

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

ANTHONY RIENZI, :
 : CIVIL ACTION
 PETITIONER, :
 :
 v. :
 : No. 03-5593
 FRANK D. GILLIS, ET AL. :
 :
 RESPONDENTS. :

ORDER - MEMORANDUM

Padova, J.

AND NOW, this 7th day of June, 2005, upon careful and independent consideration of the Petition for Writ of *Habeas Corpus* (Doc. No. 1), after review of the Report and Recommendation of Chief United States Magistrate Judge M. Faith Angell, and in consideration of Petitioner's Objections to the Magistrate Judge's Report and Recommendation, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. The petition for writ of *habeas corpus* is **DENIED**;
4. As Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2); and

5. The Clerk shall **CLOSE** this case statistically.

On February 5, 1996, following a jury trial in the Philadelphia Court of Common Pleas, Petitioner was convicted of third degree murder and criminal conspiracy in the death of Eddie Polec. Com. v. Rienzi, 827 A.2d 369, 370 (Pa. 2003). He was sentenced to an aggregate term of 15 to 30 years imprisonment. Id. Petitioner appealed his judgment of sentence to the Pennsylvania Superior Court, which affirmed on December 17, 1997. Id. Petitioner did not file a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, therefore, his conviction became final on January 15, 1998, the deadline for filing a petition for allowance of appeal with the Pennsylvania Supreme Court. See Com. v. Herrold, 776 A.2d 994, 997 (Pa. Super. Ct. 2001) (holding that a judgment of sentence becomes final either at the conclusion of a direct appeal, including discretionary review, or when the time for appeal has expired); Pa. R. App. P. 1113 ("A petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days of the entry of the order of the Superior Court.").

On July 2, 1998, almost six months after his conviction became final, Petitioner filed a counseled petition for relief pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-9579. However, at the time he filed his petition, his counsel, Oscar N. Gaskins, Esq., was suspended from the practice of law. Jettie Newkirk, Esquire, subsequently entered

her appearance replacing Mr. Gaskins. Rienzi, 827 A.2d at 370. On December 28, 1998, the PCRA petition was withdrawn without prejudice at the request of Ms. Newkirk. Id.

On October 12, 1999, Petitioner, who had retained new counsel, filed a second counseled PCRA petition, alleging ineffective assistance of counsel and prosecutorial misconduct. Com. v. Rienzi, No. 1468 EDA 2000, slip op. at 2 (Pa. Super. Ct. Mar. 20, 2001). The PCRA court dismissed this petition as untimely, as it had been filed more than one year after Petitioner's judgment became final and did not qualify for any of the three exceptions to the PCRA's one year limitation on filing. Id.; see also 42 Pa. Cons. Stat. Ann. § 9545(b)(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 one of three exceptions apply).¹ Petitioner appealed to the Superior Court, on the grounds that his previous PCRA counsel was ineffective and withdrew the first petition without his consent. Id. at 3. He also argued "that the second petition should relate back to the first petition since the first petition was dismissed without prejudice." Id. The Superior Court agreed with Petitioner

¹The exceptions to the one year limitation on filing petitions under the PCRA are: 1) the petitioner was prevented from timely raising his claims as a result of illegal interference by government officials; 2) the evidence upon which the petition is based is newly discovered; and 3) petitioner's petition asserts a newly recognized constitutional right. 42 Pa. Cons. Stat. Ann. § 9545(b)(1).

and reversed the PCRA Court, remanding for an evidentiary hearing and holding that, "due to the 'unique procedural posture' of the case, the second, untimely petition should be treated as an amended first petition." Rienzi, 827 A.2d at 370. The Commonwealth sought an allowance of appeal from the Pennsylvania Supreme Court, which was granted. Id. The Supreme Court then reversed the decision of the Superior Court, finding that Rienzi's second PCRA petition was untimely. Id. at 371-72. The Supreme Court first noted that the one year time limitation for filing PCRA petitions is jurisdictional, and, therefore, "a PCRA court cannot hear untimely PCRA petitions." Id. at 371 (citations omitted). The Supreme Court then stated that, since Petitioner's judgment of sentence became final on January 15, 1998, he had until January 15, 1999 to file all PCRA petitions. Id. Petitioner did not, however, file his second PCRA petition until October 12, 1999, after the one year time limit had passed, and nearly eleven months after his first petition was withdrawn. Id. The Supreme Court explained its reversal of the Superior Court as follows:

As previously stated, this Court has consistently upheld and repeatedly noted the jurisdictional nature of the PCRA time requirement. Indeed, in Fahy, we specifically held that the PCRA "jurisdictional time limitation is not subject to equitable principles such as tolling" Accordingly, we reject the instant attempt by the Superior Court to circumvent the PCRA time-bar by treating the second PCRA petition as an amendment to the first petition, where, as here, the second petition was filed after

the expiration of the PCRA filing deadline. Moreover, we note that the Superior Court ignored the fact that the petition was withdrawn and, therefore, there was nothing pending before the PCRA court that Appellee could "amend."

Appellee maintains that his counsel withdrew the petition without discussing her intentions to do so with him and without any review of the merits. However, that argument does not overcome the fact that Appellee had adequate time to amend his petition or file a new one in a timely manner, but failed to do so. Instantly, Appellee does not offer any explanation as to why he waited until after the filing period expired to file his second petition.

Id. at 371 (quoting Com. v. Fahy, 737 A.2d 214, 222 (Pa. 1999)).

Petitioner filed the instant, counseled, petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 on October 7, 2003. Petitioner asserts the following grounds for relief: 1) ineffective assistance of trial counsel for failing to move for severance; 2) ineffective assistance of counsel for failure to investigate; 3) ineffective assistance of counsel for failure to present character testimony; 4) prosecutorial misconduct; and 5) failure to provide exculpatory materials. (Petition at 9-10.) The Magistrate Judge filed a Report and Recommendation recommending that the Court deny the Petition as barred by the one-year period of limitations set forth in 28 U.S.C. § 2244(d). Petitioner objects to the Report and Recommendation on the ground that the period of limitations should be equitably tolled. (Obj. at 4-8.)

Where a *habeas* petition has been referred to a magistrate

judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b).

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which went into effect on April 24, 1996, established a one-year statute of limitations which begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" 28 U.S.C.A. § 2244(d)(1)(A). Petitioner's conviction became final on January 15, 1998. His one year period for filing a federal *habeas* petition began running on January 15, 1998. Consequently, Petitioner had until January 15, 1999 to timely file his Petition, unless the limitations period was tolled.

The AEDPA provides that 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 shall not be counted toward any period of limitation under this subsection." 28 U.S.C.A. § 2244(d)(2). Petitioner filed his first PCRA petition on July 2, 1998, after 168 days of the one-year period for filing a federal *habeas* petition had run. The filing tolled the running of the one-year period with 197 days remaining.

The one-year period for filing a federal *habeas* petition recommenced on December 28, 1998, when Petitioner's first PCRA petition was withdrawn without prejudice, at which time there were 197 days remaining for Petitioner to file a *habeas* petition. Petitioner's filing of his second PCRA petition on October 12, 1999 did not further toll the limitations period pursuant to the AEDPA because the state courts found that petition to be time barred. See Pace v. DiGuglielmo, - U.S. -, 125 S. Ct. 1807, 1814 (2005) ("Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2)."); see also Merrit v. Blaine, 326 F.3d 157, 163 (3d Cir. 2003) ("[A] PCRA petition that was dismissed by the state court as time-barred was not 'properly filed' under AEDPA.") (citing Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001)). Accordingly, the one year period in which Petitioner could have filed a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 began to run on January 15, 1998 and ended on July 13, 1999, more than four years prior to the filing of the instant Petition on October 7, 2003.

Petitioner does not dispute that the instant Petition was filed outside of the time provided by 28 U.S.C. § 2244(d)(1). Instead, he argues that the one-year period of limitations should be equitably tolled in this case. The limitations period provided by the AEDPA is subject to equitable tolling in extraordinary

circumstances. Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace, 125 S. Ct. at 1814.

Petitioner asserts that the circumstances leading to the withdrawal of his first PCRA petition were extraordinary and require equitable tolling. These circumstances are (1) his counsel's suspension from the practice of law, denying him the right to counsel; (2) the last-minute substitution of new counsel, which he claims occurred without his consent; and (3) new counsel's withdrawal of his PCRA petition without his knowledge or consent. However, Petitioner ignores the fact that, at the time his initial PCRA petition was withdrawn, without prejudice, the one year time period for filing a PCRA petition under Pennsylvania law had not yet expired. See 42 Pa. Cons. Stat. Ann. § 9545(b)(1). Petitioner does not claim that any extraordinary circumstance prevented him from filing a new PCRA petition within the one year period for filing such a petition in state court. Petitioner also does not claim that any extraordinary circumstance prevented him from filing a petition for writ of *habeas corpus* in this Court prior to July 13, 1999. Consequently, the Court finds that Petitioner has not established that he diligently pursued his rights and that he was

prevented from filing his petition by an extraordinary circumstance. Accordingly, the Petitioner's objections to the Report and Recommendation are overruled.

BY THE COURT:

John R. Padova, J.