

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

<b>JAMAR BOST</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 04-5385</b>
	:	
<b>FRANKLIN TENNIS, <u>et al.</u></b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**February 12, 2007**

Now before the Court is the pro se Petition of Jamar Bost (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated in the State Correctional Institution at Bellefonte, Pennsylvania (“SCI-Rockview”). For the reasons that follow, the Petition will be denied and dismissed as untimely.

**I. Procedural History**

On March 11, 1999, Petitioner was found guilty of third-degree murder for the drive-by shooting of Darren Townsend, and subsequently was sentenced to a term of fourteen to twenty-eight years imprisonment. On May 26, 2000, the Pennsylvania Superior Court affirmed the judgment. Commonwealth v. Bost, 759 A.2d 19 (Pa. Super. Ct. 2000). The Pennsylvania Supreme Court denied a petition for allowance of appeal on December 19, 2000, and the judgment of sentence became final on March 19, 2001, at the expiration of the 90-day period for seeking review from the United States Supreme Court. On December 19, 2001, Petitioner filed a timely petition pursuant to Pennsylvania’s Post Conviction Relief Act (“PCRA”), 42 Pa. Cons. Stat. Ann. § 9541, et seq. On February 26, 2002, the PCRA court denied the petition. Due to a dispute over attorney’s fees, Petitioner’s attorney failed to file a notice of appeal on his behalf.

Almost one year later, on January 2, 2003, Petitioner, acting pro se, filed a second PCRA petition requesting reinstatement of his appellate rights nunc pro tunc. Petitioner's appointed counsel filed an amended second PCRA petition, adding a number of new issues. The Commonwealth stipulated to the reinstatement of Petitioner's appellate rights, but objected to the introduction of the new issues as time-barred. On April 8, 2003, after an oral argument, the trial court issued an order reinstating Petitioner's right to appeal the denial of his first PCRA petition, but denying the new issues raised in the second petition as untimely.

On appeal, the Superior Court dismissed the Petition as time-barred, holding that the trial court had no jurisdiction to grant Petitioner leave to appeal the dismissal of his first PCRA petition, when Petitioner failed to timely appeal that dismissal. The Superior Court further held that the Petitioner could not "circumvent" the statute of limitations by "construing an untimely second or subsequent petition as an extension of a timely, but previously dismissed, first petition." Commonwealth v. Bost, No. 1706 EDA 2003 (Pa. Super. Ct. June 14, 2004).

On November 9, 2004, Petitioner, acting pro se, petitioned this Court for a writ of Habeas Corpus, claiming denial of due process and ineffective assistance of counsel. The Court designated United States Magistrate Judge Thomas R. Rueter to submit a Report and Recommendation. See 28 U.S.C. § 636(b)(1)(B); Local R. Civ. P. 72.1(I)(b). Magistrate Judge Rueter has recommended that the Court deny the Petition as time-barred.<sup>1</sup> Because Petitioner has objected to the Magistrate Judge's Report and Recommendation, the Court must "make a de novo determination of those portions of the report or specified proposed findings or

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<sup>1</sup> On August 9, 2006, this Court granted Petitioner leave to amend his habeas petition. On January 3, 2007, Petitioner filed an Amended Petition for Writ of Habeas Corpus. In the amended submission, Petitioner failed to address the timeliness issue.

recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(c).

## **II. Legal Standard**

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2244 *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 statute is tolled 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 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**

In accordance with 28 U.S.C. § 2244, Petitioner’s conviction became final on March 19, 2001, upon the expiration of the time for seeking certiorari review by the United States Supreme

Court. On that date, the one-year statute of limitations period for filing a habeas petition began to run. Clay v. United States, 537 U.S. 522, 527 (2003) (“[F]inality has a long-recognized, clear meaning in the post-conviction relief context: Finality attaches in that setting when [the Supreme Court] affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires”); Long v. Wilson, 393 F.3d 390, 394 (3d Cir. 2004).

Absent any tolling, Petitioner would have had until March 19, 2002 to file his habeas petition. However, Petitioner filed a timely PCRA petition on December 19, 2001, which triggered the tolling provision of 28 U.S.C. § 2244(d). The trial court denied the petition on February 26, 2002, and the tolling period ended at the expiration of the 30-day appeal period. Petitioner’s second PCRA petition, filed on January 2, 2003, was ruled untimely by the Superior Court, and therefore cannot be considered a “properly-filed application” for purposes of statutory tolling. 28 U.S.C. § 2254(d)(2). Since ninety days of the one-year limitations period remained at the time of the filing of the first PCRA petition, the limitations period expired on June 26, 2002, almost two and a half years before the instant habeas petition was filed.

Petitioner contends that the Court should exercise its equitable powers to toll the statute of limitations. The statute of limitations under AEDPA is subject to equitable tolling, but “only when the principle of equity would make the rigid application of a limitation period unfair.” Miller v. New Jersey State Dep’t of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). The burden of showing a basis for equitable tolling is a heavy one. Mazzie v. Bowen, 1988 WL 92202 at \*2 (E.D. Pa. Sep. 1, 1988) (citing Heckler v. Day, 467 U.S. 104, 106 (1984)). A habeas petitioner seeking equitable tolling of the limitations period must show that he has been pursuing his rights

diligently, and that some extraordinary circumstance stood in his way. See Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); LaCava v. Kyler, 398 F.3d 271, 277 (3d Cir. 2005) (“It is a well-established principle that, in order for appellant to claim an entitlement to equitable tolling, he must show that he exercised reasonable diligence in bringing the claims” (citations omitted)); Schlueter v. Varner, 384 F.3d 69, 78 (3d Cir. 2004). Upon review of this case, Magistrate Judge Rueter concluded that Petitioner has failed to make a showing that he diligently pursued his claims and was prevented, in some extraordinary way, from asserting his rights. This Court agrees. Although Petitioner’s first PCRA petition was denied on February 26, 2002, he did not seek reinstatement of his appellate rights until January 2, 2003 – almost a year later. Petitioner made no effort to file the instant habeas petition until November 2004, more than two years after the deadline for seeking habeas relief had expired. Because Petitioner has failed to show that he exercised reasonable diligence in pursuing his claims, he is not entitled to the extraordinary remedy of equitable tolling.

#### **IV. Conclusion**

Petitioner’s delay in filing the instant Petition was not negligible. The applicable limitations period expired in June 2002. In the absence of a compelling basis that would meet the rigorous standard for equitable tolling, the Petition will be dismissed as time-barred. Because Petitioner has not made the requisite showing of the denial of a constitutional right, a certificate of appealability should not issue. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). An appropriate order follows.

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**ORDER**

**AND NOW**, this 12<sup>th</sup> day of February, 2007, upon consideration of the Report and Recommendation of United States Magistrate Thomas J. Rueter (docket no. 7) and Petitioner's Objection thereto (docket no. 8), and after de novo review of the pleadings and record in this case, it is **ORDERED** that:

1. The 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. There is no probable cause to issue a certificate of appealability.

**BY THE COURT:**

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