

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

CALVIN JOHNSON : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
SUPT. KYLER, et al. : NO. 03-4810

**MEMORANDUM AND ORDER**

**Juan R. Sánchez, J.**

**March 23, 2004**

Petitioner Calvin Johnson, currently serving a life sentence for murder at State Correctional Institution Huntingdon, Pennsylvania, raises two objections to Magistrate Judge M. Faith Angell's Report and Recommendation that Johnson's habeas corpus petition be denied as untimely under 28 U.S.C. § 2244(d). After a careful and independent review pursuant to 28 U.S.C. § 636, we find neither of the issues presents a ground for relief; therefore, we overrule Johnson's objections and approve and adopt Magistrate Judge M. Faith Angell's Report and Recommendation.

**FACTS**

A jury convicted Johnson of first degree murder on September 10, 1985 in the shooting death of Gerald Goode in the Bartram Gardens Village projects of Philadelphia on September 23, 1984. Johnson was sentenced to life in prison and a consecutive two and one-half to five year sentences for possessing an instrument of crime.

The Superior Court denied Johnson's timely direct appeal. The Supreme Court of Pennsylvania denied allocatur December 14, 1987. Johnson filed a petition for relief under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541, on July 18, 1995, which the

PCRA court denied on December 18, 1996.<sup>1</sup>

Johnson filed a pro se appeal, which the Superior Court denied on the merits on May 29, 1998. The Pennsylvania Supreme Court denied allocatur on January 15, 1999. In December 1999, Johnson filed his second pro se PCRA petition, which, after amendment with the assistance of counsel, the PCRA court dismissed on timeliness grounds without a hearing. The Superior Court rejected Johnson's claim that the government's withholding of *Brady v. Maryland*<sup>2</sup> material amounted to "governmental interference," triggering an exception to the PCRA timely filing requirement. The Superior Court held "the *Brady* claim fails . . . as it is wholly speculative." Memorandum opinion, 2402 EDA 2001, December 19, 2002, p. 6. The Pennsylvania Supreme Court denied allocatur on July 15, 2003.

Johnson filed the present petition for writ of habeas corpus on August 21, 2003. Johnson also filed motions seeking discovery from his two prior PCRA counsel and a motion for an evidentiary hearing. After review of Johnson's and the Commonwealth's arguments, Magistrate Judge M. Faith Angell recommended denial of Johnson's petition for writ of habeas corpus. Johnson objects to the Report and Recommendation, arguing statutory and equitable tolling should apply to make his petition timely.

## **DISCUSSION**

The Antiterrorism and Effective Death Penalty Act of 1996<sup>3</sup> (AEDPA) establishes a one-year statute of limitations for state prisoners seeking federal habeas relief under 28 U.S.C. § 2254. 28 U.S.C. § 2244(d)(1). A petitioner must file a federal habeas petition within one year from the date

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<sup>1</sup> Prior to filing the PCRA petition, Johnson filed a pro se habeas petition, which the Honorable Clifford Scott Green later dismissed without prejudice for Johnson's failure to exhaust state remedies. *See Calvin Johnson v. William Love, et al.*, CA #93-3305: August 26, 1993 Order [Dkt Entry #8].

<sup>2</sup> 373 U.S. 83 (1963)

<sup>3</sup> Codified in 28 U.S.C. §§ 2241-2255.

state conviction becomes final. 28 U.S.C. § 2244(d)(1)(A).<sup>4</sup>

In construing the AEDPA in *Burns v. Morton*, the Third Circuit allowed a one-year “grace-period” for petitioners, whose convictions became final prior to the enactment of the AEDPA. 134 F.3d 109, 111 (3d. Cir. 1998). In view of *Burns*’s holding, Johnson’s limitations period commenced on April 24, 1996,<sup>5</sup> despite the fact his conviction became final years prior.<sup>6</sup> As a result, Johnson had until April 23, 1997 to file a timely habeas petition. Because Johnson filed his petition for habeas corpus relief on April 23, 2003, his petition is untimely, unless statutorily or equitably tolled.

The AEDPA’s one-year limitations period for filing a federal habeas petition is subject to both statutory and equitable tolling. 28 U.S.C. §2244(d)(enumerating statutory tolling provisions); *Merritt v. Blaine*, 326 F.3d 157, 161 (3d. Cir. 2003) (holding AEDPA’s time limit is subject to the doctrine of equitable tolling, a judicially crafted exception). The AEDPA expressly prescribes statutory tolling of its one-year limitations period for the “time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Section 2244(d)(2) tolled Johnson’s limitations period until January 15, 1999, when the Pennsylvania Supreme Court denied allocatur of Johnson’s first

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<sup>4</sup> Section 2244(d)(1) provides: A 1-year period of limitations shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitations period shall run 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 for 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.

<sup>5</sup> The AEDPA’s effective date.

<sup>6</sup> The Supreme Court of Pennsylvania denied discretionary direct review of Johnson’s conviction on December 14, 1987. Johnson’s conviction became final 90 days after December 14, 1987, when time for seeking certiorari review in the United States Supreme Court expired. *See Kapral v. United States*, 166 F.3d 565, 575 (3d. Cir. 1999).

PCRA application. As a consequence, Johnson had one year from that date to file a timely habeas petition, before the statute of limitations expired on January 15, 2000.

Johnson argues the absence of the alleged criminal history reports should toll the limitations period during his second PCRA application on both statutory and equitable grounds. Johnson argues the Commonwealth failed to turnover to his attorneys, either at trial or during his PCRA applications, the complete police records of two eye-witnesses and the decedent Goode.

Johnson first argues he is entitled to statutory tolling of AEDPA's one year statute because under *Brady* the Commonwealth's refusal to produce the complete arrest records of two testifying witnesses and the decedent was a state impediment to filing a habeas corpus petition. 28 U.S.C. § 2244(d)(1)(B). Johnson argues the Commonwealth's failure to respond to his *Brady* claim either during his two PCRA petitions or during this litigation constitutes a state impediment to filing a habeas petition.

The Third Circuit held an untimely PCRA petition does not toll the statute of limitations because an untimely state post-conviction petition is not "properly filed" under Section 2244 (d)(1) for purposes of tolling. *Merritt*, 326 F.3d at 165-66 (citing *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001)). The United States Supreme Court held "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (meeting requirements concerning the form of the document, applicable time limits upon its delivery, the court and office in which it must be lodged, and payment of a filing fee). The Third Circuit concluded a "properly filed" application must be "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Fahy*, 240 F.3d at 243.

Johnson's first PCRA application was both pending and properly filed, thereby tolling the limitations period. Johnson's second PCRA application, however, failed to comply with procedural

requirements under the amended Pennsylvania PCRA statute. In 1995, the state legislature amended Pennsylvania's PCRA statute to include a new time limitation for the filing of PCRA petitions.<sup>7</sup> To file a timely PCRA petition under § 9545(b)'s "grace period," the petitioner must meet three requirements: (1) his judgment must have become final prior to January 16, 1996; (2) he must have filed a PCRA petition on or before January 16, 1997; and (3) this petition must have been the prisoner's first PCRA petition. *Commonwealth v. Williams*, 828 A.2d 981, 987 (Pa. 2003). Although Johnson's first PCRA application qualified for the "grace period," Johnson's second petition was foreclosed by the timeliness requirements of Section 9545(b)(1).

The Third Circuit instructed federal courts to look to "state law governing when a petition for collateral relief is properly filed" and "defer to a state's highest court when it rules on an issue."<sup>8</sup> *Merritt*, 326 F.3d at 165 (citing *Fahy*, 240 F.3d at 243-44). Federal courts, reviewing timeliness of PCRA petitions, must defer to state decisions.<sup>8</sup> *Merritt*, 326 F. 3d. at 165. On December 19, 2002, the Superior Court of Pennsylvania affirmed the PCRA court's holding that Johnson's second petition was time-barred. Moreover, the Superior Court refused to invoke a governmental interference exception to the PCRA timely filing requirement. The Superior Court quotes at length from the PCRA court, which recited the Commonwealth's disclosure of adult criminal histories of

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<sup>7</sup> 42 Pa.C.S. §9545(b) provides in relevant part: (b) Time for filing petition. – (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of the Commonwealth or the Constitution or laws of the United States;
- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by the court to apply retroactively. 42 Pa.C.S. § 9545(b)(1).

<sup>8</sup> By extension, this Court is also bound by the state court's decisions regarding the exceptions to the limitations period as set forth in 28 U.S.C. § 2244(d)(1)(B). As determined in state court, the Court affirms that Johnson has failed to sufficiently demonstrate a state impediment, which prevented him from filing his state claim. Johnson's claim, based on suppressed reports, does not achieve the requisite materiality for 28 U.S.C. § 2244(d)(1)(B). *Egerton v. Cockrell*, 334 F.3d 433, 439 (5<sup>th</sup> Cir. 2003) (holding an inadequate prison law library may constitute a state created impediment that would toll the AEDPA's one-year limitations period pursuant to § 2244(d)(1)(B); *Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004) (holding in a procedural default case a court may reach the merits of *Brady* claims if the petitioner makes the standard showing of cause and prejudice or establishes a fundamental miscarriage of justice).

the two witnesses and the victim to trial and PCRA counsel. The Superior Court quoted with approval the PCRA court's conclusion, "[t]he defendant has failed to establish, in any manner whatsoever, what documents or information trial counsel had or did not have at trial." Memorandum Opinion, 2402 EDA 2001, December 19, 2002, p. 5. For this reason, Johnson's second PCRA petition is not properly filed as a matter of state law and thus, cannot serve to toll Johnson's habeas statute of limitations. *Fahy*, 240 F.3d at 244 (deferring to Pennsylvania Supreme Court's ruling that Fahy's PCRA petition was not properly filed as a matter of state law).

Johnson's statute of limitations period for filing a federal habeas petition expired on January 15, 2000, one year after the conclusion of his first PCRA petition. Johnson filed his habeas petition on August 15, 2003, nearly 3½ years after the statutory bar. Consequently, absent any equitable tolling, Johnson's habeas petition is time-barred.

Johnson's second objection claims he is entitled to an equitable tolling of AEDPA's time limit. Johnson claims the state misled him with regard to the *Brady* material and that his two PCRA counsel failed to provide affidavits regarding the *Brady* material. Equitable tolling is available "only when the principle of equity would make the rigid application of a limitation period unfair." *Miller v. New Jersey Dept. of Corr.*, 145 F.3d 616, 618 (3d. Cir. 1998). Furthermore, the Third Circuit has cautioned courts to apply the doctrine of equitable tolling sparingly and "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice." *United States v. Midgley*, 142 F.3d 174, 179 (3d. Cir. 1998)(citing *Alvarez-Machain v. United States*, 96 F.3d 1246, 1251 (9th. Cir. 1996)).

To warrant equitable tolling, the petitioner must prove he has in "some extraordinary way been prevented from asserting his . . . rights" and he "exercised reasonable diligence in investigating and bringing [the] claims." *Fahy*, 240 F.3d at 244. In non-capital cases, such as Johnson's, the Third Circuit held "attorney error, miscalculation, inadequate research, or other mistakes have not been

found to rise to the ‘extraordinary’ circumstances required for equitable tolling.” *Id.* Johnson’s claims of attorney malfeasance do not elevate this case to an “extraordinary circumstance,” sufficient to demand equitable tolling.

In order for Johnson to be entitled to equitable tolling, Johnson must show he “exercised reasonable diligence in investigating and bringing [the] claims,” *Miller*, 145 F.3d at 618-19 (citing *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1126 (3d. Cir. 1997)). Johnson did not exercise the requisite due diligence in his investigation, as evidenced by the lapse of nearly 3 ½ years before filing his petition for habeas relief after the conclusion of his first PCRA petition. *See e.g., Robinson v. Johnson*, 313 F.3d 128, 142 (3d. Cir. 2002)(holding equitable tolling is not warranted where petitioner failed to show he exercised reasonable diligence in attempting to file a timely petition). Moreover, it is a well established principle that the obligation does not “pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period appellant is exhausting state court remedies as well.” *Lacava v. Kyler*, 398 F.3d 271, 277 (3d. Cir. 2005). In light of this principle, Johnson failed to demonstrate he exercised reasonable diligence in satisfying state exhaustion requirements as well.

Although Johnson argues he is entitled to equitable tolling based on attorney malfeasance, the Third Circuit’s recent decision in *Schlueter v. Varner* holds otherwise. 384 F.3d 69, 74 (3d. Cir. 2004). In support of this position, the Third Circuit made clear that a habeas petitioner is “not excused from exercising due diligence merely because he has representation during various states of or even throughout, his state and federal proceedings.” *Id.* In *Schlueter*, where counsel informed petitioner he anticipated filing a PCRA petition but failed to do so, the Third Circuit still concluded petitioner did not satisfy the reasonable diligence requirement. Johnson argues the claimed *Brady* violation and deceptions by both PCRA counsel warrant equitable tolling. There is no merit to the objection. Johnson failed to exercise due diligence, and as a result, is not entitled to equitable

