

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

VINCENT TOLENTINO,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	
DONALD VAUGHN, et al.,	:	NO. 02-8889
Respondents	:	

ORDER

AND NOW, this <sup>1<sup>st</sup></sup> day of June, 2003, upon careful and independent consideration of the pleadings and record, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith (Docket No. 11) and the petitioner's objections thereto, IT IS HEREBY ORDERED that:

(1) the petitioner's objections to the Report and Recommendation are overruled for the reasons stated below;

(2) the Report and Recommendation is APPROVED and ADOPTED except for the Magistrate Judge's discussion of procedural default in footnote three;

(3) the Petition for Writ of Habeas Corpus is DENIED and DISMISSED;

(4) there is no probable cause to issue a certificate of appealability.

In his Report and Recommendation, Magistrate Judge Charles B. Smith recommended dismissal **of** the petition as time-barred by the one year statute **of** limitations set forth in the Antiterrorism and Effective Death Penalty Act of **1996** ("AEDPA"), 28 U.S.C. § 2244(d). The Court agrees with this conclusion and will dismiss the petition. The Court writes separately to amplify the facts relevant to whether the petition is time-barred and to address the objections raised by the petitioner.

In summary, the petitioner's probation was revoked on December 29, **1997** by the Honorable Pamela Cohen Dembe of the Philadelphia County Court of Common Pleas. In revoking the petitioner's probation, Judge Dembe relied in part **on** the petitioner's December **1, 1997** arrest for carrying a weapon. On September 24, **1998**, the petitioner challenged Judge Dembe's decision through a Post-Conviction Relief Act ("PCRA") petition. The petition was dismissed on March **17, 1999**. No appeal was taken.

On June **6, 1999**, while the petitioner was in prison, the charge related to the petitioner's December **1, 1997** arrest was dismissed for failure to prosecute. The petitioner learned of the dismissal in September 2001 from his parole agent. The petitioner was in prison until August **2001**. Pet'r Traverse to the Ans. **Ex. 2**; Pet'r Objections, at ¶¶ 5-7.

The petitioner challenged the probation revocation decision in a December 18, 2001 pro se PCRA petition and a state writ of habeas corpus filed sometime in 2002. Both filings were denied in state court as untimely. Pet'r Objections, at ¶¶ 7-8.

On December 4, 2002, the petitioner filed his federal habeas corpus petition claiming that he is innocent of the charges used to revoke his probation. The government argues that the petition is time-barred.

Under AEDPA, the petitioner had one year to apply for a writ of habeas corpus. The one year limitations period begins to run from the latest of several dates. 28 U.S.C. § 2244(d)(1). The limitations period is subject to statutory and equitable tolling. Statutory tolling applies during the time that a properly filed application for state post-conviction relief is pending. Untimely applications are not properly filed and do not toll the statute of limitations. 28 U.S.C. § 2244(d)(2); Merritt v. Blaine, 326 F.3d 157, 165-66 (3d Cir. 2003). Equitable tolling applies when: (1) the government actively misled the petitioner; (2) the petitioner was prevented in some extraordinary way from asserting his rights; or (3) the petitioner has timely asserted his rights mistakenly in the wrong forum. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001).

The Report and Recommendation concluded that, after allowing for the proper amount of statutory tolling and finding

that the circumstances did not warrant equitable tolling, the petitioner had until mid-August 1999 to file a habeas petition. The petition for a writ of habeas corpus filed on December 4, 2002, therefore, is time-barred. The Magistrate Judge reached his conclusion by using January 28, 1998 as the starting point for the one year limitations period. Under 28 U.S.C. § 2244(d) (1)(A), January 28, 1998 was a possible starting point for the limitations period because it was the date on which the probation revocation decision became final. The Magistrate Judge's conclusion that the petition is time-barred is correct when January 28, 1998 is used as the starting point for the limitations period.

The petitioner argues in his objections that the one year limitations period began to run in September 2001 when he learned that the charge from his arrest on December 1, 1997 had been dismissed. The dismissal of the earlier charge is the factual predicate for the petitioner's claim that he is innocent of the charges used to revoke his probation.

The petitioner is correct that the one year limitations period may begin on the date that the factual predicate for a claim could be discovered. The limitations period, however, begins when the factual predicate could have been discovered through an exercise of due diligence. This is not necessarily

the date that the petitioner learned of the factual predicate of his claim. See 28 U.S.C. § 2244(d) (1)(D).

The earlier charge was dismissed on June 6, 1999. The dismissal was discoverable through an exercise of due diligence shortly after the dismissal occurred. If the petitioner had been tracking the status of his criminal case, he should have been able to learn of the dismissal by the end of June 1999 at the latest. The petitioner, however, took no action to learn the status of the earlier charge.

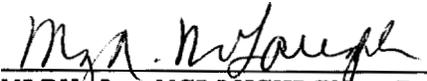
Even if the one year limitations period began at the end of June 1999, the habeas petition is still time-barred. The statute of limitations expired at the end of June 2000 because nothing happened in the year after the end of June 1999 to trigger statutory or equitable tolling. The untimely state court filings in December 2001 and sometime in 2002 were filed over seventeen months after the statute of limitations expired. Whether the state court filings could toll a limitations period that had not yet expired is irrelevant because the time the petitioner had to file a habeas petition had already expired.

In his objections, the petitioner argues that equitable tolling should apply because he alleges that he is actually innocent of the charges that led to his parole being revoked. A claim of actual innocence, however, does not fit within the narrow set of circumstances that allow for equitable tolling.

Actual innocence does not explain why there was a delay in the filing of the petition.

Regardless of whether the one year limitations period began on January 28, 1998 or at the end of June 1999, the petition is time-barred. The Court, therefore, expresses no opinion on whether the doctrine of procedural default would also bar the petition.

BY THE COURT:

  
MARY A. MCLAUGHLIN, J.

faxed 6/4/03  
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V. Tolentino