

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMAL SUNDIATA SCOTT, : CIVIL ACTION  
Petitioner, :  
 :  
v. :  
 :  
DONALD VAUGHN, et al., :  
Respondents. : NO. 00-2155

MEMORANDUM ORDER

J.M. KELLY, J.

MAY , 2001

Presently before the Court is the Petition for a Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254 (1994) (amended 1996), of Jamal Sundiata Scott ("Scott"). A Report and Recommendation was prepared by United States Magistrate Judge M. Faith Angell, to which Scott has filed Objections.

Scott's sole objection is that Judge Angell incorrectly rejected his argument that his time to file his Petition was equitably tolled during the time period in which his attorney misrepresented the applicable statute of limitations for his case.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(1), Scott had one year from the date his conviction became final to file his § 2254 Petition. *Id.* It is undisputed that Scott's attorney improperly advised him that his one year period commenced upon dismissal of his state petition for post conviction relief, rather than that his state petition had merely tolled an already running clock.

The one year statute of limitations in § 2244(d)(1) can only be equitably tolled when the petitioner has "exercised reasonable diligence in investigating and bringing the claims." Miller v. New Jersey Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998). Excusable neglect is insufficient; rather, the petitioner must in some extraordinary way demonstrate that he was prevented from asserting his rights. Id. There are three enumerated circumstances that would permit Scott equitable tolling: (1) the defendant has actively misled the plaintiff; (2) the plaintiff has been prevented from asserting his rights in some extraordinary way; or (3) the plaintiff timely asserted his rights in the wrong forum. Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999).

Thus, "attorney error, miscalculation, inadequate research, or other mistakes" are not the extraordinary circumstances necessary to establish equitable tolling. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001). In setting forth the borders of what constitutes an extraordinary circumstance, the Fahy court relied upon Taliani v. Chrans, 189 F.3d 597 (9th Cir. 1999), where the United States Court of Appeals for the Ninth Circuit found that a lawyer's inadequate research which lead to miscalculating the deadline did not warrant equitable tolling. While lamentable, the miscalculation by Scott's attorney is not an extraordinary circumstance.

Nor, as Scott requests, does the flexible definition of extraordinary circumstances that applies in death penalty cases extend to Scott. See Fahy, 240 F.3d at 245. Such flexibility is called for in death penalty cases only because of the difference and finality of the death penalty, society's overwhelming interest that death penalty decisions be correct and the "confounding and unsettled" state of the applicable law. Id. at 244-45. Because this is not a death penalty case, the Court must apply the stricter general standard adopted in Fahy.

Accordingly, after a careful and independent consideration of the Objections to the Report and Recommendation of Scott, it is ORDERED:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is DISMISSED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

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JAMES MCGIRR KELLY, J.