

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

ROBERT HOLBROOK, : CIVIL ACTION
 : NO. 03-6841
 Petitioner, :
 :
 v. :
 :
 SUPERINTENDENT LOUIS FOLINO, :
 ET AL. :
 :
 Respondents. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

FEBRUARY 28, 2005

Before the Court is a Report and Recommendation from Magistrate Judge Jacob P. Hart recommending that pro se Petitioner Robert Holbrook's request for habeas relief pursuant to 28 U.S.C. 2254 be denied and dismissed as untimely. For the reasons that follow, the Court will adopt the Report and Recommendation of the Magistrate Judge.

I. BACKGROUND

Petitioner Robert Holbrook ("Petitioner") pled guilty in the Court of Common Pleas for Philadelphia County to murder generally, robbery, burglary, criminal conspiracy and possessing an instrument of crime. The Honorable Michael R. Stiles then presided over a non-jury hearing to determine the degree of

murder. On February 28, 1991, following the degree-of-guilt hearing, Judge Stiles convicted Petitioner of first-degree murder, robbery, burglary, criminal conspiracy and possessing an instrument of crime, and imposed the mandatory sentence of life imprisonment for first-degree murder, deferring sentencing on the remaining convictions.

Petitioner subsequently retained new counsel and filed a motion to withdraw his guilty plea. On January 22, 1992, following a two day evidentiary hearing, Judge Stiles denied Petitioner's motion to withdraw his guilty plea and imposed sentences on the robbery and conspiracy convictions to be served concurrently to Petitioner's life sentence. Petitioner appealed to the Superior Court of Pennsylvania and on August 9, 1993 the Superior Court rejected Petitioner's claims as meritless and affirmed the judgment of sentence imposed by the trial court. See Commonwealth v. Holbrook, 427 Pa. Super. 387, 629 A.2d 154 (1993). Petitioner then filed a petition for allowance of appeal in the Pennsylvania Supreme Court which was denied on December 14, 1993. See Commonwealth v. Holbrook, 536 Pa. 620, 637 A.2d 280 (1993). On March 14, 1994, Petitioner's convictions became final upon expiration of the ninety day period in which to file a petition for writ of certiorari in the United States Supreme Court. See SUP. CT. R. 13.

On December 18, 1996, Petitioner filed a timely pro se petition for relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541, et seq., in the Court of Common Pleas asserting, inter alia, involuntariness of plea, ineffective assistance of counsel, and evidentiary error at the degree-of-guilt hearing. Counsel was appointed and counsel subsequently filed a "no merit" letter pursuant to Commonwealth v. Finley, 379 Pa. Super. 390, 550 A.2d 213, 215 (1988) (en banc). Following its own independent review of the record, the PCRA court dismissed Petitioner's PCRA petition on August 7, 1997. Petitioner retained new counsel and appealed to the Pennsylvania Superior Court. On July 27, 1999, the Superior Court, finding that Petitioner's claims were meritless, affirmed the decision of the PCRA court.

On May 17, 2000, the Pennsylvania Supreme Court granted Petitioner's request for an allowance of appeal and remanded the case to the PCRA court for consideration of Petitioner's ineffectiveness claim. On remand, the PCRA court found Petitioner's ineffectiveness claim to be meritless. Petitioner appealed that decision to the Pennsylvania Superior Court and on August 14, 2002, the Superior Court again affirmed denial of PCRA relief. See Commonwealth v. Holbrook, 809 A.2d 957 (Pa. Super. 2002). State remedies were exhausted on December 24, 2002, the

date on which the Pennsylvania Supreme Court denied allocatur.
See Commonwealth v. Holbrook, 572 Pa. 731, 815 A.2d 631 (2002).

Petitioner filed the instant Petition for a Writ of Habeas Corpus on December 22, 2003 asserting the following four grounds for relief: (1) Petitioner was unlawfully coerced to plead guilty by counsel who promised a verdict of third-degree murder; (2) counsel was ineffective for failing to adequately investigate and prepare Petitioner for the "hearing"; (3) counsel did not remain with Petitioner during his statements to police rendering those statements constitutionally infirm since Petitioner was a juvenile at the time unable to waive his right to counsel; and (4) counsel was ineffective at the change of plea hearing for failing to adequately prepare and advise Petitioner for his guilty plea.

Magistrate Judge Hart issued his Report and Recommendation, recommending dismissal of the Petition as untimely, on June 4, 2004. Objections to the Report and Recommendation were then filed by Petitioner on July 9, 2004. This Court's review of the portions of the Report to which objections were lodged is de novo. 28 U.S.C. § 636(b)(1).

II. DISCUSSION

Petitioner's claims are time-barred by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"). The AEDPA, enacted April 24, 1996, imposes a one-year statute of limitations on prisoners seeking federal habeas review of state convictions. 28 U.S.C. § 2244(d)(1). The one-year period for filing a petition for a writ of habeas corpus runs from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. However, the habeas statute provides that the time during which an application for State post-conviction or collateral review is "pending" is not to be counted in calculation of the one-year period. 28 U.S.C. § 2244(d)(2). Moreover, the Third Circuit has made clear that any time prior to the enactment date of the AEDPA, April 24, 1996, is also not to be counted in the one-year calculation. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998).

Here, Petitioner's pertinent state convictions became final on March 14, 1994. Since none of the exceptions to the limitations period set forth in 28 U.S.C. § 2244(d)(1)(B)-(D) apply and since Petitioner's convictions became "final" before the AEDPA came into effect on April 24, 1996, the one-year statute of limitations period began to run from that date. See Douglas v. Horn, 359 F.3d 257, 261 (3d Cir. 2004) (citing Burns, 134 F.3d at 111). The statute of limitations period was then tolled 238 days later on December 18, 1996 when Petitioner filed a pro se PCRA petition. The limitations period began to run again on December 24, 2002, when the Pennsylvania Supreme Court denied allocatur effectively exhausting Petitioner's state remedies. See Stokes v. Dist. Attorney of the County of Phila., 247 F.3d 539, 542-43 (3d Cir. 2001) (holding that the statute of limitations period is not tolled during the ninety day period following exhaustion of state remedies when a state prisoner may file a writ of certiorari in the United States Supreme Court). Since 238 days passed prior to Petitioner's filing of his PCRA petition, he had 127 days following denial of allocatur, or until April 30, 2003, to file a timely federal habeas petition. Petitioner, however, delayed in filing the instant Petition until December 22, 2003, 234 days past the deadline. Therefore, the instant Petition is untimely.

The Third Circuit, however, has held that the AEDPA's one-year statute of limitations period is not an "absolute limit." Schlueter v. Varner, 384 F.3d 69, 75 (3d Cir. 2004) (citing Douglas, 359 F.3d at 261). The statute of limitations period is subject to equitable tolling. Lacava v. Kyler, --- F.3d ---, 2005 WL 326832, at *3 (3d Cir. 2005). The doctrine of equitable tolling, however, is to be used "sparingly," applied "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice." Id. (quotation marks and citation omitted). In Miller v. New Jersey State Dep't of Corr., 145 F.3d 616 (3d. Cir. 1998), the Third Circuit first declared that the AEDPA's one-year statute of limitations was subject to equitable tolling explaining that "[g]enerally, this will occur when the petitioner has 'in some extraordinary way . . . been prevented from asserting his or her rights.'" Id. at 618 (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1380 (3d Cir. 1994)). Citing Miller and its progeny, the Third Circuit most recently propounded that:

Equitable tolling is appropriate when "the principles of equity would make the rigid application of a limitation period unfair," . . . such as when a state prisoner faces extraordinary circumstances that prevent him from filing a timely habeas petition and the prisoner has exercised reasonable diligence in attempting to investigate and bring his claims. . . . Mere excusable neglect is not sufficient.

Lacava, 2005 WL 326832, at *3 (citations omitted).

In the form of objections to the Report and Recommendation, Petitioner offers two bases for equitable tolling in this case: (1) Petitioner was placed in restrictive housing and thereby denied access to legal materials and information pertaining to his case by prison officials during the statute of limitations period, and (2) Petitioner is actually innocent of the charges brought against him. Each objection will be addressed in turn.

A. Deprivation of Access to Legal Materials and Case Documents Claim

Petitioner asserts that his case involves extraordinary circumstances warranting tolling of the AEDPA one-year statute of limitation because during the period of June 26, 2002 to August 21, 2003 he was held in restrictive housing and thereby denied access to the law library, telephone, privileges and information pertaining to his case. According to Petitioner, the violation was so egregious that he filed a civil rights action under 42 U.S.C. § 1983. Petitioner cites Miller for support as the habeas petitioner in that case attributed his delay in filing for federal habeas relief to the fact that he was in transit between various institutions and consequently without access to his legal documents during the statutory period. Miller, 145 F.3d at 617. The Third Circuit, for the first time recognizing the applicability of equitable tolling to the AEDPA's one-year

statute of limitations period remanded the case to the district court for consideration of petitioner's equitable tolling claim. Id. at 617-18.

Petitioner's assertion that he was without access to information pertaining to his case and other legal materials from June 26, 2002 to August 21, 2003 is somewhat contradicted by the fact that Petitioner must have requested an allowance of appeal in the Pennsylvania Supreme Court at some point in time following the Superior Court's affirmation of denial of his PCRA petition on August 14, 2002 and the Pennsylvania Supreme Court's denial of allocatur on December 24, 2002. Nevertheless, even accepting Petitioner's assertion as true, the Court concludes that Petitioner has failed to demonstrate that he acted with reasonable diligence in investigating and bringing his claim. This conclusion is bolstered by the Third Circuit's decision in Robinson v. Johnson, 313 F.3d 128, 142-43 (3d Cir. 2002) where the Court of Appeals found that a petitioner who had alleged deprivation of access to legal materials was not entitled to equitable tolling. Specifically, the petitioner in Robinson had asserted that he was transferred to a different unit at his correctional institution in August of 1997 with less than five weeks before the expiration of the statute of limitations, id. at 142, which expired not later than September 25, 1997,¹ id. at

¹ There was an unresolved issue in Robinson as to whether the statute of limitations period expired on April 23, 1997 or

133. According to the petitioner, all of his personal belongings, including his legal papers, were taken from him and never returned at the time of the transfer. Id. The petitioner asserted that without those legal papers he was not able to submit a timely petition. Id. The petitioner in Robinson eventually filed a grievance in December of 1997, over two months after the limitations period expired, stating that he had asked prison staff members to obtain his legal documents in September 1997. Id. The petitioner in Robinson ultimately filed his federal habeas petition with the district court in September 1998. Id.

The Third Circuit concluded that the facts presented in Robinson did not provide a basis for equitable tolling. Id. Particularly, the Robinson court found that the petitioner failed to demonstrate that he exercised adequate diligence in attempting to file a timely petition. Id. Problematic was the fact the petitioner's grievance was filed two months after expiration of the statute of limitations and it stated that the legal documents were needed for petitioner's state court filings. Id. The Third Circuit also explained that the petitioner ultimately filed his federal habeas petition without the benefit of the legal documents suggesting that they were not necessary to his federal filing. Id. The Third Circuit further explained that

September 25, 1997. See Robinson, 313 F.3d at 133.

while the fact that the petitioner's deprivation occurred at the very end of the limitations period was troublesome, the petitioner did not claim that he was working on the habeas petition before his papers were removed. Id. at 143. Finally, the Third Circuit remarked that the petitioner in Robinson did not seek to file a timely petition and then clarify it once he had access to his materials as he would have been permitted to do under 28 U.S.C. § 2242 and Federal Rule of Civil Procedure 15(a). Id.

In the instant matter, the facts alleged by Petitioner, to some degree, support application of the doctrine of equitable tolling where the facts described by the Third Circuit in Robinson did not. For instance, here Petitioner alleges that his denial of access to legal materials was so egregious that he filed a civil rights action under 42 U.S.C. § 1983 more than 3 months prior to expiration of the one-year statute of limitations period. Also, Petitioner here was purportedly in restrictive housing without access to legal materials substantially longer than five weeks. According to Petitioner, he was in restrictive housing for over thirteen months, which included the last four months of the statute of limitations period.

Despite these factors, the evidence collectively demonstrates that Petitioner failed to exercise the diligence necessary to warrant application of the "sparing" doctrine of

equitable tolling. First, the civil rights action Petitioner references essentially requests access to legal materials for purposes of litigating an earlier section 1983 case Petitioner had filed. There is no indication in the section 1983 Complaint referenced by Petitioner that Petitioner sought access to materials for the filing of a federal habeas petition. This fact makes the instant case like Robinson where the petitioner in that case filed a grievance seeking access to legal materials for preparation of state court filings. Second, the argument of deprivation of access to legal materials does nothing to explain the lack of diligence during periods when Petitioner was not in restrictive housing. See McKeithan v. Varner, 108 Fed. Appx. 55, 59 (3d Cir. 2004) (not precedential) (finding no basis for equitable tolling where a habeas petitioner alleged restricted access to legal materials but failed to explain his lack of diligence during periods when he was not in restrictive housing), cert. denied, --- S. Ct. ---, 2005 WL 406358 (U.S. Feb. 22, 2005) (No. 04-7451). For instance, Petitioner waited 238 days after enactment of the AEDPA before filing his PCRA petition effectively tolling the statute of limitations. The obligation to exercise reasonable diligence pertains not only to the filing of the federal habeas petition but also "exists during the period appellant is exhausting state court remedies." Lacava, 2005 WL 326832, at *4. Moreover, any delay in filing for state

collateral relief is a factor to be considered in determining whether a petitioner has exercised reasonable diligence. See id. Petitioner also waited three months after being released from restrictive housing before filing his Petition and not once sought an extension to file it beyond the one-year period. Finally, Petitioner, like the petitioner in Robinson, opted not to file a timely petition and then clarify it once he had access to his materials as the law would have allowed him to do. 28 U.S.C. § 2242; FED. R. CIV. P. 15(a); see also United States v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999) (holding that the Federal Rules of Civil Procedure apply to motions to amend habeas corpus petitions).

B. Actual Innocence Claim

Petitioner secondarily argues as a basis for equitable tolling that he was actually innocent of the crimes of which he was convicted. A credible allegation of "actual innocence," constitutes a "miscarriage of justice" that enables courts to hear the merits of otherwise procedurally defaulted habeas claims. Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004), cert. denied, 125 S. Ct. 910 (2005). To date, neither the Supreme Court nor the Third Circuit has addressed the issue of whether there is an "actual innocence" exception to the one-year statute of limitations period for petitions filed under 28 U.S.C.

§ 2254. See Lacava, 2005 WL 326832, at *2 n.3 (declining to address whether petitioner's actual innocence claim could overcome the time-bar of the AEDPA); Hussman v. Vaughn, 67 Fed. Appx. 667, 669 (3d Cir.) (finding that a habeas petitioner failed to establish actual innocence and thereby declining to address whether there is an actual innocence exception to the AEDPA's statute of limitations) (not precedential), cert. denied, 540 U.S. 936 (2003). This Court, however, need not reach the issue because Petitioner has failed to proffer evidence to establish that an actual innocence exception would apply in this case.

"'To be credible', a claim of actual innocence must be based on reliable evidence not presented at trial." Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (internal citation omitted). In order to establish actual innocence on a habeas claim, a habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (quotation marks and internal citations omitted). The requisite probability is established by a showing by the petitioner that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence" presented in his habeas petition. Id. at 327.

Here, Petitioner failed to point to any specific evidence in the instant Petition from which this Court could conclude that no reasonable juror would have convicted him. In fact, nowhere in the instant Petition did Petitioner claim that he was actually innocent. Petitioner for the first time asserted that he was "actually innocent" in Objections to the Report and Recommendation. In support of his assertion that he was actually innocent, Petitioner claimed that he was questioned as a juvenile without counsel and was misled by counsel into pleading guilty. Petitioner also argued that all evidence points to his having a minor role, if any, in the substantive offense. Petitioner further argued that there is a growing and compelling amount of scientific evidence that exists to indicate that juveniles are incapable of understanding their rights and of forming specific intent.

None of the reasons provided by Petitioner in support of his actual innocence claim establish that Petitioner was actually innocent of the crimes of which he was convicted such that this Court could conclude that no reasonable juror would have convicted him. Assuming arguendo that there is some validity to Petitioner's allegations that he was inappropriately questioned without counsel as a juvenile and misled into pleading guilty by his counsel, this evidence does nothing to demonstrate that Petitioner is innocent of the crimes of which he was

convicted. Petitioner's general reference that he played a minor role in the substantive offense also does not prove actual innocence. "Assertions of innocence must be buttressed by facts in the record that support a claimed defense." United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2003). Finally, as to Petitioner's argument that there is a growing and compelling amount of scientific evidence that exists to indicate that juveniles are incapable of understanding their rights and of forming specific intent, Petitioner does not argue, let alone offer case-specific evidence establishing, that he was incapable of forming specific intent thereby rendering him innocent of the crimes of which he was convicted. Therefore, Petitioner has not established a claim of actual innocence in this case.

III. CONCLUSION

Petitioner's claim is barred by the one-year statute of limitation set forth under the AEDPA. Moreover, there is no basis for equitable tolling in this case. For the foregoing reasons, the instant Petition for Writ of Habeas Corpus is dismissed as untimely.

