

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

MICHAEL GIBBS,	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION
	:	
PHILLIP L. JOHNSON, Superintendent, State Regional	:	NO. 00-5744
Correctional Facility - Pittsburgh, et al.	:	
Respondents.	:	

**Memorandum and Order**

YOHN, J.

January \_\_\_\_, 2002

Presently before the court is a pro se petition for a writ of habeas corpus filed by petitioner Michael Gibbs pursuant to 28 U.S.C. § 2254. For the reasons that follow, the petition will be dismissed as untimely.

On May 4, 1994, in the Court of Common Pleas of Philadelphia County, Gibbs pled guilty to second degree murder, three counts of robbery, two counts of aggravated assault, criminal conspiracy and possessing an instrument of crime. Petitioner’s Objections to the Magistrate Judge’s Report and Recommendation (“Objections”) at 2-3. The charges stemmed from the April 25, 1993 armed robbery of Moon’s Deli, during the course of which Su Yang Jin, the manger of the establishment, was murdered. Respondents’ Response to Petition for Writ of Habeas Corpus (“Response”) ¶ 2.

Gibbs did not directly appeal his conviction, and it consequently became final on

June 3, 1994.<sup>1</sup> He did, however, file on August 3, 1994 a timely pro se petition for state post-conviction relief. *See* Exhibit A to Response at 2. Counsel subsequently was appointed for petitioner, and an amended PCRA petition was filed thereafter. This petition was denied on October 25, 1995, and this denial was affirmed by the Superior Court on April 9, 1997. *Commonwealth v. Gibbs*, 698 A.2d 664 (Pa. Super. Ct. 1997) (unpublished memorandum). On September 26, 1997, petitioner filed a second pro se PCRA petition. The PCRA court dismissed this petition on October 29, 1997, *see* Exhibit B to Response at 2, and on June 21, 1999, the Superior Court affirmed, holding that the petition was untimely under 42 Pa. Cons. Stat. § 9545(b)(1).<sup>2</sup> *See id.* at 3-5. Gibbs then petitioned the Pennsylvania Supreme Court to allow his

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<sup>1</sup> Under Pennsylvania law, a criminal conviction becomes final “at the conclusion of direct review or the expiration of the period for seeking such review.” *Commonwealth v. Brown*, 767 A.2d 576, 579 n.2 (Pa. Super. Ct. 2001). Because direct review must be sought within 30 days of the imposition of sentence, *see id.*, a conviction becomes final 30 days following sentencing in cases in which such review is not sought.

<sup>2</sup> That section provides that:

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 this 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 that court to apply retroactively.

42 Pa. Cons. Stat. § 9545(b)(1).

In petitioner’s case, the Superior Court concluded that none of these exceptions to the one year limitations period were applicable. *See* Exhibit B to Response at 5.

appeal, but this petition was denied on November 11, 1999.

On November 7, 2000,<sup>3</sup> Gibbs filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He asserts four grounds for relief: 1) that he was denied a decertification hearing;<sup>4</sup> 2) that the denial of such a hearing deprived him of due process of law; 3) that his attorney's failure to request such a hearing constituted ineffective assistance of counsel in contravention of the Sixth Amendment; and 4) that the trial court erred in not permitting him to withdraw his guilty plea. Respondents raise several arguments in opposition to the petition, one of which is that the petition was not filed within the one year limitations period imposed by 28 U.S.C. § 2244(d)(1). Because I conclude that the petition is indeed untimely, I do not reach the remainder of Respondents' contentions.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petition for a writ of habeas corpus must be filed within one year of the date on which the conviction became final. 28 U.S.C. § 2244(d)(1)(A). However, in cases (like this one) in which the habeas petitioner's conviction became final prior to the statute's effective date of April 24, 1996, the AEDPA has been construed as providing a one year grace period, thus permitting the filing of a habeas petition any time before April 24, 1997. *Duncan v. Walker*, 121 S. Ct. 2120, 2130 (2001) ("In the context of AEDPA's 1-year limitations period, which by its terms runs from

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<sup>3</sup> While the petition was received by the clerk of this court on November 13, 2000, pro se habeas corpus petitions are deemed to have been filed on the date they are delivered to prison authorities. *Houston v. Lack*, 487 U.S. 266, 270-71 (1988). Accordingly, I will consider Gibbs's petition as having been filed on November 7, 2000, the date on which it was signed. See *Petition for Habeas Corpus under 28 U.S.C. § 2254* ("Petition") at 12.

<sup>4</sup> Under Pennsylvania law, decertification is a procedure by which a juvenile defendant who is charged as an adult, may transfer the proceedings "to the division or a judge of the court assigned to conduct juvenile hearings." 42 Pa. Cons. Stat. § 6322(a).

‘the date on which the judgment became final,’ see § 2244(d)(1)(A), the Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA's enactment, for prisoners whose state convictions became final prior to AEDPA.”); *Burns v. Morton*, 134 F.3d 109, 111-12 (3d Cir. 1998). Moreover, as provided in 28 U.S.C. § 2244(d)(2), this limitations period is tolled during the pendency of a “properly filed” petition for state collateral review. *See Nara v. Frank*, 264 F.3d 310, 315 (3d Cir. 2001).

Respondents contend that the AEDPA’s statute of limitations is fatal to Gibbs’s petition. Specifically, they assert that the limitations period began to run on May 8, 1997, 30 days after the Superior Court affirmed the dismissal of Gibbs’s first PCRA petition. Response at 6. Although the second PCRA petition was filed within a year of that decision, Respondents argue that because this second petition was untimely as a matter of state law, it was not “properly filed” within the meaning of § 2244(d)(2), and that the limitations period accordingly was not tolled during its pendency. *See id.* at 7. Because the instant federal habeas corpus action was filed on November 7, 2000, some two and one half years after the commencement of the limitations period, Respondents conclude, it is untimely under § 2244(d)(1). In his Report and Recommendation, the Magistrate Judge adopted this reasoning.

Gibbs vigorously contests Respondents’ assertion and objects to the Magistrate Judge’s Report and Recommendation. He argues that his second PCRA petition was “properly filed,” as that term is employed in § 2244(d)(2), and that § 2244(d)(1)’s automatic tolling provision consequently is applicable. He also contends that even if this argument is unpersuasive, the limitations period should be equitably tolled, the possibility of which was indicated in *Miller v. New Jersey Dept. of Corrections*, 145 F.3d 616 (3d Cir. 1998). *See*

Objections at 11. As for petitioner's first argument, Gibbs asserts that "it is . . . fair to conclude that a PCRA petition is properly filed in Pennsylvania for purposes of tolling AEDPA's statute of limitations when it is delivered and accepted in accordance with applicable Pennsylvania laws and rules." *Id.* at 13. Because his second PCRA petition was delivered and accepted before it was dismissed, Gibbs claims, it was "properly filed." *See id.*

Petitioner's argument as to the propriety of equitable tolling is somewhat more intricate. He contends that at the time that his second PCRA petition was filed, federal courts within the Third Circuit were uncertain whether the one year limitations provision of 42 Pa. Cons. Stat. § 9545(b)(1) was jurisdictional in nature. Accordingly, he continues, even if he had filed a federal habeas action at that time, the petition would have been dismissed for failure to exhaust the available state court remedies despite the fact that—as indicated by subsequent Pennsylvania jurisprudence—his state court action would have been barred on timeliness grounds. Objections at 20-21 (citing *Banks v. Horn*, 126 F.3d 206, 211-14 (3d Cir. 1997) and *Hammock v. Vaughn*, 1998 WL 163194, at \*6 (E.D. Pa. Apr. 7, 1998)). Gibbs asserts that "it would be patently unfair if the federal statute of limitations ran during the time in which petitioner was not allowed to bring a federal petition," and, accordingly, that "this court should find that AEDPA's statute of limitation was equitably tolled while petitioner's second PCRA petition was pending from September 26, 1997 to November 11, 1999." *Id.* at 21. Gibbs further contends that the argument for equitable tolling is bolstered by the fact that he was sentenced at the age of sixteen to life imprisonment without the possibility of parole. The harshness of his sentence, he avers, counsels in favor of a hearing of his federal claims on their merits. *See id.*

Upon considering the arguments advanced by both petitioner and respondents, as

well as the Magistrate Judge's Report and Recommendation, I conclude that it is unnecessary to determine whether Gibbs's second PCRA petition was "properly filed" within the meaning of § 2244(d)(2) or whether equitable tolling of the AEDPA's limitations period was warranted during the pendency of that petition. Indeed, even assuming that the AEDPA's one year limitations period was tolled while the second petition was pending, the instant habeas petition was filed only four days short of one year following the date on which the dismissal of that petition became final. While this in itself obviously fits within § 2244(d)(1)'s limitations period, that period also ran between May 8, 1997 and September 26, 1997—after the denial of the first PCRA petition became final but before the second PCRA petition was filed. In sum, the statute of limitations was not tolled for a total of four months and eighteen days in addition to the 361 days between November 11, 1999 and November 7, 2000. Thus, the AEDPA's one year limitations period was exceeded in this case by more than four months. Accordingly, the petition is not timely under 28 U.S.C. § 2244(d)(1), and must be dismissed.

An appropriate order follows.

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**Order**

And now, this \_\_\_\_ day of January, 2002, upon consideration of the petition for habeas corpus (Doc. # 1), respondents' response thereto (Doc. # 16), the Magistrate Judge's Report and Recommendation and petitioner's objections thereto (Doc. # 20), it is hereby ORDERED that the petition is DISMISSED. No certificate of appealability will be granted to petitioner, as he has failed to make a substantial showing of the denial of a constitutional right.

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William H. Yohn, Jr., Judge