was before the deadline. In short, every reasonable jurist would agree that Krusley fails to demonstrate entitlement to equitable tolling.

Accordingly, a certificate of appealability is **DENIED**, remand is **DENIED**, and the motion for appointment of counsel is **DENIED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 25-5054

DOUGLAS A. KRUSLEY,

Petitioner-Appellant,

v.

ABIGAIL CAUDILL, Warden,

Respondent-Appellee.

Before: MURPHY, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Douglas A. Krusley for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

DOUGLAS KRUSLEY,

Petitioner,

V.

KEVIN R. MAZZA,
Warden at Northpoint Training Center

Respondent.

CIVIL ACTION NO. 6:24-CV-88-KKC-EBA

OPINION & ORDER

*** *** ***

This matter is before the Court on the petitioner Douglas Krusley's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DE 1) and Magistrate Judge Edward B. Atkins' recommendation. (DE 16.)

Krusley filed objections to the magistrate judge's report and recommendation ("R&R"). (DE 17.) When objections are submitted to the magistrate judge's report, the district court reviews the record *de novo*. 28 U.S.C. § 636(b)(1)(c). To the extent that Krusley does not specifically object to the R&R, the Court concurs in the result recommended by the magistrate judge. *Thomas v. Arn*, 474 U.S. 140, 150–52 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). The Court, having reviewed the record *de novo* in light of Krusley's objections and being otherwise advised, will accept the magistrate judge's recommended disposition.

I.

Douglas Krusley is a state prisoner who was convicted in Pulaski Circuit Court of first-degree rape in violation of KRS § 510.040. He was sentenced to fifteen years in prison.

Krusley alleges that his imprisonment is unconstitutional. Proceeding *pro se*, he brings this 28 U.S.C. § 2254 action and requests that his conviction be vacated and "[h]is record be [expunged]." (DE 1 at 74.) Before the magistrate judge, the Warden filed a limited answer asserting untimeliness as a defense to Krusley's petition. Thus, before considering the merits of Krusley's petition, the magistrate judge determined whether Krusley's petition was timely. The magistrate judge determined that it was not and that no rules of tolling were applicable to save the tardiness of Krusley's petition. (DE 16.)

II.

As an initial matter, Krusley requests an evidentiary hearing. Circuit precedent is clear, however, that a habeas petition "may be summarily dismissed [without a hearing] if the record clearly indicates that the petitioner's claims are either barred from review or without merit." *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001) (citation omitted). For the following reasons, the Court finds that Krusley's claims are barred from review and therefore denies his request for an evidentiary hearing.

The R&R concludes that Krusley's petition is barred pursuant to timeliness requirements for filing a habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). (DE 16 at 3.) Section 2244(d)(1) of the AEDPA provides that prisoners have one year from the date their convictions become final to file a petition for writ of habeas corpus with a federal court. While Krusley objects to the degree by which the magistrate judge found his habeas petition to be untimely,[1] he ultimately does not object to the determination that his petition was, in fact, untimely. (DE 17 at Page ID# 494) (stating in his objections that he was "at most 40 days delayed in filing his Federal Habeas Corpus petition in the District Court."). Thus, because Krusley does not specifically

[1] The magistrate judge concluded that Krusley's petition was filed two-hundred-sixty-three (263) days after the one-year limitations period had expired.

object to the magistrate judge's conclusion that his petition was untimely, the Court concurs in the result recommended in the R&R. *Howard*, 932 F.2d at 509.

Instead of challenging the timeliness issue, Krusley's objections to the R&R focus on whether principles of tolling should save his untimely petition. First, Krusley objects to the magistrate judge's conclusion that equitable tolling does not apply to his petition. Habeas petitions may benefit from equitable tolling in limited circumstances. *Dunlap v. United States*, 250 F.3d 1001, 1007 (6th Cir. 2001). An otherwise time-barred habeas petition may be reviewed on the merits if "a litigant's failure to meet a legally mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Robertson v. Simpson*, 624 F.3d 781, 783 (6th Cir. 2010). To be entitled to equitable tolling, a petitioner must show: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The petitioner "bears the burden of demonstrating that he is entitled to equitable tolling." *McClendon v. Sherman*, 329 F.3d 490, 494 (6th Cir. 2003) (citation omitted). Here, Krusley objects to the magistrate judge's equitable tolling conclusion on the following bases: (1) he claims he suffered from mental health issues which prevented him from timely filing his petition; and (2) he claims the COVID-19 pandemic prevented him from timely filing his petition.

Krusley alleges he has mental health issues that serve as "extraordinary circumstances" which stood in his way of filing his habeas petition. The Court notes as an initial matter that Krusley's argument may be procedurally barred. Krusley did not argue mental health issues as grounds for equitable tolling initially. The only instance of Krusley raising any medical concern as an issue before the magistrate judge occurred when he cited general "health conditions" as an extraordinary circumstance he claims stood in the way of filing the instant petition. (DE 15 at Page ID# 474.) Even then, Krusley only raised these health concerns within the context of his argument that the COVID-19 pandemic delayed his

filing. The magistrate judge thus never had the opportunity to consider Krusley's alleged mental health issues, and "Courts have held that while the Magistrate Judge Act, 28 U.S.C. § 631 et seq., permits *de novo* review by the district court if timely objections are filed, absent compelling reasons, it does not allow parties to raise at the district court stage new arguments[.]" *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000) (citations omitted).

Even if his argument is not procedurally barred, Krusley's alleged mental health issues cannot serve as "extraordinary circumstances" which justify the application of equitable tolling. The Court agrees that mental health issues may serve as a basis for equitable tolling. *See Ata v. Scutt*, 662 F.3d 736, 741 (6th Cir. 2011). But Krusley's argument fails for lack of support. *See Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (claims that mental health issues serve as "extraordinary circumstances" must be factually supported). While Krusley alleges his mental health issues are well documented in the exhibits attached to his objections, the documents submitted do not support the allegation.

Moreover, "a habeas petitioner must allege more than the 'mere existence of physical or mental ailments' to invoke the equitable tolling of the AEDPA's statute of limitations." *Brown v, McKee*, 232 F. Supp. 2d 761, 767 (E.D. Mich. 2002) (citation omitted). A petitioner must also show a "causal connection between [their] mental illness and [their] ability to file a timely federal habeas petition." *McSwain v. Davis*, 287 F. App'x 450, 457 (6th Cir. 2008). Here, not only has Krusley failed to provide evidence which supports the presence of mental health issues, but Krusley has also failed to present evidence supporting a causal connection between any mental health issues and his ability to file a timely petition. Accordingly, Krusley's alleged mental health issues are not a sufficient extraordinary circumstance justifying the application of equitable tolling.

Krusley next objects to the magistrate judge's conclusion that the COVID-19 pandemic was not an "extraordinary circumstance" sufficient to trigger equitable tolling.

Equitable tolling arguments related to the COVID-19 pandemic are only tenable when a petitioner can demonstrate how specific circumstances related to the pandemic hindered their ability to timely file. *United States v. Amos*, No. 20-4-DLB-HAI, 2022 WL 2828796, at *3 (E.D. Ky. July 20, 2022). In his objections, Krusley argues the COVID-19 pandemic constitutes an extraordinary circumstance because it prevented him from obtaining "his necessary court records and other material[s]," needed to file his habeas petition. (DE 17 at Page ID# 495.) Again, Krusley's argument may be procedurally barred. Before the magistrate judge, Krusley argued the COVID-19 pandemic was an extraordinary circumstance because it led to him being "denied access to the library to use the Lexis Nexis Computer and typewriters in order to help aid him in his habeas corpus" petition. (DE 15 at Page ID# 474.) Thus, Krusley is plainly making a new argument before this Court which was not properly presented to the magistrate judge first. *See Murr*, 200 F.3d at 902 n.1.

Krusley's COVID-19 argument nonetheless fails even if it is not procedurally barred. Courts have consistently held that lack of access to legal materials, whether caused by the COVID-19 pandemic or some other circumstance, does not provide grounds for equitable tolling. *Andrews v. United States*, No. 17-1693, 2017 WL 6376401, at *2 (6th Cir. Dec. 12, 2017) ("Courts have consistently held that general allegations of placement in segregation and lack of access to legal materials are not exceptional circumstances warranting equitable tolling[.]"). Accordingly, Krusley's contention that the COVID-19 pandemic effected his ability to timely file his habeas petition is unavailing and does not warrant the application of equitable tolling.

Finally, Krusley objects to the magistrate judge's determination that "actual innocence" does not excuse his late filing. "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, the expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383,

386 (2013). The standard for proving actual innocence requires a petitioner to "persuade[] the district court that, in light of [] new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Importantly, the petitioner must, in fact, present "new" evidence that has not been previously considered or that was not available to them at the time the petitioner took their direct appeal. *Moore v. Woods*, No. 18-1356, 2018 WL 3089822, at *3 (6th Cir. June 20, 2018). Such new evidence must also be credible. *Schlup*, 513 U.S. at 324.

The magistrate judge correctly concluded that Krusley fails to present either new or credible evidence to prove his actual innocence. Krusley specifically objects to the R&R's finding with respect to evidence he states is related to the element of "forcible compulsion."[2] (DE 17 at Page ID# 498.) The evidence consists of supposed testimony from Krusley himself that there were alternative explanations for bruising the complaining witness experienced—that bruising having been used by the Commonwealth to prove forcible compulsion. It is clear to the Court, however, that the "evidence" which Krusley suggests proves his innocence was already considered on direct appeal in *Krusley v. Commonwealth*, No. 2014-CA-001223-MR, 2015 WL 8528398, at *3–4 (Ky. Ct. App. Dec. 11, 2015) (holding that the "circuit court's failure to allow evidence of a possible alternate source of the bruises," did not violate Krusley's rights because the "'evidence' at issue was not actually evidence, but rather a mere allegation by defense counsel, based upon hearsay from," Krusley). And because evidence "available to him at the time of his direct appeal," is not "new" evidence under the *Schlup* standard, Krusley's actual innocence claim fails. *Moore*, 2018 WL 3089822, at *3.

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[2] Pursuant to KRS 2 510.040(1), a person is guilty of rape in the first degree when:
(a) He engages in sexual intercourse with another person by forcible compulsion; or
(b) He engages in sexual intercourse with another person who is incapable of consent because they:
(1) are physically helpless; or
(2) are less than twelve (12) years old.

In conclusion, Krusley's objections to the R&R are unavailing and do not save the untimely nature of his habeas petition. Accordingly, the Court must deny Krusley's petition.

III.

For the reasons stated above, it is hereby ORDERED that

1. the report and recommendation (DE 16) is ADOPTED as the Court's opinion;
2. the plaintiff's petition under 28 U.S.C. § 2254 (DE 1) is DENIED;
3. a certificate of appealability will not be issued, the Court having found that no jurists of reason would find it debatable whether the district court was correct in its procedural ruling; and
4. a judgment consistent with this order and the report and recommendation will be ENTERED.

This 7th day of January, 2025.

Karen K. Caldwell

KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

DOUGLAS KRUSLEY, Petitioner, V. KEVIN R. MAZZA, Warden at Northpoint Training Center Respondent.	CIVIL ACTION NO. 6:24-CV-88-KKC-EBA **JUDGMENT**

*** *** ***

In accordance with the order entered on this date, the Court hereby ORDERS and ADJUDGES as follows:

1. the petitioner's petition under 28 U.S.C. § 2254 (DE 1) is DENIED;
2. this judgment is FINAL and APPEALABLE;
3. a certificate of appealability will not be issued, the Court having found that no jurists of reason would find it debatable whether the district court was correct in its procedural ruling; and
4. this matter is DISMISSED and STRICKEN from the Court's active docket.

This 7th day of January, 2025.

KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL ACTION NO. 6:24-CV-00088-KKC-EBA

DOUGLAS KRUSLEY, PETITIONER,

V. **REPORT AND RECOMMENDATION**

KEVIN R. MAZZA,
Warden, Northpoint Training Center, RESPONDENT.

*** *** *** ***

INTRODUCTION

Douglas Krusley, a state prisoner, alleges that his imprisonment is unconstitutional. Proceeding *pro se*, he brings this 28 U.S.C. § 2254 action, [R. 1], and requests that "[h]is false conviction be vacated" and "[h]is record be [expunged]." [R. 1 at pg. 74]. The Warden filed a Limited Answer asserting untimeliness as a defense to Krusley's Section 2254 petition. [R. 14 at pgs. 1–3]. Krusley replied. [R. 15]. So, before reaching the merits of Krusley's petition, the Court must determine whether it is timely filed. *Daniels v. United States*, 532 U.S. 374, 381 (2001) ("Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim."); *see also United States v. Olano*, 507 U.S. 725, 731 (1993).

FACTS AND PROCEDURAL HISTORY

Under AEDPA, prisoners have one year from the date that their conviction becomes final to petition a federal district court for habeas corpus relief. 28 U.S.C. § 2244(d). Of course, the one-year statute of limitations can be tolled upon the filing of an "application for State post-conviction

or other collateral review[.]" 28 U.S.C § 2244(d)(2).

Krusley was convicted of rape in the first degree—in violation of KRS § 510.040(1)—in Pulaski Circuit Court and, on May 13, 2013, was sentenced to fifteen years in prison. His conviction was affirmed on appeal before the Kentucky Court of Appeals on December 11, 2015. *Krusley v. Commonwealth*, No. 2014-CA-001223, 2015 WL 8528398 (Ky. Ct. App. Dec. 11, 2015. From December 11, 2015, Krusley enjoyed 30 days to file a motion for discretionary review to the Kentucky Supreme Court, *see* KY. R. APP. PRAC. 44(B)(2), but he failed to do so. Thus, his conviction became final on January 11, 2016.[1] *See* 28 U.S.C. § 2244(d)(1)(A) (a judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such review"); *see also Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (holding that, where a petitioner does not file an appeal from the state appellate court to the state supreme court, the judgment becomes final when the time for seeking such review expires); *Keeling v. Warden, Lebanon Correctional Inst.*, 673 F.3d 452, 460 (6th Cir. 2012) (same). And because Rule 6(a) of the Federal Rules of Civil Procedure provides that statutes of limitation do not include the date from which the period begins to run, *see* FED. R. CIV. P. 6(a)(1)(A), Krusley's one-year time limit began running on January 12, 2016, and it continued to run until he filed two CR 11.42 motions in state court collaterally attacking his sentence in August of 2016. Assuming his motions were filed on August 1, 2016,[2] 201 days passed before the statute of limitations was tolled, and it remained tolled until the Kentucky Supreme Court's March 15, 2023, decision to deny discretionary review

[1] Technically, Krusley's conviction became final on January 10, 2016. However, because January 10, 2016, was a Sunday, Rule 6 of the Federal Rules of Civil Procedure provides that the period continued to run until Monday, January 11, 2016. *See* FED. R. CIV. P. 6(a)(1)(c).

[2] The record is devoid of an exact date on which Krusley filed the motions collaterally attacking his conviction and sentence. Indeed, the only evidence indicating a date is a Kentucky Court of Appeals opinion, which suggests that Krusley filed the motions in August of 2016. *Krusely*, 2019 WL 3990996 at *1. Accordingly, to give Krusley the benefit of the doubt, the Court will consider the earliest possible date he filed his collateral attack motions to be August 1, 2016.

because a properly filed state collateral attack motion tolls the one-year limitations period while it remains pending in the state courts. *See* 28 U.S.C. § 2244(d)(2). Therefore, after the Kentucky Supreme Court denied discretionary review, Krusley had 164 days to petition a federal district court for habeas corpus relief, putting the deadline before which Krusley had to file his petition on August 28, 2023.[3]

Krusley's Section 2254 petition is untimely. Indeed, at earliest,[4] Krusley did not file his Section 2254 petition until May 17, 2024—263 days late. Moreover, it does not appear in dispute that the petition was late, as Krusley makes no pertinent arguments in either his Section 2254 petition or his briefs. Krusley's only argument effectively disputing his petition's tardiness is an assertion that he "is a layman who 'does not' know or understand the statutes, rules[,] or laws of this great and honorable court." [R. 15 at pg. 1]. But Krusley's "lack of knowledge of the law [is] not sufficient to . . . excuse his late filing." *Keeling v. Warden, Lebanon Correctional Inst.*, 673 F.3d 452, 464 (6th Cir. 2012). Accordingly, because Krusley did not file his petition for a writ of habeas corpus within the one-year limitations period, his petition is untimely.

B.

Nonetheless, even untimely habeas petitions may benefit from equitable tolling in limited circumstances.[5] *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004) (citing *Dunlap v. United States*, 250 F.3d 1001, 1007 (6th Cir. 2001)). Indeed, equitable tolling permits federal courts to review a time-barred habeas petition "provided that 'a litigant's failure to meet a legally-mandated deadline

[3] Technically, Krusley's deadline to petition a federal district court for habeas corpus relief fell on August 26, 2023. However, because August 26, 2023, was a Saturday, Rule 6 of the Federal Rules of Civil Procedure provides that last day to file for habeas corpus relief was Monday, August 28, 2023. *See* FED. R. CIV. P. 6(a)(1)(c).

[4] In federal courts, "a *pro se* prisoner's [motion] is deemed filed when it is handed over to prison officials for mailing to the court." *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008). And the rule assumes "that, absent contrary evidence, a prisoner does so on the date he or she signed the [filing]." *Id.*; *see Goins v. Saunders*, 206 F.App'x 497, 498 n.1 (6th Cir. 2006). Krusley signed his habeas petition on May 17, 2024. [*See* R. 1 at pg. 74]. Therefore, at earliest, Krusley is deemed to have filed his habeas petition on that date.

[5] This is because the one-year statute of limitations in AEDPA actions is not jurisdictional.

unavoidably arose from circumstances beyond that litigant's control.'" *Robinson v. Easterling*, 424 F. App'x 439, 442 (6th Cir. 2011), *cert. denied*, 565 U.S. 964 (2011) (quoting *Robertson v. Simpson*, 624 F.3d 781, 783 (6th Cir. 2010)). To be entitled to equitable tolling, a petitioner must show: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also Holland v. Florida*, 560 U.S. 631, 649 (2010). Additionally, the petitioner "bears the burden of demonstrating that he is entitled to equitable tolling." *McClendon v. Sherman*, 329 F.3d 490, 494 (6th Cir. 2003) (citation omitted).

Krusley suggests that the Court should apply the doctrine of equitable tolling. [R. 15 at pgs. 2–5]. In support, he avers that "Covid shut down part of Northpoint Training Center and [he] was unable to work on his appeal." [*Id.* at pg. 3]. He further asserts that, because of COVID-19-related restrictions, he was "denied access to the library to use the Lexis Nexis Computer and typewriters in order to help aid him in his habeas corpus" petition. [*Id.*].

Krusley is not entitled to equitable tolling because the extraordinary circumstances he asserts are insufficient. Indeed, "[w]hen evaluating equitable tolling arguments related to COVID-19, a petitioner 'must demonstrate fact-specific circumstances related to the pandemic that hindered his ability to timely file'" a habeas petition. *United States v. Amos*, No. 20-4-DLB-HAI, 2022 WL 2828796, at *3 (E.D. Ky. July 20, 2022) (quoting *United States v. Marshall*, No. 5:21-CV-00072-KKC-MAS, 2021 WL 3854469, at *2 (E.D. Ky. Aug. 5, 2021)). Moreover, blanket assertions that a lack of access to a prison's law library constitute extraordinary circumstances necessitating equitable tolling is an argument which has been expressly rejected in the Sixth Circuit. *See, e.g.*, *Andrews v. United States*, No. 17-1693, 2017 WL 6376401, at *2 (6th Cir. Dec. 12, 2017) ("Courts have consistently held that general allegations of placement in segregation and

lack of access to legal materials are not exceptional circumstances warranting equitable tolling, especially where a petitioner does not sufficiently explain why the circumstances he describes prevented him from timely filing a habeas petition"); *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750–52 (6th Cir. 2011) (holding that equitable tolling was not warranted even where prisoner was *pro se*, had limited law-library access, and was unable to access trial transcripts). Accordingly, Krusley's contention that equitable tolling is necessary because COVID-19 caused "poor conditions" and "shut down" part of the prison where he is housed is unavailing. [*See* R. 15 at pg. 3].

Krusley also asserts that he is entitled to equitable tolling because of "gross attorney malfeasance." [*Id.* at pg. 4]. Courts in this Circuit, and others, have recognized that equitable tolling may be appropriate where evidence of gross attorney malfeasance exists. *See, e.g.*, *McCoy v. Sheets*, No. 2:08-CV-151, 2010 WL 1849276, at *8–11 (S.D. OH. April 30, 2010); *Dial v. Beightler*, 689 F.Supp.2d 906, 907 (N.D. Ohio 2010); *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003); *Baladayaque v. United States*, 338 F.3d 145, 152 (2nd Cir. 2003); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002). Importantly, however, equitable tolling has been found appropriate only where the alleged malfeasance was *specifically related* to the filing or handling of the petitioner's habeas petition. *See, e.g.*, *McCoy*, 2010 WL 1849276, at *11 ("Petitioner does not allege, nor does the record reflect, misrepresentations by counsel regarding the status of his case, gross malfeasance, or abandonment of the case as it pertains to filing a habeas corpus action. . . . It is not clear why this Court should consider the actions or inactions of counsel . . . where the attorney's [alleged] gross misconduct occurred during the course of the pursuit of habeas corpus relief, or relief under § 2255, and actually prevented the filing of a timely petition."); *Smith v. U.S.*, No. 2:05-CV-0017, 2006 WL 3324859, at *3 (S.D. Ohio Nov. 14, 2006) (finding *Baladayaque*

and *Spitsyn* instructive, and holding that equitable tolling was warranted where petitioner alleged that her "attorney lied to her, advised her that he would meet the deadline for filing her habeas corpus petition, and failed to communicate with her or to return her phone calls"). Here, to the extent Krusley alleges that his attorney engaged in gross misconduct or provided ineffective assistance of counsel, this purported misconduct did not occur during the process of filing his subsequent Section 2254 petition. Rather, all of Krusley's allegations that his attorney was engaged in misconduct related to conduct which occurred during his trial or direct appeal. [*See* R. 10-2 at pgs. 1–9; *see also* R. 15 at pg. 4]. Accordingly, because the alleged "gross attorney malfeasance" did not occur during the filing of his Section 2254 petition, Krusley's argument that he should be granted equitable tolling on this basis must fail.

Moreover, Krusley's allegations that his counsel "abandoned" him fail because "claims that a petitioner did not have professional legal assistance [is] not an extraordinary circumstance which would toll the statute of limitations." *Wilson v. Birkett*, 192 F.Supp.2d 763, 766 (6th Cir. 2002). Furthermore, Krusley's argument that he is entitled to equitable tolling because he is a layman without understanding of the law is also unavailing. *See Moore v. Woods*, No. 18-1356, 2018 WL 3089822, at *2 (6th Cir. June 20, 2018) (citing *Hall*, 662 F.3d at 750–51) (holding that Petitioner's "lack of legal expertise and misunderstanding of the limitations statute are not proper bases for equitable tolling"). Accordingly, Krusley has failed to demonstrate extraordinary circumstances which necessitate that this Court equitably toll AEDPA's statute of limitations.

C.

Finally, Krusley asserts actual innocence as reason for this Court to consider his untimely Section 2254 petition. "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, the expiration

of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). However, the standard for proving actual innocence is very high, so "tenable actual-innocence gateway pleas are rare[.]" *Id.* Indeed, "a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995); *see House v. Bell*, 547 U.S. 518, 538 (2006) (noting that the *Schlup* standard is "demanding" and rarely met). Importantly, however, this "new evidence" must be "credible." *Schlup*, 513 U.S. at 324. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliance—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. Furthermore, courts must "count unjustifiable delay on a habeas petitioner's part . . . as a factor in determining whether actual innocence has been reliably shown." *McQuiggin*, 569 U.S. at 387.

Over the course of 48 pages, Krusley lays out his version of events which purport to demonstrate his actual innocence. [*See* R. 10-4]. In support, he provides a plethora of exhibits as evidence, which he states were wrongfully suppressed from his trial, or have since been discovered, and prove his innocence. [R. 10-5]. But it appears that many of these factual assertions were previously considered—and rejected—on direct appeal. *See Krusley*, 2015 WL 8528398 (affirming Krusley's conviction and rejecting his arguments regarding "forcible compulsion" as defined in KRS 510.040(1), the admission of certain evidence under Kentucky Rule of Evidence 412, the validity of the sexual assault rape kit's chain of custody, and purported violations of Krusley's rights under the Confrontation Clause and due process). So, this evidence cannot be considered "new" under the *Schlup* standard. *See Guadarrama v. United States*, No. 16-6218, 2017 WL 3391683, at *3 (6th Cir. Feb. 13, 2017) (finding no "new" evidence where petitioner argued

that evidence presented at trial was insufficient to meet the government's burden of proof); *see also Moore*, 2018 WL 3089822, at *3 (finding no "new" evidence where petitioner presented evidence "available to him at the time of his direct appeal"). And to the extent that any of this evidence is "new," it cannot reasonably be deemed credible. [*See, e.g.*, R. 10-5 at pgs. 10–19 (providing as evidence handwritten, unverified letters that purport to demonstrate the victim's sexual history)]. Therefore, Krusley has not provided this court with "new evidence," and certainly no evidence to "persuade the district court that . . . no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schulp*, 513 U.S. at 329. Plainly, Krusley fails to "present[] evidence of innocence so strong that [the] court cannot have confidence in the outcome of [his] trial." *McQuiggins*, 569 U.S. at 401. Accordingly, because he has failed to show actual innocence, the undersigned will recommend that Krusley's petition be dismissed as untimely.

D.

A Certificate of Appealability may issue where a movant made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires a movant to demonstrate that "reasonable jurists would find that the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). The reviewing court must indicate which specific issues satisfy the "substantial showing" requirement. 28 U.S.C. § 2253(c)(3); *Bradley v. Birkett*, 156 F. App'x 771, 774 (6th Cir. 2005). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack, 529 U.S. at 484.

Here, Krusley failed to comply with the statute of limitations and reasonable jurists would not debate the dismissal of Krusley's Section 2254 petition as untimely. Therefore, the undersigned will recommend that the District Court deny a Certificate of Appealability.

CONCLUSION

Krusley petitions the Court for a writ of habeas corpus under Section 2254. [R. 1]. However, his petition is untimely, and he is not entitled to equitable tolling. Therefore, this Court will recommend the District Court deny Krusley's (1) Section 2254 petition and (2) Certificate of Appealability, if Krusley requests one.

RECOMMENDATION

Upon review of the record, and for the reasons stated herein, and in accordance with Rule 10 of the Rules Governing Section 2254 Habeas Cases, **IT IS RECOMMENDED** that:

1. Krusley's Section 2254 petition, [R. 1], be **DISMISSED WITH PREJUDICE**; and
2. A Certificate of Appealability be **DENIED** as to all issues raised, should Krusley so request.

*** *** *** ***

The parties are directed to 28 U.S.C. § 636(b)(1) for a review of appeal rights governing this Recommended Disposition. Particularized objections to this Recommended Disposition must be filed within fourteen days from the date of service thereof or further appeal is waived. *United States v. Campbell*, 261 F.3d 628, 632 (6th Cir. 2001); *Thomas v. Ann*, 728 F.2d 813, 815 (6th Cir. 1984). General objections or objections that require a judge's interpretation are insufficient to preserve the right to appeal. *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995). A party may file a response to another party's objections

within fourteen days after being served with a copy thereof. 28 U.S.C. § 636(b)(1)(C); Fed. R. Crim. P. 59(b)(1).

Signed November 6, 2024.

Signed By:
Edward B. Atkins EBA
United States Magistrate Judge

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