UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY CIOFFI, JR.,	)	Case No. 4:04 CV 1836
Petitioner,	)	Judge Peter C. Economus
vs.	)	REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE
DAVID BOBBY, WARDEN,	)	(Regarding Docket Nos. 1, 12)
Respondent.	)	Magistrate Judge James S. Gallas

On December 4, 1996 petitioner Anthony Cioffi, Jr., ("Cioffi") entered into a plea agreement in the Trumbull County Court of Common Pleas and changed his plea to guilty to the amended indictment charging gross sexual imposition and kidnapping of a nine-year-old female. He was sentenced to 3 to 15 years to run concurrently with a 10 to 25 year sentence from conviction on three counts of rape and three counts of gross sexual imposition that arose from a separate criminal incident involving his minor sons.[1]

Following his December 6, 1996 sentencing, Cioffi took no timely appeal. He waited nearly four and one-half years before filing his "motion to set aside judgment of conviction and to withdraw plea of guilty" on March 16, 2001. This motion was denied by the state trial court and on appeal. See *State v. Cioffi*, 2003 WL 21054780, 2003- Ohio-2374 (Ohio App. 22 Dist. May 12, 2003), appeal not allowed, 99 Ohio St. 1546, 795 N.E.2d 684, 2003-Ohio-4671 (Table Sept. 10, 2003).

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[1] These convictions were challenged in a companion habeas corpus case, *Cioffi v. Bobby*, Case No. 4:04 CV 1837 (N.D. Ohio).

More than seven years after conviction, on September 10, 2004, Anthony Cioffi filed his counseled petition for habeas corpus in this Court pursuant to 28 U.S.C. §2254 seeking to overturn his December 4, 1996 state court convictions for gross sexual imposition and kidnapping, arguing for his sole ground for relief:

> Federal law and the Sixth Amendment to the United States Constitution provide defendant with the right to effective counsel. Petitioner was denied his constitutional right to effective counsel.

Respondent, Warden David Bobby (hereinafter "Respondent") has filed a motion to dismiss Cioffi's petition for habeas corpus relief as being time-barred under the "1-year period of limitation" of 28 U.S.C. §2244(d)(1)(A).[2] Respondent has incorporated by reference exhibits that he had filed

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[2] This section reads in full:

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

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

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

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

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

(d)(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.

in Case 4:04 CV 1837 (ECF11). The substance of each of the two petitions, the ground for each writ, and the arguments presented are identical in both cases. The state appeals from denials of the plea-withdrawal motions were also consolidated. The petition has been referred to the undersigned for a report and recommendation. The undersigned acknowledges that the burden of proving that the statute of limitations under §2244(d)(1)(A) has expired, falls upon respondent. *DiCenzi v. Rose*, 419 F.3d 493, 496 (6th Cir. 2005). Respondent has met this burden and for the reasons that follow Cioffi's §2254 petition should be dismissed as time-barred.

The trial court journalized Cioffi's December 6, 1996 convictions and sentence on December 18, 1996. (See Certified Copy of Sentence 95 CR 00690, Ex. 4, Doc. 11-5, Case No. 4:04 CV 1837). This slight delay in memorialization extended the 30 day appeal period by a few more days under Rule 4 of the Ohio Rules of Appellate Procedure, since time to appeal commenced with journalization. This computes to January 17, 1997. Because January 17, 1997 fell on a Saturday, Cioffi had one year from January 19, 1997 to file his petition for a writ of habeas corpus. Cioffi did not file his federal habeas corpus petition until September 10, 2004.

Respondent argues that between January 19, 1997 and January 19, 1998, Cioffi took no action that would serve to toll the running of the statute, so when the "1-year period" expired on January 19, 1998, Cioffi's subsequent March 16, 2001 motion to withdraw his guilty plea did not toll the limitations period, since it was neither "pending" nor "properly filed" during the 1-year limitations period as required under 28 U.S.C. §2244(d)(2).

This argument is not as simple as respondent leads the court to believe. There is no question that the limitation period does not begin to run until direct review ends. However, there is indication in at least one unpublished decision that a postsentence motion to withdraw guilty plea under Ohio Crim. R. 32.1 is part of the state's direct review process. In *Colwell v. Tanner*, the court explained:

> The Ohio Supreme Court has held that a postsentence motion to withdraw a guilty plea filed in the trial court, which is governed by Ohio Criminal Rule 32.1, "is not collateral but is filed in the underlying criminal case," and accordingly "it is not a 'collateral challenge to the validity of a conviction or sentence.'" *State v. Bush*, 96 Ohio St.3d 235, 773 N.E.2d 522, 526 (Ohio 2002) (quotation omitted). The appeal of the denial of such a motion is thus part of the direct review process.

Id., 79 Fed. Appx. 89, 91 n.1 (6th Cir. Oct. 9, 2003).

Judge Gwin also confronted this problem in *Goodballet v. Mack*, 266 F.Supp. 702, 706-07 (N.D. Ohio 2003).

In *Colwell*, the motion to withdraw guilty plea closely followed the plea by four months, so delay in filing was not an issue. See *Colwell*, 79 Fed. Appx. at 90. Consequently, there was no need to address whether delay would have consequences. Judge Gwin, however, did address this issue and found that to allow the limitation period to recommence for a postsentence motion to withdraw plea pursuant to *State v. Bush, supra*, would eviscerate the limitation period. The undersigned agrees.

Presuming that the Ohio Supreme Court's decision in *State v. Bush* does identify Ohio Crim. R. 32.1 motions as a form of state direct review, this can be analogized to Ohio App. R. 26(B)

applications to reopen- which formerly were also denominated as a form of direct review.[3] Shortly after the Sixth Circuit concluded that applications to reopen were a form of direct review under Ohio's jurisprudence, the Court determined that delay was prejudicial to petitioners:

> because we have held in *White* that Rule 26(B) applications are part of direct review, the statute of limitations should not run during the time in which Bronaugh's Rule 26(B) application was pending in the Ohio courts. It is important to note that Bronaugh will not be able to benefit from his delay in bringing a Rule 26(B) application to reopen direct appeal by requesting that §2244(d(1)(A)'s one-year statute of limitations does not begin until after his Rule 26(B) application has run its course through the courts. Instead the statute of limitations is tolled only for that period of time in which the Rule 26(B) application is actually pending in the Ohio courts.

Bronaugh, 235 F.3d 280, 286 (6th Cir. 2000).

Bronaugh was criticized in *Lambert v. Warden, Ross Correctional,* 81 Fed. Appx. 1, 7 (6th Cir. Sept. 2, 2003), as being internally inconsistent. In *Lambert*, the panel of the unpublished decision believed that an Ohio App. R. 26(B) application to reopen would not toll the statute of limitations but rather the limitations would be retriggered. The published decision, though, overrides the unpublished and inconsistent decision in *Lambert*. See *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton County, Ohio*, 430 F.3d 783, 789 (6th Cir. 2005); *U.S. v. Webber*, 208 F.3d 545, 551 n. 3 (6th Cir. 2000); 6th Cir. R. 206(c). (unpublished decisions lack precedential affect and are not binding). Furthermore this point was reemphasized in a published decision in 2003 when a panel, adhering to *Bronaugh* explained:

> Even if the principles of the *Payton* and *White* line were not limited to Ohio cases by a unique aspect of Ohio law that forces us to treat ineffective

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[3] In *Lopez v. Wilson*, the court reversed its earlier pronouncement that applications to reopen under Ohio App. R. 26(B) were a form of direct review and found that they were a form of collateral or post conviction review governed by §2244(d)(2). *Id.*, 426 F.3d 339, 349-54 (6th Cir. 2005).

> assistance of counsel claims as part of the direct review process, see *White*, 201 F.3d at 752-53 (citing *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204, 1208 (1992), which rules that ineffective assistance of counsel claims cannot be raised in state post-conviction proceedings), those cases make clear that upon the filing of an ineffective assistance claim in state court, the statute of limitations is not restarted, but merely tolled. See *Bronaugh v. Ohio*, 235 F.3d 280, 286 (6th Cir. 2001); see also *Isham v. Randle*, 226 F.3d 691, 692-93, 694 (6th Cir. 2000) (treating Ohio prisoner's state ineffective assistance of appellate counsel challenge as tolling, though not restarting, the statute of limitations), *cert. denied*, 531 U.S. 1201, 121 S.Ct. 1211, 149 L.Ed.2d 124 (2001). The conviction is still considered final at the close of the initial direct appellate proceedings. If the rule were otherwise, such that a subsequent motion could constitute part of the direct appeal and thus restart the limitation period, the rule "would severely undercut Congress'[s] intent in enacting the AEDPA by greatly extending the time in which a petitioner may properly bring a . . . challenge." *Johnson v. United States*, 246 F3d 655, 659 (6th Cir. 2001) (refusing to allow §2255 petitioner to restart the limitation period simply by filing a Federal Rule of Criminal Procedure 33 motion for a new trial.)

McClendon v. Sherman, 329 F.3d 490, 494 (6th Cir. 2003).

Further, *Bronaugh* was applied recently in *Williams v. Wilson*, 149 Fed. Appx. 342, 346-47 (6th Cir. Aug. 9, 2005), where the court found that the time to appeal to the Ohio Supreme Court had expired on February 10, 2001, giving petitioner until February 10, 2002, to timely file a habeas petition, but this period was not restarted by the subsequent Rule 26(B) application to reopen filed on March 18, 2002, which was beyond the one-year of limitation.[4] Respondent's argument is correct- Cioffi's §2254 application was untimely brought.

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[4] The recent decision of *Evans v. Chavis*, - U.S. -, 126 S.Ct. 846 (2006), does not address the problem confronting the court because at issue was a state habeas petition which was analyzed under §2244(d)(2), as a matter of state post-conviction or collateral review. Nor does the oft-quoted passage from *Searcy v. Carter* serve to support this proposition because the cited passage from *Raynor v. Dufrain*, 28 F.Supp.2d 896, 898 (S.D. N.Y. 1998) refers to the state post-conviction or collateral matter of delayed appeal under Ohio App. Rule 5. Moreover the Second Circuit's reliance on *Raynor* is clearly in matters of state post-conviction or collateral review. See *Bethea v. Girdich*, 293 F.3d 577, 578-79 (2nd Cir. 2002).

Equitable Tolling:

Cioffi argues that the limitations period for his petition should be equitably tolled principally on his assertion that he is mentally challenged and did not understand the effect of his plea agreement. Equitable tolling requires the Court to consider several factors in assessing the reasonableness of a petitioner's ignorance of the requirement of timely filing. See *Dunlap v. U.S.*, 250 F.3d 1001, 1008 (6th Cir. 2001), *cert. denied*, 534 U.S. 1057 (92001); *Vroman v. Brigano*, 346 F.3d 598, 604-05 (6th Cir. 2003); *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004), *cert. denied*, 543 U.S. 865 (2004). "[T]he doctrine of equitable tolling allows a federal court to toll a statute of limitations when, 'a litigant's failure to meet a legally-motivated deadline unavoidably arose from circumstances beyond that litigant's control.'" *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005), quoting *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000).[5] Cioffi, though, bears the burden of establishing entitlement. See *Griffin v. Rogers*, 308 F.3d 647, 652 (6th Cir. 2002); *McClendon v. Sherman*, 329 F.3d at 492; *Keenan*, 400 F.3d at 420.

Cioffi supports his argument for equitable tolling on respondent's unfortunate choice of a FED. R. CIV. P.12(b) motion to dismiss. Cioffi claims he prevails under Rule 12(b)(6), the court must construe the complaint (i.e. habeas petition) in a light most favorable to plaintiff (i.e.

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[5] In determining whether to allow equitable tolling, the Court must consider the *Andrews* factors: petitioner's lack of notice of the filing requirement; petitioner's lack of constructive knowledge of the filing requirement; diligence in pursuing one's rights; absence of prejudice to the Respondent and the petitioner's reasonableness in remaining ignorant of the legal requirements for filing his claim. *Dunlap*, 250 F.3d at 1008. However, "this list of factors is not necessarily comprehensive, and not all factors are relevant in all cases." *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988); *Vroman v. Brigano*, 346 F.3d at 605; *Allen v. Yukins*, 366 F.3d at 401, *cert. denied*, 125 S.Ct. 200 (2004).

petitioner), and accept all well-pled allegations as true. See *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999); *LRL Properties v. Portage Metro. Housing Authority*, 55 F.3d 1097, 1101 (6th Cir. 1995).

Cioffi is incorrect. First, respondent did not identify the motion to dismiss as having been brought under Rule 12(b)(6). A more reasonable construction is that it is an attempt to raise a Rule 12(b)(1) defense of lack of jurisdiction due to untimeliness. Of course, the attempt fails because the one-year statute of limitation is not jurisdictional. See *Allen*, 366 F.3d at 401; *Dunlap v. U.S.*, 250 F.3d at 1007.

Second, motions to dismiss are, in general, not compatible with habeas corpus procedures. See *Browder v. Director, Dept. of Corr. of Ill.*, 434 U.S. 257, 269 n.14, 98 S.Ct. 556, 54 L.Ed.2d. 521 (1978) (*dictum*). Rule 5 of the Rules Governing §2254 Cases provides for filing an answer but permits, "such other action as the judge deems appropriate." Also, Rule 11 of Rules Governing §2254 Cases and Fed. R. Civ. P. 81(a)(2) allows federal civil rule procedures in habeas cases , but "to the extent that they are not inconsistent." See *White v. Lewis*, 874 F.2d 599, 602-03 (9th Cir. 1989); *Purdy v. Bennett*, 214 F.Supp.2d 348, 353 (S.D. N.Y. 2002). There is no foundation for respondent's erroneous assumption as to the jurisdictional underpinnings of his Rule 12 (b)(1) motion. Accordingly, the motion to dismiss should be deemed to be respondent's answer filed in accordance with Rule 5 of the Rules Governing §2254 Cases, to render it compatible with habeas procedure, and Cioffi does not prevail because his allegations will not be received with unqualified acceptance.

Under 28 U.S.C. §2254(e)(1) factual determinations by the state court are entitled to a presumption of correctness which a petitioner for habeas review must rebut by clear and convincing evidence. As shall be addressed under the analysis of Cioffi's request for an evidentiary hearing, Cioffi has offered nothing to rebut the presumption of correctness regarding those factual findings. Cioffi fails to allege that he lacked notice of the habeas filing requirements, that he reasonably remained ignorant of the filing requirements, or that he was diligent in allowing over 4 years to lapse. See *Dixon v. Ohio*, 81 Fed. Appx. 851 (6th Cir. 2003) (petitioner's lack of counsel and 1 month placement in solitary confinement did not excuse lack of diligence in pursuing his claims); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002), *cert. denied*, 538 U.S. 984 (2003) (inmate's lack of legal training, poor education and even illiteracy do not provide reason to toll the statute of limitations). Consequently, his claims do not excuse this untimely petition.

Although respondent has not been prejudiced by Cioffi's delay, "Absence of prejudice is a factor to be considered only after a factor that might justify tolling is identified." *Vroman*, 346 F.3d at 605; *Allen*, 366 F.3d at 404. Given that Cioffi has not established any factor that might justify tolling, lack of prejudice is not a consideration.

Finally, however, there is the question of whether Cioffi is an innocent. The Sixth Circuit has determined in *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005), as an issue of first impression, that a credible claim of actual innocence will equitably toll the §2244(d) limitations period. *Id.*, at 588-596. None of Cioffi's arguments, however, demonstrate actual innocence. Instead his claim is based on ineffective representation of counsel. Actual innocence means "factual innocence not mere

legal insufficiency." *Bousley v. U.S.*, 523 U.S. 614, 623-24, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Cioffi has not produced new evidence of innocence that was not presented at the state post-trial evidentiary hearing. See *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

Evidentiary Hearing:

This brings the Court to Cioffi's request for evidentiary hearing. Evidentiary hearings are not ordinarily held on habeas corpus review because state factual determinations are entitled to a presumption of correctness. 28 U.S.C. §2254(e)(1); and an evidentiary hearing shall not be held unless the applicant shows that ---

> (A) the claim relies on ----
>
> > (i) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
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> 28 U.S.C. §2254(e)(2)(A) and (B).

Following hearing and appeal in state court on Cioffi's Rule 32.1 motion to withdraw guilty plea, the state appellate court found: that Cioffi (1) insisted on making a plea agreement, despite his trial counsel's advice to the contrary; (2) possessed average basic intelligence (Cioffi's medical

expert testified I.Q. of 75, but was man of at least average basic intelligence); (3) had previous experience in criminal proceedings; and (4) confirmed several times at sentencing that he is satisfied with his trial counsel's performance. *Cioffi*, 2003 WL 21054780 at *4-5. The state court expressly found "appellant's mental deficiencies did not affect the validity of his plea." *Id.* at *5 ¶25.

Cioffi has not shown that he relies on a new rule of constitutional law, nor does he claim a "factual predicate that could not have been previously discovered." Instead, Cioffi claims there was allegedly exculpatory evidence in the Children's Services investigatory file. His claim is that these files contained recantations by "some" of the alleged victims involved in the charges.

The state appellate court addressed Cioffi's argument explaining:

> As for the letter from the counseling service, appellant's counsel testified that he could not recall receiving the letter, and at the time he counseled appellant regarding the plea agreement, was not aware of the letter or its contents. This assessment was reinforced by the trial court in its judgment entry, which stated: "Had the conference with the judge, prosecutor and counsel for the Defendant not been interrupted by Defendant's summons of counsel, the information contained in the Children Services file **would have been provided** to counsel, at least those portions that may have been exculpatory." (emphasis added). Again, appellant offered no testimony to the contrary on this issue. As a result, appellant has failed to show any prejudice as a result of his trial counsel's actions. Indeed, his trial counsel advised him to forego the plea agreement and proceed with the trial on the first indictment. The record also indicates that had appellant not interrupted the conference with the judge to seek a plea bargain, *appellant's counsel would have received the information from the counseling service.* (Bolding in original, italics supplied).

Cioffi, 2003 WL 21054780 at *4.

The factual predicate could have been discovered through due diligence. It was Cioffi's pell-mell rush to enter his guilty pleas which was at fault, not any constitutional infirmity in the trial process or counsel's performance. As in *McAdoo v. Elo*, Cioffi points to no fact that he could develop were his request for hearing granted that would result in granting of the writ. *Id.*, 365 F.3d 487, 500 (6th Cir. 2004). Cioffi rejected counsel's advice and has no right to complain about it . The argument attempts to shift blame where it none belongs.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, it is recommended that Cioffi's request for an evidentiary hearing be denied pursuant to 28 U.S.C.§2254(e)(2), and his habeas corpus petition be denied as time-barred under 28 U.S.C.§2244(d)(1)(A).

s/James S. Gallas
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of mailing of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. See *U.S. v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

February 7, 2006