

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

<b>BENJAMIN ALEXANDER</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 00-4589</b>
	:	
<b>BEN E. VARNER, et al.</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**October 11, 2006**

Now before the Court is the Petition of Benjamin Alexander (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is incarcerated in the State Correctional Institution in Dallas, Pennsylvania. For the reasons that follow, the Petition will be denied.

**I. Procedural History**

On July 23, 1991, a jury sitting in the Court of Common Pleas of Philadelphia County convicted Petitioner on two counts of murder in the first degree, aggravated assault, and possession of an instrument of crime.<sup>1</sup> Petitioner received a sentence of life in prison for the

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<sup>1</sup> The trial court described the facts leading to the charges as follows:

On 30 August 1990, around 8:00 pm, Philadelphia police officers . . . were called to the 1500 block of Stillman Street in South Philadelphia. When they arrived, the officers found 38 year old David Cotton and 43 year old Richard Mills lying on the sidewalk, mortally wounded from gunshot wounds. . . .

The fatal incident began that night with an argument involving [the petitioner], David Cotton, and Richard Mills. The argument occurred on Stillman Street where all three men lived. It is not clear what the subject of the argument was but there were no blows exchanged and no threats made. The dispute seemed to end when David and Richard walked away from the [petitioner] toward their own homes.

As David and Richard were heading home, the [petitioner] reached inside his front door, grabbed his .9 millimeter handgun and fired once at David’s back. David turned to face the [petitioner], put his hands in the air and asked him why he was shooting. The [petitioner] responded by shooting him again and David fell to the sidewalk.

murder convictions. Additionally, he received concurrent terms of five to ten (5 - 10) years imprisonment on the aggravated assault charge and two and one half to five (2.5 - 5) years imprisonment on the possession of an instrument of crime charge. Commonwealth v. Alexander, October Term, 1990, Nos. 1945, 1947, 1950 slip op. at 1-2 (C.C.P. Philadelphia County, August 12, 1992).

On January 6, 1993, the Superior Court of Pennsylvania affirmed Petitioner's convictions. Petitioner did not file a petition for allowance of appeal with the Pennsylvania Supreme Court. On December 26, 1996, Petitioner filed a pro se petition under the Pennsylvania Post-Conviction Relief Act, 42 Pa.C.S. ¶ 9541, et. seq. ("PCRA"). The PCRA petition was denied on March 23, 1998. On June 16, 1999, the Superior Court affirmed the denial of PCRA relief and the Pennsylvania Supreme Court denied allowance of appeal on December 1, 1999. On September 1, 2000, Petitioner filed the present Petition for Habeas Corpus.

This Court designated United States Magistrate Judge Carol Sandra Moore Wells to submit a Report and Recommendation on the Petition. See 28 U.S.C. § 6369(b)(1)(B); Local R.

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Next, the [petitioner] turned his attention toward Richard who had reached his front steps when David was shot. Richard immediately changed course and started towards his fallen neighbor but he slipped and fell when he saw the [petitioner] coming at him. As he tried to get up, from about ten feet away, the [petitioner] shot him. Richard rolled onto his back as the [petitioner] walked up, stood over him and said; "you're not dead yet, pussy." Then the [petitioner] shot Richard in the face.

Although both David and Richard lay on the sidewalk mortally wounded, the [petitioner] was not yet through. He walked back over to the prone David and apparently shot him again. Then, when David's wife Deborah came to her front door, the [petitioner] fired his .9 millimeter at her but missed.

Finally, the [petitioner] left the scene. He went into his house, eventually got his car and drove to a gas station in Lester, PA, near route 291. There, the [petitioner] told the attendant that he had just shot two guys and asked him to call the police.

Commonwealth v. Alexander, October Term, 1990, Nos. 1945, 1947, 1950 slip op. at 2-4 (C.C.P. Philadelphia County, August 12, 1992) (citations omitted).

Civ. P. 72.1(I)(b). In her original Report, Judge Wells recommended that the Petition be denied as time-barred. Petitioner objected to the Report.

The Court sustained Petitioner's objections and remanded the case to Judge Wells with instructions to conduct an evidentiary hearing regarding the Petitioner's right to equitable tolling. After the hearing, Judge Wells issued a Supplemental Report and Recommendation, again recommending that the Petition be denied as time-barred.

Because Petitioner has objected to the Magistrate Judge's Supplemental Report and Recommendation, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Having reviewed the Supplemental Report and Recommendation and Petitioner's Objections thereto, the Court will approve and adopt the Supplemental Report and Recommendation.

## **II. Legal Standard**

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 et seq., which provides in pertinent part:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation 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 ...

28 U.S.C. § 2244(d)(1). The period of limitation tolls during the time in 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).

The statute of limitations is also subject to equitable tolling when the “principles of equity would make [the] rigid application [of a limitation period] unfair.” Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998) (internal quotations omitted). “This unfairness generally occurs when the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights.” Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (internal quotations omitted). The petitioner “must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.” Id. at 618-19 (internal quotations omitted).

### **III. Analysis**

Petitioner’s conviction became final on February 5, 1993, thirty days after the Superior Court of Pennsylvania affirmed his conviction. Because this occurred before the AEDPA became effective, the one-year period of limitation commenced after the statute became effective, on April 24, 1996. See Pace v. DiGuglielmo, 544 U.S. 408, 423 (2005). On December 26, 1996, Petitioner commenced a PCRA action in the state courts, thereby statutorily tolling his time to file a habeas petition. 28 U.S.C. § 2244(d)(2). On December 1, 1999, the Pennsylvania Supreme Court denied allocatur regarding Petitioner’s PCRA appeal and the statutory tolling period ended. As a result, Petitioner’s one-year period of limitation expired on March 31, 2000. Petitioner failed to file his habeas petition until September 1, 2000, 154 days beyond the AEDPA deadline.

Petitioner admits that his petition is untimely. However, he asserts that he is entitled to equitable tolling because his lawyer failed to notify him that the Supreme Court of Pennsylvania had denied him allowance of appeal, thereby “restarting” the statute of limitations clock. Petitioner argues that the clock should not have restarted until July 24, 2000, the date he

allegedly learned of the denial.

At the evidentiary hearing before Judge Wells, Petitioner's PCRA counsel, Mitchell Scott Strutin, testified that he has no specific recollection of whether or not he notified Petitioner that his petition had been denied. Transcript of Evidentiary Hearing at 11-12, Alexandar v. Varner, No. 00-cv-4589 (docket no. 30). He noted, however, that he forwards copies of all court orders to his clients as a matter of practice. Id. Nevertheless, Petitioner claims he never received any notice. Id. at 30. He claims he learned about the denial only after he wrote a letter to Strutin on July 14, 2000 inquiring about the status of his case and received Strutin's reply on July 24, 2000. Id. This was Petitioner's only inquiry to counsel since he filed his petition for allowance of appeal to the Pennsylvania Supreme Court on June 29, 1999, over a year earlier. Id.

Counsel's alleged neglect in informing Petitioner of the denial of his allowance of appeal is not an "extraordinary circumstance" meriting equitable tolling. Grave v. Folino, 2006 U.S. Dist. LEXIS 29989, at \* 12 (E.D. Pa. May 17, 2006) ("An attorney's failure to notify a habeas petitioner of a state court decision is not a basis for equitable tolling."); Poller v. Kyler, 2003 U.S. Dist. LEXIS 14866, at \*4-5 (E.D. Pa. Aug. 26, 2003) (same); see also Johnson v. Hendricks, 314 F.3d 159, 163 (3d Cir. 2002) ("attorney error has not been found to rise to the extraordinary circumstances required for equitable tolling"). Furthermore, Petitioner, who first inquired about his petition to Pennsylvania's Supreme Court over a year after it was filed, has failed to demonstrate that he diligently pursued his claims. See Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). Accordingly, the Court finds that equitable tolling is not warranted.

### **III. Conclusion**

Petitioner's claims are time-barred and will be dismissed. Because Petitioner has not made the requisite showing of the denial of a constitutional right, a certificate of appealability will not issue. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). An appropriate Order follows.

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**AND NOW**, this 11<sup>th</sup> day of October 2006, upon consideration of the Report and Recommendation and Supplemental Report and Recommendation of United States Magistrate Judge Carol S. Wells (docket nos. 14, 36) and Petitioner’s Objections (docket nos. 16, 37, 38), and for the reasons set forth in the accompanying Memorandum, it is **ORDERED** that:

1. The Supplemental Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is **DENIED** and **DISMISSED**;
3. Because there is no probable cause to issue a certificate of appealability, a certificate of appealability shall not issue.

**BY THE COURT:**

/s/ Bruce W. Kauffman  
**BRUCE W. KAUFFMAN, J.**