

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

CURTIS MANNING	:	CIVIL ACTION
	:	
vs.	:	
	:	
CONNOR BLAINE, WARDEN; DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	: : : : : : :	NO. 01-2279

ORDER AND MEMORANDUM

ORDER

AND NOW, this 20th day of November, 2001, upon consideration of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi dated November 1, 2001, Petitioner's Objection to the Report and Recommendation, and the record in this case, **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Peter B. Scuderi dated November 1, 2001, is **APPROVED** and **ADOPTED**;
2. Petitioner's Objection to the Report and Recommendation is **OVERRULED**;
3. The Petition of Curtis Manning for Writ of Habeas Corpus under 28 U.S.C. § 2254 is **DISMISSED**; and,
4. A certificate of appealability will not be granted because petitioner has not made a substantial showing of a denial of a constitutional right as required by 28 U.S.C. § 2253(c).

MEMORANDUM

After submission of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, petitioner filed an Objection in which he raised the issue of equitable tolling.

The equitable tolling issue was not raised in the Petition for Writ of Habeas Corpus, nor was it presented to the Magistrate Judge in any other manner.

This Memorandum addresses the issue raised in the Objection. For the reasons stated below, the Objection is overruled.

Petitioner states in his Objection that the Court should apply equitable tolling in this case because he was advised by his prior attorney¹ in a document entitled Case Review that the “deadline date” for filing a petition for writ of habeas corpus was May 9, 2001. That is the date on which petitioner filed his counseled petition for writ of habeas corpus.

The attorney who advised petitioner erred when he concluded that the deadline for filing the Petition for Writ of Habeas Corpus was May 9, 2001. As is correctly stated in the Report and Recommendation, petitioner had until approximately August 17, 2000, to file his federal habeas petition, and he failed to do so.

Petitioner argues that, because he relied on his attorney’s advice, he is entitled to equitable tolling. He is incorrect.

The Third Circuit has held that the one-year filing deadline for habeas corpus petitions under 28 U.S.C. § 2244(d)(1) can be subject to equitable tolling

only when the principles of equity would make [the] rigid application [of a limitation period] unfair. Generally, this will occur when the petitioner has in some extraordinary way...been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.

Miller v. New Jersey Dept. of Corr., 145 F.3d 616, 618-19 (3d Cir. 1998) (internal citations and

¹ Petitioner is now represented by different counsel.

quotations omitted). Thereafter, the court enumerated three circumstances permitting equitable tolling: “if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum. Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (internal citations and quotations omitted).

The issue raised by petitioner with respect to equitable tolling in this case has repeatedly been rejected. As explained by the Third Circuit in Fahy v. Horn, 240 F.3d 239, 244 (2001), “[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the ‘extraordinary’ circumstances required for equitable tolling.” See also Harris v. Hutchinson, 209 F.3d 325, 330-31 (4th Cir. 2000) (holding no equitable tolling for petitioner who relied on mistaken advice of counsel in calculating federal filing deadline, even where counsel’s mistake was “innocent”); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (finding lawyer’s inadequate research, which led to miscalculating the deadline, did not warrant equitable tolling).

Attorney error is not a basis for equitable tolling in the Third Circuit because it does not rise to the level of the extraordinary circumstances which must be present for equitable tolling to apply. Accordingly, petitioner’s Objection to the Report and Recommendation is overruled.

BY THE COURT:

JAN E. DUBOIS, J.