

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

DERRYCK HENSON,

CASE NO.: 1:12-CV-602

PETITIONER,

BARRETT, J.

MERZ, M.J.

v.

WARDEN, LEBANON CORRECTIONAL  
INSTITUTION,

RESPONDENT.

**ORDER**

This matter is before the Court on the November 21, 2013 Report and Recommendation (Doc. 20) and the December 27, 2013 Supplemental Report and Recommendation of the Magistrate Judge. (Doc. 23).

Proper notice has been given to the parties under 28 U.S.C. § 636(b)(1)(C), including notice that the parties may forfeit rights on appeal if they failed to file objections to the Supplemental Report and Recommendation in a timely manner. *United States v. Walters*, 6348 F.2d 947 (6th Cir. 1981). The Respondent filed objections to the November 21, 2013 Report and Recommendation (Doc. 21), but no objections have been filed to the December 27, 2013 Supplemental Report and Recommendation.

**I. BRIEF BACKGROUND**

On October 11, 2013, the Magistrate Judge issued a Report and Recommendation in which he recommended that the petition be dismissed with prejudice on statute of limitations grounds. (Doc. 11). The Report recommended, however, that Petitioner be granted a certificate of appealability on the issue of equitable tolling because the law of equitable tolling remains in development. (Doc. 11). As no objections were filed, the undersigned adopted the Report and

dismissed the petition with prejudice. (Doc. 12). In doing so, the undersigned indicated that a certificate of appealability should issue if Petitioner appealed the decision. (*Id.*).

Subsequent to that Order, Petitioner's counsel sought to withdraw from the case. (Doc. 14). By notation order, counsel was advised that he needed to take appropriate steps to protect his client's right to appeal by filing (1) a notice of appeal, (2) a motion for certificate of appealability, and (3) an application to proceed on appeal *in forma pauperis*, if appropriate. In this Court, Petitioner's counsel filed his notice of appeal (Doc. 15), a motion for certificate of appealability (Doc. 18), and a motion for leave to appeal *in forma pauperis* (Doc. 19).

As is relevant here, the Magistrate Judge issued a Report and Recommendation recommending (consistent with the undersigned's prior order) that the certificate of appealability issue on the limited question of whether Petitioner was entitled to equitable tolling of the AEDPA one-year statute of limitations. (Doc. 20). At that time, the Respondent objected on the grounds that Petitioner failed to preserve his right to appeal by failing to object to the Report. (Doc. 23). The Magistrate Judge agreed, relying on *Souter v. Jones*, 395 F.3d 577, 585-86 (6th Cir. 2005). (Doc. 23, PageID 1298).

## **II. ANALYSIS**

Having reviewed the issue presented, the Court holds that a certificate of appealability should issue. As the undersigned and the Magistrate Judge both have recognized, Petitioner has made the requisite showing for the issuance of a certificate of appealability on the limited issue of whether he was entitled to equitable tolling of the AEDPA one-year statute of limitations. *See* 28 U.S.C. § 2253. Whether Petitioner objected or failed to object to the Report does not change that determination, as the standards for a waiver and the standards for issuance of a certificate of appealability, though related, are substantively distinct from one another. *See Carson v. Hudson*,

421 F. App'x 560, 563-64 (6th Cir. 2011) (issuing a certificate of appealability and then considering whether the petitioner's failure to object to the Report constituted a waiver) (citing *Souter v. Jones*, 395 F.3d 577, 585-86 (6th Cir. 2005)). Indeed, a certificate of appealability may still issue even when a waiver may have occurred. *See id.* As the Sixth Circuit has recognized, a waiver for failure to object "plainly is not a jurisdictional rule; the court of appeals retains subject matter jurisdiction over the appeal regardless of the untimely filing or nonfiling of objections." *Souter*, 395 F.3d at 585 (quoting *Kent v. Johnson*, 821 F.2d 1220, 122 (6th Cir. 1987)). The Sixth Circuit may excuse any default in failing to object if it determines it is within the interests of justice to do so. *Id.* (citing *Thomas v. Arn*, 474 U.S. 140, 155 (1985)). As such, the undersigned believes that the question of waiver is more appropriately addressed by the Sixth Circuit on appeal and that it does not preclude the issuance of a certificate of appealability in this matter.

### **III. CONCLUSION**

For the foregoing reasons, the undersigned **ADOPTS** the recommendation in the November 21, 2013 Report (Doc. 20) and **DECLINES TO ADOPT** the recommendation in the December 27, 2013 Supplemental Report (Doc. 23). A certificate of appealability shall issue on the limited question of whether Petitioner is entitled to equitable tolling of the AEDPA one-year statute of limitations.

**IT IS SO ORDERED.**

s/Michael R. Barrett  
JUDGE MICHAEL R. BARRETT  
UNITED STATES DISTRICT COURT