

count of kidnapping in violation of Ohio Revised Code § 2905.01(A)(2). ECF Dkt. #11, Attachment #3. Petitioner was alleged to have fondled the genitalia of the nine year-old daughter of Petitioner's girlfriend. ECF Dkt. #11, Attachment #1. While these charges were pending, Petitioner was indicted on other charges on September 27, 1996. ECF Dkt. #11, Attachment #4. These charges, which included three counts of rape in violation of Ohio Revised Code § 2907.02(A)(1)(b)(2) and three counts of gross sexual imposition in violation of Ohio Revised Code § 2907.05(A)(4) stemmed from allegations that Petitioner engaged in sexual activity with two of his biological children in 1992 while they were under the age of thirteen. ECF Dkt. #11, Attachment #s 1, 4.

Although filed on different dates, it appears that in exchange for the dismissal of the life sentencing specifications, Petitioner chose to plead guilty in both cases as he entered a guilty plea to one count of gross sexual imposition and the kidnapping count as to the November 17, 1995 indictment and he pled guilty to three counts of rape and the three counts of gross sexual imposition as to the September 27, 1996 indictment. ECF Dkt. #11, Attachment #s 1, 5. On December 11 and December 18, 1996, the Trumbull County Court of Common Pleas issued entries on sentencing in which Petitioner was sentenced to ten to twenty-five years on each count of rape and one year definite sentence on each of the gross sexual imposition convictions with these sentences to run concurrent to each other and to also run concurrently with the one-year definite sentence on the gross sexual imposition conviction in the November 17, 1995 indictment and the three to fifteen year sentence on the kidnapping conviction, with these sentences to also run concurrently with one another. ECF Dkt. #11, Attachment #5.

A. POST-CONVICTION RELIEF PETITION

Petitioner did not file a direct appeal of his convictions or sentences. Rather, on March 16, 2001, four years and three months after the entry of his convictions and sentences, Petitioner filed a motion to set aside the judgment of conviction and withdraw his guilty pleas in the Trumbull County Court of Common Pleas. ECF Dkt. #11, Attachment #6. In this motion, Petitioner, through counsel, alleged the following:

- A. CRIMINAL RULE 32.1 PERMITS AN INDIVIDUAL TO WITHDRAW A PLEA POST-SENTENCE TO CORRECT A MANIFEST INJUSTICE
- B. MANIFEST INJUSTICE IS PRESENTED WHERE, AS HERE DEFENDANT'S GUILTY PLEAS WERE PREDICATED UPON THE ADVICE OF COUNSEL WHO FAILED TO PROPERLY INVESTIGATE AND PREPARE THE CASES FOR TRIAL

ECF Dkt. #11, Attachment #6. The State filed a response in opposition to Petitioner's motion and thereafter filed a supplemental response. ECF Dkt. #11, Attachment #s 8, 9.

On January 31, 2002, the Trumbull County Court of Common Pleas held an evidentiary hearing on Petitioner's motion to vacate and motion to withdraw his guilty pleas in both criminal cases. ECF Dkt. #11, Attachment #s 10-13. Petitioner's original trial counsel testified, as did a psychologist. ECF Dkt. #11, Attachment #15. On March 11, 2002, the trial court denied Petitioner's motion to vacate his convictions and withdraw his guilty pleas. ECF Dkt. #11, Attachment #15.

B. APPEAL OF RULING ON POST-CONVICTION RELIEF PETITION

On March 26, 2002, Petitioner, through counsel, filed a notice of appeal in the Eleventh District Court of Appeals. ECF Dkt. #11, Attachment #16. On April 1, 2002, the Eleventh District Court of Appeals consolidated Petitioner's appeals of the denial of his motion to vacate

his conviction and withdraw his plea of guilty in both cases. ECF Dkt. #11, Attachment #17.

Petitioner, through counsel, thereafter filed his brief on appeal, asserting the following assignment of error:

The trial court erred in overruling Defendant-Appellant's motion to set aside judgments of conviction and to withdraw pleas of guilty.

ECF Dkt. #11, Attachment #18. Petitioner reiterated the assertions that he had made in his motion to vacate and motion to withdraw his guilty pleas. *Id.* at 9. The State filed an appellee brief. ECF Dkt. #11, Attachment #20. On May 12, 2003, the Eleventh District Court of Appeals affirmed the decision of the trial court denying Petitioner's motion to vacate and withdraw his guilty pleas. ECF Dkt. #11, Attachment #22.

On June 23, 2003, Petitioner, through counsel, filed a notice of appeal to the Ohio Supreme Court and a memorandum in support of jurisdiction in that court. ECF Dkt. #11, Attachment #24. Petitioner set forth the following proposition of law:

A Motion to Set Aside Judgments of Conviction and To Withdraw Guilty Pleas is the proper vehicle to attack the validity of guilty pleas entered by a mentally challenged accused who depends upon the advice and counsel of his attorney when the attorney has not evaluated the State's case prior to counseling the accused relative to acceptance or rejection of the plea proposal.

Id. The State filed a memorandum in opposition to jurisdiction on July 18, 2003. ECF Dkt. #11, Attachment #25. On September 10, 2003, the Supreme Court of Ohio denied leave to appeal and dismissed Petitioner's appeal as not involving any substantial constitutional question. ECF Dkt. #11, Attachment #26.

C. INSTANT FEDERAL HABEAS CORPUS PETITION

On September 10, 2004, Petitioner, through counsel, filed the instant federal habeas corpus petition pursuant to 28 U.S.C. §2254. ECF Dkt. #1. In his petition, Petitioner presents the following sole ground for relief:

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

Id. On December 10, 2004, Respondent filed an motion to dismiss Petitioner's federal habeas corpus petition as untimely filed. ECF Dkt. #11. Despite notification by electronic means, Respondent has not filed a response to the motion to dismiss.

II. PROCEDURAL BARRIERS TO REVIEW

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 applies to this Court's review of the instant case because Petitioner filed his petition for habeas corpus relief on September 10, 2004, well after the act's effective date of April 24, 1996. *Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000). The AEDPA contains a period of limitation which states:

- (d)(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 run from the latest of—
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively

applicable to cases on collateral review; or

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

III. ANALYSIS

Respondent asserts that this Court should dismiss Petitioner's §2254 federal habeas corpus petition because it was filed outside of the AEDPA's one-year statute of limitations. ECF Dkt. #11. The undersigned agrees and recommends that the Court dismiss Petitioner's § 2254 federal habeas corpus petition as untimely filed.

A. THE AEDPA LIMITATION PERIOD

1. TIMELINESS

A prisoner whose convictions became final after the effective date of the AEDPA generally has one year from the date that his convictions became final in order to file his federal habeas corpus petition with this Court. 28 U.S.C. § 2244(d)(1); *Brown v. O'Dea*, 187 F.3d 572, 576-77 (6th Cir.1999), *overruled on other grounds*, 530 U.S. 1257 (2000). The limitation period begins to run from the latest of the four delineated dates detailed in 28 U.S.C. § 2244(d)(1). *Id.*

In the instant case, the trial court journalized Petitioner's convictions and sentences on December 11, 1996 and December 18, 1996, respectively. ECF Dkt. #11, Attachment #5. Petitioner did not file a notice of appeal in the state appellate court within 30 days of his

convictions as required by Rule 4 of the Ohio Rules of Appellate Procedure¹. The Sixth Circuit has held that for purposes of federal habeas corpus review, a state-court judgment becomes final when direct review by the state court ends or when the time to seek direct review expires, whichever comes later. *Wilberger v. Carter*, 35 Fed. Appx. 111, 2002 WL 89671 (6th Cir. Jan.18, 2002), unpublished, citing *Austin v. Mitchell*, 200 F.3d 391, 393 (6th Cir.1999). Petitioner's direct review therefore became final on January 17, 1997, when the time to directly appeal the convictions and sentences had expired. Accordingly, Petitioner had one year, or until January 19, 1998, in which to file his § 2254 federal habeas corpus petition in this Court as January 17, 1998 was a Saturday. 28 U.S.C. § 2244(d)(1), *supra*. Petitioner did not file his federal habeas corpus petition in this Court until September 10, 2004, well beyond the AEDPA one-year limitation period. ECF Dkt. #1.

However, the tolling provision of AEDPA stays the one-year grace period for filing a federal habeas corpus petition during the time in which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. 28 U.S.C. § 2244(d)(2). Pursuant to the terms of § 2244(d)(2), state court petitions and applications must be both "pending" and "properly filed" in order to toll the AEDPA's one-year period of limitation. 28 U.S.C. § 2244(d)(2); *see also Thomas v. Johnson*, No. 99-3628, 211 F.3d 1270 (Table), 2000 WL 553948 at *2 (6th Cir. Apr. 28, 2000), citing *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000). That is, if a state petition or application is filed following the

¹ "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure." Ohio App. R. 4(a)(emphasis added).

expiration of the period of limitation, it cannot possibly toll the period because there is "no period remaining to be tolled." *Webster*, 199 F.3d at 1259. In addition, the state petition or application must concern the federally cognizable claim that the petitioner is raising in his instant federal habeas corpus petition. *Austin v. Mitchell*, 200 F.3d 391, 395 (6th Cir. 1999). In *Austin*, the Sixth Circuit adopted the holding that:

The tolling provision applies to a pending state review "with respect to the pertinent judgment or claim...." 28 U.S.C. §§ 2244(d)(2) (emphasis added). Just as such state review must concern a federally cognizable claim to toll the AEDPA period of limitation, so also the rule should be that such review must concern a federally cognizable claim that is being made in the instant habeas petition. Otherwise, the purpose of tolling, which is to provide the state courts with the first opportunity to resolve the prisoner's federal claim, is not implicated.

Id.

Further, the Sixth Circuit Court of Appeals has recently held that a properly filed, pending and cognizable state post-conviction or other collateral filing tolls the AEDPA one-year grace period from the date of the filing of the state relief until the conclusion of the time for seeking certiorari in the United States Supreme Court, even if the petitioner has not filed a petition for said certiorari. *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003).

In the instant case, the one-year AEDPA grace period began running on January 18, 1997, the day after the last day on which Petitioner could have timely filed his appeal on direct review to the Ohio Supreme Court. *Wilberger*, 2002 WL 89671; *Austin*, 200 F.3d at 393; Ohio Sup.Ct.Prac.R. II §2(A)(1)(a). Petitioner made no filings from January 18, 1997 until March 16, 2001 when he filed a motion to set aside the judgment of his convictions and to withdraw his guilty pleas. ECF Dkt. #11, Attachment #6. Rather than file a direct appeal in the Ohio appellate court, Petitioner waited until nearly four and an half years later to make any filing in his case.

This filing does not serve to toll the AEDPA statute of limitations clock, however, because it was filed well beyond the expiration of the period of limitation and therefore cannot possibly toll the one-year grace period because there is "no period remaining to be tolled." *Webster*, 199 F.3d at 1259. The tolling provision does not revive a limitation period, but rather, "it can only serve to pause a clock that has not yet fully expired." *Rashid v. Khulmann*, 991 F.Supp. 254, 259 (S.D.N.Y. 1998). The AEDPA clock had already expired in the instant case by the time that Petitioner had filed his motion to vacate his convictions and sentences in the trial court.

For these reasons, the undersigned recommends that the Court grant Respondent's motion to dismiss Petitioner's § 2254 federal habeas corpus petition and dismiss Petitioner's § 2254 federal habeas corpus petition with prejudice as untimely filed.

2. EQUITABLE TOLLING

The Court must also consider whether Petitioner is entitled to equitable tolling on his § 2254 federal habeas corpus petition. The doctrine of equitable tolling may be invoked to toll the one-year limitations period applicable to § 2254 habeas corpus petitions. *Dunlap v. United States*, 250 F.3d 1001, 1008-1009 (6th Cir. 2001). "Because AEDPA's one-year statute of limitations is not jurisdictional, a petitioner who misses the deadline may still maintain a viable habeas petition if the court decides that equitable tolling is appropriate." *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004)(citations omitted). It is Petitioner who bears the burden of establishing that he is entitled to the equitable tolling of the AEDPA statute of limitations. *Id.* Unless Petitioner can establish that he is actually innocent of the crime or he is entitled to equitable tolling, the Court should dismiss his federal habeas corpus petition with prejudice as time-barred. While Petitioner has not presented equitable tolling arguments because he failed to

respond to Respondent's motion to dismiss, the undersigned will nevertheless address this issue.

In this Circuit, the standard to be applied to determine whether equitable tolling of a limitations period is appropriate is the five-part test set out in *Andrews v. Orr*, 851 F.2d 146,150 (6th Cir.1988). *Dunlap*, 250 F.3d at 1008-1009. This Court must consider the following factors: (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a petitioner's reasonableness in remaining ignorant of the notice requirement. *Id.* The Sixth Circuit has held that "the doctrine of equitable tolling should be used sparingly" and is generally used "only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003)(citations and internal quotation marks omitted).

Applying the factors set forth in *Andrews, supra*, to the circumstances surrounding Petitioner's habeas corpus filing, the undersigned recommends that the Court find that Petitioner is not entitled to equitable tolling. Petitioner makes no assertion that he was unaware in any way of the filing date for his federal habeas corpus petition. And Petitioner was not diligent in pursuing his rights in the state courts as he did not directly appeal his convictions and sentences and he failed to file any document in the state courts until nearly four and a half years after his convictions. In addition, Petitioner neglected his time limitations in filing the instant federal habeas corpus petition and fails to explain how this negligence was "reasonable". Finally, the undersigned finds that prejudice would result to Respondent in litigating Petitioner's federal constitutional claims, given the length of time that has elapsed since Petitioner entered his guilty pleas.

Moreover, it appears that had Petitioner filed a response to Respondent's motion to dismiss, he may have argued that he is entitled to equitable tolling of the AEDPA statute of limitations because his mental deficiencies and psychological problems prevented him from timely filing his federal habeas corpus petition. See ECF Dkt. #1 at 4, ECF Dkt. #11, Attachment #s 6, 16. However, in *Price v. Lewis*, the Sixth Circuit Court of Appeals held that a federal habeas corpus petitioner could not show that his mental incapacity actually prevented him from pursuing his claims during the limitations period when it was shown that he sought and obtained help for completing legal paperwork during this time. No. 03-6467, 2005 Fed.App. 0012N, 2005 WL 23371 (Jan. 5, 2005), unpublished. The Court cited cases from other federal courts as support for its holding that "Illness— whether mental or physical— tolls a statute of limitations only if it actually prevents the sufferer from pursuing his legal rights during the limitations period." *Id.* at 3, citing *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996)(discussing mental illness); *Rhodes v. Senkowski*, 82 F.Supp.2d 160, 168-170 (S.D.N.Y. 2000)(discussing physical and mental illness and collecting cases).

In this case, the Court find no evidence to show that Petitioner's mental and psychological challenges prevented him from pursuing his claims at either the state or federal levels, especially when he was represented by counsel at both stages. Accordingly, based upon the application of the equitable tolling factors to the instant case, the undersigned recommends that the Court find that Petitioner is not entitled to equitable tolling. Further, Petitioner presents no argument relating to his actual innocence.

IV. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the undersigned recommends that the Court dismiss Petitioner's §2254 federal habeas corpus petition with prejudice as time-barred and find that it is not subject to equitable tolling.

Dated: January 25, 2005

/s/George J. Limbert
George J. Limbert
United State Magistrate Judge

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