

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY CIOFFI, #332-078,
Petitioner,

v.

DAVID BOBBY, Warden,
Respondent.

Case No. 4:04 CV 1837

Judge Gwin
Magistrate Judge Limbert

(HABEAS CORPUS)

**RESPONDENT BOBBY'S RESPONSE IN OPPOSITION TO PETITIONER'S
OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION**

The Respondent denies each of the allegations made by the petitioner except those expressly admitted herein. Respondent filed on December 10, 2004, a motion to dismiss the petition as time-barred, depriving the Court of jurisdiction to proceed. (See ECF 11). Petitioner's counsel did not file a response in opposition to the motion to dismiss. The Magistrate Judge issued on January 25, 2005, a Report and Recommendation (see ECF 12) that the petition be dismissed as time-barred and that equitable tolling was not demonstrated pursuant to the application of *Dunlap v. United States*, 250 F.3d 1001 (6th Cir. 2001). (See ECF 12). Petitioner filed on February 3, 2005, objections to the Magistrate Judge's Report and Recommendation. (See ECF 13).

It is only now, in these objections, that Petitioner alleges that equitable tolling should apply to save the untimely petition. (See ECF 13 at p. 2-3). Petitioner's counsel, so as to excuse the lack of diligence by Cioffi in his federal legal affairs, makes the unsupported assertion that Cioffi is "mentally challenged," "can barely read," and did not "understand the effect of the waivers of his constitutional rights [during his guilty plea proceedings in the trial court]." (See ECF 13 at p. 8). Furthermore, Petitioner's counsel

repeats the claim made in the petition that trial counsel did not properly investigate the case nor advise Cioffi properly (of the recantation of two of the three victims)¹ prior to entering the guilty plea, so as to render the guilty plea invalid. While the factual substance of these assertions by Petitioner's habeas counsel must be taken as true with regard to the dismissal of a claim, impacting a factual determination of a particular claim vis-à-vis a procedural default situation or a merits review of the habeas claim should the petition survive dismissal as untimely, there is no such presumption under Fed.Civ.Rule.P. 12(B) with respect to determining the defense of lack of jurisdiction², and in no way explains the petitioner's inordinate 2,437-day delay in filing for federal habeas relief despite being represented by counsel in the trial court and in postconviction relief prior to seeking untimely federal habeas relief.

Equitable Tolling Standard

The Sixth Circuit does recognize that the one-year limitation period is subject to equitable tolling. See *Dunlap v. United States*, 250 F.3d 1001 (6th Cir. 2001). It is the burden of petitioner to show entitlement to equitable tolling. *Griffen v. Rogers*, 308 F.3d 647 (6th Cir. 2002). Also, "equitable tolling relief should only be granted sparingly." *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). In *Dunlap*, the Sixth Circuit adopted five factors from *Anderson* to be balanced when determining whether equitable tolling is appropriate. *Dunlap v. United States*, 250 F.3d at 1008 (citing *Anderson v. Orr*, 851 F.2d

¹ The fact that two of the three victims may have recanted their statements to the police does not equate to a finding of actual innocence. There still remained one victim with which to prove guilt.

² Taking Petitioner counsel's logic of applying the presumption of truth to facts under Rule 12(B) to jurisdiction defenses to its conclusion, an untimely petition would never be subject to a statute of limitations dismissal if only the petitioner affirmatively asserts in the petition that the petition was timely filed or that equitable tolling is present.

146 (6th Cir. 1988)). The factors to be considered are as follows:

- (1) the petitioner's lack of notice of the filing requirement;
- (2) the petitioner's lack of constructive knowledge of the filing requirement;
- (3) diligence in pursuing one's rights;
- (4) absence of prejudice to the respondent; *and*
- (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. (Emphasis added).

Dunlap, 250 F.3d at 1008. The fourth factor, absence of prejudice to the respondent, "may only be considered if the petitioner satisfies the other four prongs of the test and, therefore can only weigh in respondent's favor." *Harrison v. I.M.S.*, Case No. 99-2249, 56 Fed Appx. 682, 685, 2003 U.S. App. LEXIS 1061 (6th Cir. 2003) (citing *Dunlap*, 250 F.3d at 1009) (copy of *Harrison* is attached hereto for the Court's use).

Petitioner made no assertions that equitable tolling is suitable in the instant case until after the Magistrate Judge had issued his Report and Recommendation that the case be dismissed as time-barred. The reasons advanced for the equitable tolling argument in these objections, Cioffi's mental faculties and trial counsel's alleged ineffectiveness that would allegedly invalidate the guilty plea, do not demonstrate factors 1-3 and 5 of *Dunlap* and therefore do not mandate equitable tolling in this case. No effort is made to detail Cioffi's notice or knowledge of the filing requirements, his diligence in preserving his ability to seek relief in federal habeas, or his reasonableness in remaining ignorant of the legal requirement for filing his habeas petition. The Magistrate Judge, in his Report and Recommendation, succinctly disposed of the issue of whether to apply equitable tolling to Cioffi's petition:

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

(ECP 12 at pp. 11-12).

Respondent requests that Petitioner's Objection be overruled and that the well-reasoned Report and Recommendation of the Magistrate Judge be affirmed and adopted as the Order and Opinion of the Court. Additionally, Respondent requests that a Certificate of Appealability be denied as no reasonable jurist could disagree with the decision of the Court as to the petition being time-barred and that equitable tolling should not be applied.

Respectfully submitted,

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Ohio Attorney General

s/ Gregory T. Hartke

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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify this Response in Opposition was filed electronically with the Court on February 10, 2005, and that a copy of the foregoing is available to Petitioner's counsel, Jeffrey V. Goodman, Esq., 252 Seneca Avenue, Warren, OH 44481, through the Court's electronic notification of filing.

s/ Gregory T. Hartke
GREGORY T. HARTKE (0024781)
Assistant Attorney General

ATTACHMENTS

Harrison v. I.M.S., Case No. 99-2249, 56 Fed Appx. 682, 2003 U.S. App. LEXIS 1061 (6th Cir. 2003).