UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ANTHONY CIOFFI,	:	CASE NO. 4:04-CV-1837
Petitioner,	:	
vs.	:	OPINION AND MEMORANDUM [Resolving Doc. Nos. 1, 11]
DAVID BOBBY, WARDEN,	:	
Respondent.	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On September 10, 2004, Petitioner Anthony Cioffi filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. [Doc. 1]. In his petition, Cioffi also requests an evidentiary hearing. Respondent David Bobby filed a motion to dismiss the petition. [Doc. 11]. This Court referred the case to Magistrate Judge George J. Limbert under Local Rule 72.1. On January 25, 2005, Magistrate Judge Limbert filed a Report and Recommendation. [Doc. 12]. With that Report and Recommendation, the Magistrate Judge recommends that this Court deny Cioffi's petition. The petitioner objects to the Magistrate Judge's findings. For the reasons provided below, the Court adopts the Magistrate Judge's Report and Recommendation and **DENIES** Cioffi's § 2254 petition.

I. Background

The Court of Appeals for Trumbull County, Ohio, reviewed the factual background of this case in affirming the denial of the petitioner's March 2001 motion to withdraw his guilty pleas. *See Ohio v. Cioffi*, Nos. 2002-T-0037 and 2002-T-0039, 2003 Ohio App. LEXIS 2199, at *1-4 (Ohio Ct. App. May 9, 2003). The state court's determinations of factual issues "shall be presumed to be correct," unless

the petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Mitzel v. Tate*, 267 F.3d 524, 537 (6th Cir. 2001), *cert. denied*, 535 U.S. 966 (2002).

On November 17, 1995, the Trumbull County Grand Jury indicted Cioffi on two counts of gross sexual imposition and one count of kidnapping. The charges arose from an allegation that Cioffi fondled his girlfriend's nine-year old daughter. While that case proceeded, the grand jury indicted Cioffi a second time on September 27, 1996. The second indictment charged Cioffi with three counts of rape and three more counts of gross sexual imposition, based on allegations that Cioffi engaged in sexual activity with two of his own biological children. The rape charges carried life sentence specifications.

On December 3, 1996, shortly before trial on the first indictment, Cioffi entered into a plea agreement covering both indictments. The State agreed to request dismissal of the life sentence specifications. In return, the petitioner agreed to plead guilty to one count of gross sexual imposition and one count of kidnapping from the first indictment, and three counts of rape and three counts of gross sexual imposition from the second indictment.

On December 6, 1996, Judge John Stuard sentenced Cioffi to one year on the gross sexual imposition count and three to fifteen years on the kidnapping count from the first indictment. Judge Stuard also sentenced Cioffi to ten to twenty-five years on the three rape charges and one year on the three gross sexual imposition counts from the second indictment. As the sentences were to run concurrently, Cioffi faced ten to twenty five years of imprisonment. The trial court journalized Cioffi's convictions and sentences on December 11, 1996 and December 18, 1996.

More than four years later, on March 16, 2001, Cioffi filed a "Motion to Set Aside Judgment of

Conviction and to Withdraw Pleas of Guilty" in the Trumbull County Court of Common Pleas. New counsel filed the motion on Cioffi's behalf. In his motion, Cioffi argued that his trial counsel was unprepared for trial and that his own mental deficiencies rendered his guilty plea less than knowing, voluntary, and intelligent. The trial court held an evidentiary hearing in which Cioffi's trial counsel and a psychologist testified. On March 11, 2002, the trial court denied Cioffi's motion.

On March 26, 2002, Petitioner Cioffi appealed the denial of his motion to the Trumbull County Court of Appeals. The appeals court affirmed, finding that Cioffi entered into the plea agreement against the advice of his trial counsel and that Cioffi failed to show any prejudice resulted from his trial counsel's actions. The appeals court also noted that Cioffi possessed at least average basic intelligence.

On June 23, 2003, Cioffi, through counsel, filed a notice of appeal to the Ohio Supreme Court. The Ohio Supreme Court denied leave to appeal on September 10, 2003.

Petitioner Cioffi filed his petition for a writ of habeas corpus in this Court on September 10, 2004. Cioffi includes a single claim 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." [Doc. 1 ¶ 12]. Cioffi claims that he is a "mentally challenged individual" and "did not understand the effect of the [plea] agreement or the waivers of constitutional rights contained therein." *Id.* ¶ 13(a). Additionally, the petitioner says that his trial counsel did not adequately evaluate the case against Cioffi, including failing to investigate the psychological records of the alleged victims and supposed recantations by two of the three alleged victims. *Id.* ¶ 13(b).

Magistrate Judge Limbert recommends denial of Petitioner Cioffi's § 2254 petition. With respect

to the petitioner's arguments, the Magistrate Judge found that: (1) the petition is time-barred under 28 U.S.C. § 2244(d)(1); and (2) the petition is not subject to equitable tolling. The Court now reviews Magistrate Judge Limbert's Report and Recommendation *de novo*. *See Flournoy v. Marshall*, 842 F.2d 875, 875–76 (6th Cir. 1998).

II. Legal Standard

A. The AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), governs the standards of review for state court decisions. The AEDPA provides that federal courts cannot grant a habeas petition for any claim that the state court adjudicated on the merits unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). *See also Miller v. Francis*, 269 F.3d 609, 614 (6th Cir. 2001).

The United States Supreme Court outlined the proper application of § 2254(d) in *Williams v. Taylor*, 529 U.S. 362 (2000). To justify a grant of habeas relief under the "contrary to" clause, "a federal court must find a violation of law clearly established by holdings of the Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision." *Miller*, 269 F.3d at 614 (internal quotations omitted) (quoting *Williams v. Taylor*, 529 U.S. 362). Meanwhile, "under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal

principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 1523. The Sixth Circuit holds that, even if a federal court could determine that a state court incorrectly applied federal law, the court still could not grant relief unless it also finds that the state court ruling was unreasonable. *Simpson v. Jones*, 238 F.3d 399, 405 (6th Cir. 2000).

Moreover, the factual findings of a state court are presumed to be correct. A federal court may only diverge from a state court's factual findings if the petitioner shows by clear and convincing evidence that the findings are erroneous. *See* 28 U.S.C. § 2254(e)(1).

B. Statute Of Limitations

Among other things, the AEDPA amended 28 U.S.C. § 2244 to include a one-year limitations period for prisoners filing a habeas corpus petition in the federal courts under 28 U.S.C. § 2254. The statute of limitations runs from the latest of: (1) the date on which the state court judgment became final; (2) the date on which any impediment to filing the application was removed by the state; (3) the date on which a newly enacted constitutional right was created and made retroactive to cases on collateral review; and (4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *See id.* §§ 2244(d)(1)(A)-(D). In regard to the first factor, a judgment becomes final upon "the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). Direct review includes the ninety-day period that a petitioner has to seek certiorari in the United States Supreme Court after the highest state court rules on petitioner's appeal. *Perry v. Lynaugh*, 492 U.S. 302, 314 (1989).

To determine if the one-year grace period has expired before a petitioner files a § 2254 petition,

the Court does not count periods during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending and properly filed. 28 U.S.C. § 2244(d)(2). This tolling provision does not revive an expired limitations period. Rather, it only delays the expiration of a pending limitations period. *Thomas v. Johnson*, No. 99-3628, 2000 WL 553948, at *2 (6th Cir. Apr. 28, 2000) (citing *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000)).

The statute of limitations does not prevent a Court from granting relief in cases involving equitable tolling. *See Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001). The Sixth Circuit considers the following five factors in determining if equitable tolling is appropriate: (1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirements; (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. *See id.*

III. Analysis

A. Statute Of Limitations

This Court agrees with the Magistrate Judge's recommendation that Cioffi's § 2254 petition is time-barred.

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, 114 (6th Cir. 2002). Under Rule 4 of the Ohio Rules of Appellate Procedure, the petitioner had 30 days from "the later of entry of the judgment or order appealed" to appeal his convictions and sentences. The trial court journalized the convictions and sentences on

December 11 and December 18, 1996. The state court's direct review thus became final no later than January 17, 1997. Because January 17, 1997 was a Saturday, Petitioner Cioffi had one year from January 19, 1997, to file his petition for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Cioffi did not file his petition until September 10, 2004. As a result, Cioffi's petition is time-barred.

Cioffi's March 16, 2002 "Motion to Set Aside Judgment of Conviction and to Withdraw Pleas of Guilty" did not toll the limitations period pursuant to 28 U.S.C. § 2244(d)(2). Cioffi's motion was neither "pending" nor "properly filed" during the one-year limitations period, as 28 U.S.C. § 2244(d)(2) requires. Because Cioffi did not file his motion until more than three years after the limitations period expired, there was "no period remaining to be tolled." *Webster*, 199 F.3d at 1259.

The statute of limitations is a plain procedural bar to Cioffi's petition. A reasonable jurist could not conclude that this Court has erred in dismissing the petition as time-barred or that the petitioner should be allowed to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

B. Equitable Tolling

In his objection to the Magistrate Judge's Report and Recommendation, Petitioner Cioffi argues for the first time that the limitations period for his petition should be equitably tolled. [Doc. 13]. The petitioner bases his equitable tolling argument principally on his assertion that he is mentally challenged and did not understand the effect of his plea agreement. *Id.* at 8. The Court agrees with the Magistrate Judge that the petitioner's case does not merit equitable tolling.

The Sixth Circuit holds 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). Cioffi argues that the Court must accept all of his factual assertions as true in deciding his petition. The petitioner is wrong. On habeas review, factual determinations by the state court are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

The state court found that Cioffi (1) insisted on making the plea agreement, despite his trial counsel's advice to the contrary, (2) possessed at least average basic intelligence, (3) had previous experience in criminal proceedings, and (4) confirmed several times at sentencing that he was satisfied with his trial counsel's performance. *Cioffi*, 2003 Ohio App. LEXIS 2199, at *8-12. Cioffi offers nothing to this Court that rebuts the presumption of correctness regarding those factual findings. Instead, Cioffi re-hashes the same argument that failed in the state court, namely that he was incompetent and received ineffective assistance of counsel.

Petitioner Cioffi was not diligent in filing his motion for relief in the trial court and his habeas petition with this Court. Cioffi fails to allege that he lacked notice of the habeas filing requirements, or that he was reasonable in remaining ignorant of the filing requirements. Additionally, the respondent would be prejudiced if the Court equitably tolled the long-expired limitation period, given that the petitioner entered his guilty pleas more than eight years ago.

C. Evidentiary Hearing

The Court denies the petitioner's request for an evidentiary hearing. Such hearings are only appropriate where the petitioner relies on a new rule of constitutional law or facts that could not have been previously discovered through due diligence. 28 U.S.C. § 2254(e)(2). Neither circumstance is present

in this case.

The Sixth Circuit has held that "a habeas petitioner is generally entitled to such a hearing if he alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." *Sawyer v. Hofbauer*, 299 F.3d 605, 610 (6th Cir. 2002) (internal quotations omitted). However, in the present matter, the petitioner does not allege a factual dispute which would amount to sufficient grounds for release. The state court also conducted an evidentiary hearing on Cioffi's "Motion to Set Aside Judgment of Conviction and to Withdraw Pleas of Guilty." Thus, the Court denies the request for a new evidentiary hearing.

IV. Conclusion

For the foregoing reasons, the Court DENIES Petitioner Cioffi's § 2254 petition, as well as his request for an evidentiary hearing. In turn, the Court GRANTS the respondent's motion to dismiss the habeas petition as time-barred. The Court adopts, in full, the Report and Recommendation of the Magistrate Judge. Accordingly, this action is dismissed. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: March 3, 2005

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE