

3. The petitioner has failed to meet the procedural requirements to have a petition reviewed; therefore he has not shown a denial of a constitutional right. Consequently, a certificate of appealability is DENIED.

The procedural history of this case is outlined in the Report and Recommendation ("R & R"), and is adopted herein. The R & R concluded that the petitioner's habeas corpus petition was untimely under the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA").¹ The R & R also concluded that neither statutory tolling nor equitable tolling applied to excuse the fact that the petition was untimely.

The petitioner timely filed objections to the R & R, putting forth arguments that could be read to justify equitable tolling of the AEDPA's limitations period. Because the magistrate judge raised the issue of the AEDPA statute of limitations sua sponte, this Court, by Order of March 4, 2002, invited the petitioner to further explain the circumstances which might justify equitable tolling. Although the Court now

¹ The AEDPA imposes a one year statute of limitations for the filing of habeas corpus petitions following the date upon which state court judgement of conviction becomes final, See 28 U.S.C. §2244. The Report and Recommendation concluded that the present petition was filed more than a year after the one year statute of limitations had run. See R & R, at 6.

concludes that equitable tolling applies to toll some of the time that was counted against the petitioner's one year period to file a habeas petition, the petitioner's habeas petition is still untimely under the AEDPA, and must be dismissed.

The petitioner's primary objection to the R & R relates to the filing by the petitioner of two **coram** nobis petitions with the Bucks County Court of Common Pleas. The petitioner filed the coram nobis petitions seeking to withdraw his **1984** guilty plea to a charge of possession with intent to deliver a controlled substance. The first coram nobis petition was filed on February 26, **1996**. Before the state court ruled on that petition, the petitioner filed an amended coram nobis petition, along with a proposed order, on April 17, 1997. On April 23, 1997, the state court returned the proposed order with the notation "Order Refused."

Apparently believing that his original coram nobis petition remained pending before the Court of Common Pleas after April 23, the petitioner filed a petition in support of his original coram nobis petition on April 29, **1997**. After receiving no response to his original coram nobis petition or his April 29 petition in support thereof, the petitioner filed a petition for a writ **of** mandamus on August 20, **1997**. Receiving no response to the mandamus petition, the petitioner filed an emergency request

for a writ of mandamus in the Superior Court on October 14, 1997.

The petitioner, through the mandamus petitions, sought an order requiring the Court of Common Pleas to rule **on** the petitioner's coram nobis petition so that he could exhaust his state court remedies. On April 23, 1998, the Superior Court denied both mandamus petitions. Thereafter, on September 10, 1998, the petitioner filed a petition for collateral relief pursuant **to** the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546.

The R & R concluded that statutory tolling was appropriate for the time during which the petitioner's mandamus petitions were pending before the Superior Court.' However, the R & R did not toll the period between the April 23, 1997 denial of the second coram nobis petition and the August 20, 1997 filing

² The petitioner also apparently filed an "Application for Leave to File Original Process; Emergency Request for Order for Writ **of** Mandamus" in the Supreme Court *of* Pennsylvania on December 12, 1997. It was not until June 16, 1998 that the petitioner received notification that the Supreme Court did not write an opinion when it denied his petition. The pendency of this petition (if indeed it were properly filed) could also arguably support tolling of the AEDPA limitations period. However, the period from December 26, 1997 through April 23, 1998 is already tolled because *of* the pendency of the mandamus petitions before the Superior Court. Even if the Court were to conclude that it was appropriate to equitably toll the 53 days between April 23 and June **16**, 1998 because of the petitioner's filing in the Supreme Court, the petitioner's one year AEDPA limitation period would still have expired before his habeas petition was filed on June 7, 2001 (see discussion below).

of the first petition for a writ of mandamus. Therefore, these 118 days were counted against the petitioner's one year AEDPA limitations period.

The petitioner argues that because the Court of Common Pleas never answered his original coram nobis petition, and even accepted a supplemental filing in support of that petition after refusing his second petition, the time during which that petition was pending should not count against his limitations period. This argument presents strong grounds for equitable tolling.

Equitable tolling is appropriate when "principles of equity would make the rigid application of a limitation period unfair." Miller v. N.J. State Dep't of Corr., 145 F.3d 616, 618-19 (3d Cir. 1998). In order to qualify for equitable tolling, a petitioner must assert that he "exercised reasonable diligence in investigating and bringing [the] claims", although mere "excusable neglect is not sufficient." Id. The Third Circuit has held that equitable tolling may be appropriate if (1) the defendant has actively misled the plaintiff, (2) 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, 158 (3d Cir. 1999).

The petitioner's actions illustrate that he exercised

reasonable diligence in seeking to have the Court **of** Common Pleas respond to his original coram nobis petition so that he could exhaust his state court remedies. By filing a petition in support of his original coram nobis petition and following up with two petitions for a writ of mandamus to have the state court respond to the original petition, the petitioner showed reasonable diligence in pursuing his claim.³ Moreover, the fact that the Court of Common Pleas did not inform the petitioner that his original coram nobis petition was no longer pending, even after accepting a supplemental filing in support of that petition, may satisfy the standard for equitable tolling under Jones.

However, after his two petitions for a writ **of** mandamus were denied on April 23, **1998**, the petitioner should have been under no illusion that his coram nobis petition was still pending before the Court of Common Pleas. Indeed, without receiving any further notice regarding the coram nobis petition, the petitioner filed a PCRA petition on September **10, 1998**. Therefore, although

³ The petitioner also wrote a letter to the clerk **of** the Court of Common Pleas on July 20, 1997 requesting information about the disposition of his original coram nobis petition. In response, the petitioner was forwarded a copy of the docket sheet from his case, which indicated only that on April 23, 1997 the proposed order attached to the amended coram nobis petition was returned unsigned and refused.

there is justification for equitably tolling the 118 days between the April 23, 1997 denial of the second coram nobis petition and the August 20, 1997 filing of the first petition for a writ of mandamus, there is no similar justification for tolling the period between the April 23, 1998 denial ~~of~~ the mandamus petitions and the September 10, 1998 filing ~~of~~ the PCRA petition.

After equitable tolling it taken into account, the following periods must be counted against the petitioner's one year AEDPA statute of limitations: the 139 days between the denial of the petitioner's mandamus petitions and the filing of his PCRA petition (from April 24, 1998 - September 10, 1998); the 147 days between the deadline for appealing the Superior Court's denial of his PCRA petition⁴ and the filing of leave to appeal that denial nunc pro tunc (from April 18, 2000 - September 11, 2000); and, the 201 days between the denial of leave to appeal

⁴ The R & R counted the 29 days between the Common Pleas Court's denial of the petitioner's PCRA Petition on October 6, 1998 and his appeal of that decision to the Superior Court on November 5, 1998 against the one year time limit for seeking habeas relief under the AEDPA. Under the teaching of Swartz v. Mevers, 204 F.3d 417 (3d Cir. 2000), however, the time between a state's denial of post-conviction relief and the timely appeal thereof (or the time when the appeal was due, if no appeal was taken) should be tolled pursuant to 28 U.S.C. § 2244(d)(2) because the petitioner's application for relief is "pending" during that period. Swartz, 204 F.3d at 424. Therefore, those 29 days are not counted against the petitioner's limitations period.

nunc pro tunc and the filing of his petition for habeas corpus (from November 20, 2000 to June 6, 2001). Therefore, by the time the petition filed for habeas relief, 487 days had passed, well beyond the one year limitations period allowed by the AEDPA; the petition was 122 days late.⁵ For that reason, the petitioner's habeas petition is untimely, and must be dismissed.

BY THE COURT:


MARY A. McLAUGHLIN / J.

⁵ The petitioner also seems to argue that the state court could have considered his original coram nobis petition as a PCRA petition, which would have made that PCRA petition timely. He argues that the court's failure to inform him of this option supports equitable tolling. However, this argument doesn't excuse the delays between the denial of his mandamus petitions and the filing of his PCRA petition, between the denial of his PCRA petition and his request to appeal therefrom, or between the denial of his request to appeal and the filing of his habeas petition. For that reason, this argument does not affect the AEDPA calculations.