

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

<b>MICHAEL GAYNOR</b>	:	<b>CIVIL ACTION</b>
<b>Petitioner</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>SUPERINTENDENT K. KYLER <u>et al.</u></b>	:	<b>No. 01-4346</b>
<b>Respondents.</b>	:	

**MEMORANDUM AND ORDER**

**Norma L. Shapiro**

**October 24, 2003**

Petitioner, Michael Gaynor, has filed timely objections to the Report and Recommendation issued by Magistrate Judge Diane M. Welsh on April 29, 2003. Gaynor v. Kyler, No. 01-4346 (E.D. Pa. Apr. 29, 2003) (Report and Recommendation) (“R & R # 2”). The court conducts de novo review of the portions of a magistrate judge's Report and Recommendation to which specific objections have been filed. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

**Background**

In August 2001, Michael Gaynor filed a petition for a writ of habeas corpus. The petition was referred to Magistrate Judge Welsh. In her original Report and Recommendation, dated October 23, 2001, Judge Welsh found Gaynor failed to meet the one-year statute of limitations for habeas petitions for the Antiterrorism and Effective Death Penalty Act (AEDPA). Gaynor v. Kyler, No. 01-4346 (E.D. Pa. Oct. 23, 2001) (“R & R #1”). Judge Welsh recommended the petition be summarily dismissed as untimely filed, without any findings or recommendations on the merits.

Gaynor, filing objections to the Report and Recommendation, claimed that: Judge Welsh improperly raised the statute of limitations sua sponte and should only have considered that issue if raised as an affirmative defense by the Commonwealth; because the Commonwealth failed to raise the timeliness defense, Gaynor had no notice or opportunity to argue equitable tolling; and because counsel misadvised him when the limitation period began to run, the statute was equitably tolled by his diligent pursuit of his legal rights. Because the Court of Appeals decided in Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002), cert denied, 2003 U.S. LEXIS 6105 (2003), the statute of limitations is an affirmative defense, waivable by the Commonwealth, this court did not adopt R & R #1 but remanded the case. On April 29, 2003, Judge Welsh issued R & R #2, and Gaynor again filed timely objections. R & R #2 failed to address the significance of Robinson on Gaynor's claims, so we have not approved the Report but agree with the Recommendation.

### **Discussion**

In Robinson, the appellate court considered whether the Commonwealth had waived its Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C.S. § 2241 et seq. ("AEDPA"), limitations defense. 313 F.3d at 134. The appellate court determined that because the AEDPA limitations period is non-jurisdictional and "subject to equitable modifications such as tolling, it is also subject to other non-jurisdictional, equitable considerations, such as waiver." Id. Under Fed. R. Civ. P. 8(c), the defense had to be raised at the earliest practicable moment if not pleaded in the answer. Id., at 137. However, the court held the Commonwealth did not waive its limitations defense by not raising it when challenging the second petition on the ground of

successiveness or by not raising it in the appellate court in response to petitioner's appeal from the district court's dismissal of his petition. The requirements of Rule 8(c) applied only after the jurisdictional issue of successiveness was decided.

Petitioner mistakenly asserts it was mandatory for respondents to file a Rule 12(b)(6) motion in order to assert a statute of limitations defense. Robinson specifically explains:

Rule 12(g) requires the consolidation of all defenses "which the rule permits to be raised by motion." Fed. R. Civ. P. 12(g)." But, while the Third Circuit "permits a limitations defense to be raised by motion, Rule 12 does not list it among the enumerated defenses deemed waived if not consolidated with other defenses. See Fed. R. Civ. P. 12(h) (setting forth defenses waived if omitted from motion in circumstances described in Rule 12(g)). Id., at 138.

There was no Rule 12(b)(6) motion filed in this case but respondent asserted the defense in the earliest pleading: the response to the habeas petition. Respondent did not waive the statute of limitations defense.

Gaynor's next objection is that respondent's answer did not address the equitable tolling defense raised by Gaynor in his objections to R & R #1, so Judge Welsh erred in concluding in R & R #2 that equitable tolling did not apply. Gaynor apparently seeks to extend the requirement under Fed. R. Civ. P 8(c) that affirmative defenses be affirmatively pleaded. Equitable tolling is not an affirmative defense, but an exception to the application of the statute of limitations. There was no requirement respondents' answer negate equitable tolling.

R & R #2 was filed before Gaynor's Traverse (Reply) so he claims his equitable tolling arguments were not considered; therefore, we consider this claim de novo. Gaynor claims that the limitations period should be equitably tolled because of alleged incorrect advice of counsel. It is well-established AEDPA's one year filing requirement is equitably tolled only in

extraordinary circumstances. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001), cert denied, 534 U.S. 944 (2001). The Fahy 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. Id., at 244, citing Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted).

Mere excusable neglect is not sufficient to warrant equitable tolling. Jones v. Morton, 195 F.3d at 159, quoting Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998).

In Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001), cert denied, 534 U.S. 944 (2001), the Court of Appeals stated, “in 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.” The Court of Appeals has consistently rejected the argument that an attorney’s mistake in determining the date a habeas petition is due constitutes extraordinary circumstances for the purposes of equitable tolling. Pace v. Vaughn, 71 Fed. Appx. 127 (3d Cir. 2003); Merritt v. Blaine, 326 F.3d 157 (3d Cir. 2003); Brown v. Shannon, 322 F.3d 768, 774 (3d Cir. 2003); Hubley v. Superintendent, 57 Fed. Appx. 927, 933 (3d Cir. 2003); Johnson v. Hendricks, 314 F.3d 159, 163 (3d Cir. 2002).

Equitable tolling was granted for attorney error in Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236 (3d Cir. 1999), a non-capital case. But in Seitzinger, an action under Title VII, the court granted equitable tolling only because the attorney’s affirmative misrepresentations were directly responsible for the untimeliness of the plaintiff’s complaint. 165 F.3d at 237-38.

Gaynor has not demonstrated in what “extraordinary way [he has] been prevented from asserting

his rights” as a result of attorney error, deception, or otherwise. Fahy, 240 F.3d at 244.

Equitable tolling does not apply.

Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit and 28 U.S.C. §2253(c), require a district judge to make a determination whether a certificate of appealability (“COA”) should issue when a habeas petition is denied. Under AEDPA, “a COA may not issue unless ‘the applicant has made a substantial showing of the denial of a constitutional right.’” Slack v. McDaniel, 529 U.S. 473, 483 (2000) (remanding habeas petition to the district court as not “second or successive,” with an instruction to consider whether a certificate of appealability should issue) , quoting, 28 U.S.C. §2253(c). When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, the prisoner must demonstrate that reasonable jurists would find debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the district court was correct in its procedural ruling. Slack, 529 U.S. at 484. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id.

Gaynor’s Petition is barred by the AEDPA one-year period of limitation and the period is not statutorily or equitably tolled; reasonable jurists would not find this debatable. Gaynor has not made a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

**Conclusion**

For the reasons stated above, and in R & R #2, the petition for writ of habeas corpus is dismissed as time-barred.

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

<b>MICHAEL GAYNOR</b>	:	<b>CIVIL ACTION</b>
<b>Petitioner</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>SUPREINTENDENT K. KYLER <u>et.al.</u></b>	:	<b>No. 01-4346</b>
<b>Respondents.</b>	:	

**ORDER**

**Norma L. Shapiro**

**October 24, 2003**

AND NOW, this 24<sup>th</sup> day of October, 2003, upon consideration of the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. §2254, all documents submitted in support thereof, and the Response of the District Attorney of Philadelphia, and on review of the Report and Recommendation of United States Magistrate Judge Diane M. Welsh, it is hereby ORDERED that:

1. The Report is NOT APPROVED;
2. The Recommendation is ADOPTED;
3. The Petition for Writ of Habeas Corpus is DISMISSED as time-barred;
4. A certificate of appealability will not issue.

---

Norma L. Shapiro, S.J.