

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

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| <b>GERALD A. WASHINGTON,</b>        | : |                     |
|                                     | : |                     |
| <b>Petitioner</b>                   | : | <b>CIVIL ACTION</b> |
|                                     | : |                     |
| <b>v.</b>                           | : |                     |
|                                     | : |                     |
| <b>MARY LEFRIDGE BYRD; ATTORNEY</b> | : | <b>NO. 00-6389</b>  |
| <b>GENERAL OF THE COMMONWEALTH</b>  | : |                     |
| <b>OF PENNSYLVANIA; DISTRICT</b>    | : |                     |
| <b>ATTORNEY OF DELAWARE COUNTY,</b> | : |                     |
|                                     | : |                     |
| <b>Respondents.</b>                 | : |                     |
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**DuBOIS, J.**

**March 22, 2002**

**MEMORANDUM**

Petitioner, Gerald A. Washington, is a state prisoner currently serving a sentence of eight-to-sixteen years at the State Correctional Institution, Chester, Pennsylvania. His sentence arises out of a 1975<sup>1</sup> conviction for larceny, receiving stolen goods, burglary, robbery with accomplices, violation of the uniform firearms act, and conspiracy. Currently before the Court is petitioner's pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

Petitioner first filed the Petition for Writ of Habeas Corpus on December 18, 2000. However, because the petition was not submitted in the proper form, the Court directed petitioner to resubmit the petition in proper form, which he did on February 16, 2001. The petition stated six claims for relief as follows: (1) petitioner was convicted and sentenced for a crime not set

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<sup>1</sup> Petitioner spent a period of time after his conviction out of prison on bail. Additionally he has been convicted of crimes other than those at issue in this action. Because of the other convictions, petitioner is still serving an eight-to-sixteen-year sentence more than twenty-six years after conviction.

forth in the indictment; (2) the trial court improperly failed to dispose of trial counsel's motion to withdraw which was based on irreconcilable differences between petitioner and counsel; (3) the trial court permitted an improperly suggestive in-court identification of petitioner; (4) the trial court improperly allowed the prosecution to cross examine a defense witness so as to inform the jury that petitioner was incarcerated during trial; (5) the trial judge made improper gestures during his charge to the jury which suggested that the jury should not find defense witnesses credible; and (6) the trial court failed to give petitioner proper credit for time served.

On May 4, 2001, the Court issued an Order pursuant to United States v. Miller, 197 F.3d 644 (3d Cir. 1999),<sup>2</sup> requiring that petitioner notify the Court within thirty days whether he desired the Court to decide his pro se motion as filed or whether he desired to include any additional claims for relief. Petitioner did not submit a new petition within the thirty-day time period. On June 18, 2001, the Court referred the petition to United States Magistrate Judge Arnold C. Rapoport pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 72.1. After the District Attorney of Delaware County filed an Answer to the petition,<sup>3</sup> Judge Rapoport issued a Report and Recommendation dated July 20, 2001 (Document No. 9, filed July 20, 2001) recommending that the petition be dismissed without an evidentiary hearing. Judge Rapoport's recommendation was based on his conclusion that the petition was submitted beyond the one-year statute of limitations embodied in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Petitioner filed timely objections to the Report and Recommendation in this

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<sup>2</sup> The near-three month delay between petitioner's re-submission of the petition and this Court's issuance of a Miller Order was due to a docketing error in the Clerk's Office. That docketing error was not discovered until May 3, 2001.

<sup>3</sup> The District Attorney has litigated this case on behalf of all respondents.

Court.<sup>4</sup>

Upon consideration of the Report and Recommendation, petitioner's objections, and all the underlying filings, the Court overrules petitioner's objections and adopts the Report and Recommendation as modified in this Memorandum. The Court will dismiss the petition without an evidentiary hearing.

**I. BACKGROUND**

Petitioner was convicted, after a jury trial, on October 25, 1975. The facts surrounding the charges against petitioner are amply set forth in the trial court's post-trial opinion, see Court of Common Pleas April 7, 1977, Opinion, Resps.' Answer, Ex. A-1 at 2-4, and need not be re-stated here.

After the trial court denied petitioner's post-trial motions, petitioner commenced his direct appeal in the Superior Court of Pennsylvania. By October 13, 1978, petitioner had not yet filed a brief, and the Superior Court dismissed the appeal. Later information revealed that petitioner's failure to file a brief was due to his counsel's death on August 6, 1978. In response to petitioner's filing of three actions seeking to revive his appeal, on December 27, 1983, the Court of Common Pleas reinstated petitioner's appeal nunc pro tunc. On March 15, 1985, the Superior Court rejected petitioner's direct appeal and affirmed the conviction and sentence. The Supreme Court of Pennsylvania denied his petition for allocatur on October 24, 1985.

Petitioner did not initiate a collateral attack of his conviction in the Pennsylvania courts until more than eleven years later. As discussed below, see infra § II.B.1., there is some debate

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<sup>4</sup> Petitioner also filed a Traverse to respondent's answer to the petitioner. Given the Court's conclusion that the petition is time barred, however, it will not consider petitioner's Traverse, as that filing argues the merits of petitioner's claims.

as to the exact date on which petitioner filed his action under the Post-Conviction Relief Act, 42 Pa. C.S.A. § 9545 (“PCRA”); it is clear, however, that the PCRA action was filed some time between November 20, 1996 and January 14, 1997. That action raised a number of claims, including claim numbers two through six asserted in this case. The Court of Common Pleas summarily dismissed the PCRA petition on July 13, 1998.

Immediately thereafter, on July 31, 1998, petitioner filed a habeas corpus petition – as opposed to an action under the PCRA – in the Court of Common Pleas. The petition included claim number one asserted in this case. The Court of Common Pleas summarily dismissed the habeas corpus petition on August 14, 1998.

Petitioner appealed the Court of Common Pleas’ dismissals of both the PCRA petition and the habeas corpus petition to the Superior Court.<sup>5</sup> On December 15, 1999, the Superior Court issued two separate opinions rejecting petitioner’s appeals in both actions.

As to the PCRA petition, the Superior Court examined each of petitioner’s claims on the merits and rejected all of them. See Superior Court’s Dec. 15, 1999, Opinion, Docket No. 2601 Phila. 1998, Resps.’ Answer, Ex. C-2 at 4-16. Petitioner did not file a petition for allowance of appeal to the Supreme Court of Pennsylvania within the thirty-day period for doing so. See Pa. R. App. P. 1113(a) (requiring that petition for allowance of appeal be filed “within 30 days of the entry of the order of the Superior Court...sought to be reviewed”).

As to the habeas corpus petition, the Superior Court declined to consider the merits of petitioner’s claims, ruling that he was “precluded from presentation via a writ of habeas corpus

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<sup>5</sup> The date on which petitioner lodged these appeals is not clear from the record. The Superior Court treated both as timely filed.

of a claim of an illegal sentence.” Superior Court’s December 15, 1999, Opinion, Docket No. 3509 Phila. 1998, Resps’ Answer, Ex. D-2 at 3. The court so held because, in the Commonwealth of Pennsylvania, the habeas corpus remedy had been subsumed by the statutorily authorized PCRA remedy. Id. (citing 42 Pa. C.S.A. § 9542 (“The action established in this subchapter shall be the sole means of establishing collateral relief and encompasses all other common law and statutory remedies...including habeas corpus and coram nobis.”)); Commonwealth v. Diventura, 734 A.2d 397, 398 (Pa. Super. Ct. 1999) (“Pennsylvania law explicitly states that in cases where a person has been restrained by virtue of sentence after conviction for a criminal offense, the writ of habeas corpus shall not be available if a remedy may be had by post-conviction hearing proceedings authorized by law.”)). Petitioner filed a petition for allowance of appeal of the December 15, 1999, Superior Court decision in the Supreme Court of Pennsylvania. That court denied the petition on April 25, 2000. See Commonwealth v. Washington, 758 A.2d 662 (Pa. 2000) (table). Petitioner filed the present action on December 18, 2000.

## **II. DISCUSSION**

Disposition of this action turns on AEDPA’s one-year statute of limitations. The Court will analyze the proper application of that statute in this case by considering, in turn: (1) Judge Rapoport’s application of the statute in the Report and Recommendation; (2) petitioner’s objections to the Report and Recommendation with respect to tolling the statute; and (3) a final calculation of petitioner’s deadline for filing his federal habeas corpus action.

### **A. THE REPORT AND RECOMMENDATION**

AEDPA codified a one-year statute of limitations for actions brought under 28 U.S.C. §

2254. See 28 U.S.C. § 2244(d)(1). Unless one of three exceptions apply, see 28 U.S.C. § 2244(d)(1)(B)-(D), the statute runs from “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)(A). In this case, that would mean that the one-year statute began to run ninety days after October 24, 1985, the final date on which petitioner could have petitioned for certiorari after the Supreme Court of Pennsylvania declined consideration of petitioner’s direct appeal. The Third Circuit has decided, however, that, for a petitioner whose conviction became final before AEDPA’s enactment, the one-year statute of limitations is treated as running from the date of that enactment, April 24, 1996. Burns v. Morton, 134 F.3d 109, 111-12 (3d Cir.1998); see also Morris v. Horn, 187 F.3d 333, 337 (3d Cir. 1999).

Without any tolling of the statute, petitioner would be barred from filing a habeas petition after April 23, 1997. AEDPA further provides, however, that the statute should be tolled for “[t]he 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). In this case, petitioner filed two separate collateral attacks in the Pennsylvania courts. An essential question for assessing the timeliness of petitioner’s current habeas petition, then, is whether these two state-court collateral attacks tolled the AEDPA limitations period.

In answering this question, Judge Rapoport did not consider petitioner’s state habeas corpus action, nor did he explain why he declined to consider that action. Judge Rapoport did, however, conclude that petitioner’s PCRA action was a “properly filed” state-court collateral action under § 2244(d)(2) and that the running of the one-year statute was tolled while that action was pending. In so doing, Judge Rapoport rejected respondents’ argument that the PCRA action

was not “properly filed” because it was filed out-of-time under Pennsylvania procedural rules; he concluded that the PCRA action should not be considered as filed out-of-time because the Superior Court considered petitioner’s claims on the merits in its opinion.

The Court agrees with Judge Rapoport’s conclusion that the PCRA action was “properly filed” and that it tolled the statute of limitations under § 2244(d)(2). The Court notes, however, that the PCRA petition was “properly filed” for a more basic reason – it simply was not filed beyond the statutory period. See Commonwealth v. Crider, 735 A.2d 730, 732 (Pa. Super. Ct. 1999) (explaining that for petitioners whose convictions became final before January 16, 1996, amendments to the PCRA adopting a one-year statute of limitations, “the operative deadline” for first-time PCRA petitions would be January 16, 1997).<sup>6</sup> Respondents’ argument that the action was not timely is simply incorrect: petitioner filed his PCRA action, at the latest, on January 14, 1997, which is within the statutory period.

Given that the PCRA action was “properly filed,” the next issue to be addressed is the time period for which petitioner’s statute of limitations was tolled. Judge Rapoport found that petitioner filed the PCRA action on January 4, 1997, the date cited by respondents. See Resps.’ Answer at 3. He further found that the PCRA action was “pending” under § 2244(d)(2) until January 14, 2000, the final date on which petitioner could have sought discretionary review of the Superior Court’s December 15, 1999, denial of relief.<sup>7</sup>

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<sup>6</sup> This PCRA action arguably might not be viewed as a “first” PCRA action in that petitioner filed three collateral attacks in the late 1970s and early 1980s seeking to reinstate his direct appeal. Respondents concede, however, that this action should be considered a “first” PCRA action. See Resps.’ Answer at 3.

<sup>7</sup> Judge Rapoport’s conclusion on this point is clearly correct under the Third Circuit’s decision in Swartz v. Meyers, 204 F.3d 417, 424 (3d Cir.2000), where the court held that

Accordingly, Judge Rapoport found that as of petitioner's filing of the PCRA, the one-year statutory period for petitioner's federal habeas filing had run for 256 days – from April 24, 1996 until January 4, 1997. The statute was then tolled until January 14, 2000. After that date, petitioner had 109 days to file his federal habeas action, until approximately May 3, 2000. Because petitioner did not file his § 2254 petition in this Court until December 18, 2000, Judge Rapoport concluded the petition was time barred and should be dismissed.

## **B. PETITIONER'S OBJECTIONS**

Petitioner filed three objections to the Report and Recommendation, which the Court treats as five separate arguments. They are as follows: (1) Judge Rapoport incorrectly identified the date on which petitioner filed his PCRA petition and thus incorrectly identified the commencement of the time period tolled under § 2244(d)(2); (2) the period for which petitioner's state habeas corpus petition was pending should toll the statute of limitations; (3) the statute of limitations should not run while petitioner was preparing his PCRA petition; (4) the statute of limitations should not run while petitioner was in federal custody in Tennessee through September 13, 1996, because he had no access to Pennsylvania legal materials and was unable to prepare his PCRA petition; and (5) the statute of limitations should be tolled for ninety days after the Supreme Court of Pennsylvania denied review of petitioner's state habeas corpus action, because this is the time period during which he could have petitioned for certiorari. The Court will address each of these arguments in turn.

### **1. PCRA Filing Date**

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“pending,” as that word is used in § 2244(d)(2), includes “the time a prisoner has to seek review of the Pennsylvania Superior Court's decision whether or not review is actually sought.”

There is little agreement in the record as to the date on which petitioner filed his PCRA action. Judge Rapoport stated that the action was filed on January 4, 1997. He appears to have adopted the procedural history provided by respondents, who also cite this date. The Superior Court, however, in its December 15, 1999, opinion affirming the dismissal of petitioner's PCRA action stated that it was originally filed on January 14, 1997. Resps.' Answer, Ex. C-2 at 2. Petitioner argues in his objections that he filed the action as early as November 20, 1996. The exact date of filing is important, of course, because it begins the tolling period.

Although the Court finds it most likely that petitioner's PCRA action was filed between January 10, 1997 and January 14, 1997,<sup>8</sup> the Court will accept, arguendo, petitioner's assertion that he had properly filed a state court collateral attack on his conviction by November 20, 1996. The Court does so because, as will be discussed below, see infra § II.C., acceptance of this early date does not allow petitioner to escape the AEDPA time bar.

## **2. Tolling Based on Petitioner's State Habeas Corpus Petition**

Petitioner argues that his habeas corpus action filed in the Court of Common Pleas on July 31, 1998, should be considered as a "properly filed application for State post-conviction or other collateral review" under § 2244(d)(2) that tolls the statute of limitations applicable to his federal habeas petition. Under petitioner's argument, the tolled period for his federal habeas petition would be extended until April 25, 2000, the date on which the Supreme Court of Pennsylvania denied review of his appeal in the state habeas corpus action.

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<sup>8</sup> Petitioner asserts that he mailed a filing containing "all of his collateral issues" to the Court of Common Pleas on January 10, 1997. He also supplies a certified mail receipt showing that the Delaware County Office of Judicial Support received a letter from petitioner on January 14, 1997. See Pet.'s Objections, Ex. E. Finally, the Superior Court identified January 14, 1997 as the date on which the PCRA petition was filed.

The Superior Court’s grounds for dismissing the habeas corpus petition – that petitioner’s requested remedy of habeas corpus was subsumed by the statutory PCRA remedy – might suggest that petitioner’s action was not “properly filed” because it sought a remedy that was unavailable under Pennsylvania law. The Third Circuit, however, has adopted a “flexible approach” in determining whether an action is in fact properly filed. Nara v. Frank, 264 F.3d 310, 315 (3d Cir. 2001). Specifically, the Third Circuit has held that § 2244(d)(2) “covers ‘various forms of state review,’” id. (quoting Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999)), and it has “rejected ‘the notion that a meritless PCRA petition cannot constitute a “properly filed application” under § 2244(d)(2).’” Id. (quoting Lovasz v. Vaughn, 134 F.3d 146, 149 (3d Cir. 1998)). This approach draws support from a recent Supreme Court decision where “[t]he Court stated that ‘an application is “properly filed” when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.’” Id. at 316 (quoting Artuz v. Bennett, 531 U.S. 4, 8 (2000)).

Based on these principles, the Third Circuit concluded in Nara that a state-court motion to withdraw a guilty plea nunc pro tunc eleven years after conviction was “akin to an application for state post-conviction or other collateral review” and “properly filed” for tolling purposes under § 2244(d)(2). Id. at 316. The cases on which the Third Circuit relied in Nara further demonstrate the flexibility of the “properly filed” inquiry. See, e.g., Artuz, 531 U.S. at 7-8 (holding that statute of limitations was tolled while state court was considering prisoner’s motion to vacate conviction even though motion was procedurally barred under state law); Dictado v. Ducharme, 244 F.3d 724 (9th Cir. 2001) (holding state court actions characterized as “repetitive and

untimely” were “properly filed”); Villegas v. Johnson, 184 F.3d 467, 469-70 (5th Cir. 1999) (holding that petition dismissed by state court as successive or an abuse of the writ was “properly filed”); Lovasz, 134 F.3d at 148-49 (holding second or successive PCRA petition to toll statute of limitations). Further, since Nara, Judge Shapiro of this Court has held in two cases that PCRA petitions untimely filed under Pennsylvania law are nonetheless “properly filed” and toll the AEDPA statute of limitations. See Rosado v. Vaughn, No. 00-5808, 2001 WL 1667575, at \*3 (E.D. Pa. Dec. 28, 2001) (Shapiro, J.); Cooper v. Vaughn, No. 00-6016, 2001 WL 1382493, at \*3-4 (E.D. Pa. Nov. 6, 2001) (Shapiro, J.).

The instant case presents a different question than that presented in the above-cited cases. As opposed to submitting an untimely or second/successive collateral attack as did the petitioners in the above-cited cases, petitioner, in his state habeas corpus action, essentially sought a remedy that is not available under Pennsylvania law. It is not at all clear from the above cases whether the Third Circuit’s “flexible approach” would include such an action within the realm of “properly filed” collateral attacks, and the matter is further complicated by the fact that Pennsylvania courts have, in some cases, characterized pro se petitions for habeas corpus relief as PCRA petitions. See Commonwealth v. Weimer, 756 A.2d 684, 685 (Pa. Super. Ct. 2000) (citing Commonwealth v. DiVentura, 734 A.2d 397, 398 (Pa. Super. Ct. 1999)). Thus, it is possible that some courts might characterize petitioner’s state-court habeas action as a second or successive PCRA petition. If so construed, following the Third Circuit’s ruling in Lovasz, such an action would be “properly filed”; moreover, even if the action were not timely filed under Pennsylvania law, it might still be viewed as “properly filed” under Judge Shapiro’s decisions in

Rosado and Cooper.<sup>9</sup>

Having stated the issue, the Court will not decide it because the answer to the questions raised will have no bearing on this case. That conclusion is based on the fact that, assuming arguendo, the Court were to find that petitioners' state-court habeas action was properly filed and tolled the AEDPA statute of limitations, petitioner's federal habeas corpus action will still be time barred. See infra § II.C. Nevertheless, the Court decided to include the "properly filed" analysis in this Memorandum in order to frame the issue which most certainly will be presented in other habeas corpus cases.

### **3. Tolling During Petitioner's Preparation of his PCRA Action**

Petitioner's next argument is a fairly novel one. He argues that the statute of limitations for his federal habeas corpus petition should be tolled for the period during which he was preparing to commence his PCRA action. It appears that petitioner is arguing that his state-court collateral action should be viewed as "pending" under § 2244(d)(2) from the time he began work on the petition.<sup>10</sup> Although the Court's research has not produced many reported decisions to have analyzed such a claim, the court in Torres v. Kuhlmann, 1999 WL 551261, at \*2 (E.D.N.Y. June 10, 1999), rejected the same argument raised by petitioner.

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<sup>9</sup> Even if the Court were to characterize petitioner's state court habeas action as "frivolous" – which it may well be – that would not be fatal to petitioner's tolling claim. See Lovasz, 134 F.3d at 149 (refusing to read into "properly filed" provision "any requirement that the application be non- frivolous"); but cf. United States ex rel. Belmore v. Page, 104 F. Supp. 2d 943, 945-46 (N.D. Ill. 2000) (holding that petitioner's filing of state court habeas corpus action was seeking a "totally unavailable remedy" that "must be viewed as legally frivolous" and could not, therefore, be viewed as "properly filed").

<sup>10</sup> To the extent that petitioner is seeking equitable tolling for the time during which he was preparing his PCRA petition, the Court will address that argument infra at § II.B.4.

To suggest that preparation of a state court petition should toll the federal habeas petition, the Torres court concluded, “misinterprets the AEDPA.” Id. This is because “Section 2244(d)(2) excludes only 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.’” Id. (quoting § 2244(d)(2)) (emphasis supplied). During the time period when the petitioner in Torres was preparing to file a state-court collateral attack, he did not have a state-court action “properly filed.” Id. For that reason, the Torres court refused to toll the AEDPA limitations period during the petitioner’s state-action preparation time. Id.

The Court finds the Torres court’s reasoning sound, and adopts that reasoning in its analysis of petitioner’s argument. Because petitioner did not have a state-court collateral attack of his conviction “properly filed” when he was preparing to file his PCRA action, the Court will not toll the statutory period for the time during which petitioner undertook such preparation.

#### **4. Equitable Tolling**

Petitioner asserts in his objections that he was in federal custody in Tennessee in 1996 at the time the statutes of limitations embodied in the PCRA amendments and AEDPA began to run. Because the federal institution in Tennessee where petitioner was incarcerated did not provide Pennsylvania legal resources necessary for the filing of a petition under the PCRA, petitioner asserts that he was unable to begin work on his PCRA action until he was returned to Pennsylvania in September 1996. The Court interprets petitioner’s assertions as arguing that the statute of limitations governing his federal habeas petition should be equitably tolled for the period during which petitioner did not have access to Pennsylvania legal materials.

The Third Circuit has held that a petitioner may establish grounds for equitable tolling of

the AEDPA limitations period “when the principles of equity would make the rigid application of a limitation period unfair.” Miller v. N.J. State Dept. of Corr., 145 F.3d 616, 618 (3d Cir. 1998) (quotation omitted). “[T]his will occur when the petitioner has in some extraordinary way...been prevented from asserting his or her rights.” Id. (quotation omitted). Generally, “courts must be sparing in their use of equitable tolling.” Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1999).

For petitioner to succeed on an equitable tolling argument, he would need to demonstrate that his out-of-state incarceration constituted an “extraordinary” impediment to his assertion of his rights. This is a difficult burden for petitioner to meet; other courts have rejected such arguments in similar cases. See Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) (“Even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted.”); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (rejecting argument that lack of access to legal research resources justified equitable tolling of AEDPA statute of limitations); United States v. Ramsey, No. 92-590-2, 1999 WL 718079, at \*2 (E.D. Pa. Aug. 26, 1999) (holding that “lockdown” at institution where petitioner was incarcerated which impeded access to legal library did not constitute extraordinary circumstance necessitating equitable tolling).

In this case, notwithstanding petitioner’s asserted inadequate legal resources due to his custody in Tennessee for a number of months before his return to Pennsylvania custody in September 1996, petitioner was able to file a timely PCRA petition on November 20, 1996. At that time, the statute of limitations for his federal habeas action had run for approximately 210 days from April 24, 1996. Once petitioner’s state-court collateral attacks were no longer

pending, he still had approximately 155 days to file his federal habeas action – more than five months. Petitioner makes no assertion that his access to legal resources was impeded during this five-month period. The Court therefore concludes that petitioner’s claim does not justify equitable tolling of the AEDPA statute of limitations.

**5. Tolling During Time Period Available to Petition for Certiorari**

Petitioner argues that his state court action – specifically, his state-court habeas corpus action – was still “pending” for purposes of § 2244(d)(2) during the 90-day period in which he could have petitioned for certiorari after the Supreme Court of Pennsylvania declined to review his appeal. This argument, however, has already been rejected by the Third Circuit. See Stokes v. District Attorney of County of Philadelphia, 247 F.3d 539, 542 (3d Cir. 2001) (joining other courts of appeals concluding “that the time during which a state prisoner may file a petition for a writ of certiorari in the United States Supreme Court from the denial of his state post-conviction petition does not toll the one year statute of limitations under 28 U.S.C. § 2244(d)(2)”); see also Nara, 264 F.3d at 318. Accordingly, petitioner’s state habeas corpus action was only pending for purposes of § 2244(d)(2) until the Supreme Court of Pennsylvania declined discretionary review on April 25, 2000.

**C. PETITIONER’S DEADLINE FOR FILING HABEAS CORPUS PETITION IN FEDERAL COURT**

In light of the foregoing analysis, the Court concludes that petitioner’s federal habeas corpus action is time barred under AEDPA. For that reason, the petition will be denied.

The statute of limitations began to run on April 24, 1996. It ran for 210 days until November 20, 1996, the date which the Court has accepted as the beginning of petitioner’s

“properly filed” PCRA attack on his conviction under § 2244(d)(2). The PCRA action continued to toll the statute of limitations until January 14, 2000, the final date on which petitioner could have sought review of his PCRA petition before the Supreme Court of Pennsylvania. After January 14, 2000, assuming, arguendo, that petitioner’s state-court habeas corpus action was “properly filed,” the statute of limitations would have been tolled until April 25, 2000, the date on which the Supreme Court of Pennsylvania declined to review the Superior Court’s rejection of that action. After April 25, 2000, petitioner had 155 days left of the one year provided by AEDPA. This means that the AEDPA statute of limitations would have expired on or about September 27, 2000. Petitioner did not file the instant habeas action until December 18, 2000, nearly three months too late.

### **III. CONCLUSION**

For the foregoing reasons, the Court overrules petitioner’s objections to the Report and Recommendation. The Court approves and adopts the Report and Recommendation as modified by this Memorandum, and dismisses the Petition for Writ of Habeas Corpus. Because petitioner has not established a substantial denial of a constitutional right, the Court will not issue a certificate of appealability.

An appropriate Order follows.

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

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| <b>GERALD A. WASHINGTON,</b>        | : |                     |
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| <b>Petitioner</b>                   | : | <b>CIVIL ACTION</b> |
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| <b>v.</b>                           | : |                     |
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| <b>MARY LEFRIDGE BYRD; ATTORNEY</b> | : | <b>NO. 00-6389</b>  |
| <b>GENERAL OF THE COMMONWEALTH</b>  | : |                     |
| <b>OF PENNSYLVANIA; DISTRICT</b>    | : |                     |
| <b>ATTORNEY OF DELAWARE COUNTY,</b> | : |                     |
|                                     | : |                     |
| <b>Respondents.</b>                 | : |                     |
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**ORDER**

**AND NOW**, this 22nd day of March, 2002, upon consideration of the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 filed by Gerald A. Washington (Document No. 1, filed December 18, 2000; Document No. 3, filed February 16, 2001), United States Magistrate Judge Arnold C. Rapoport's Report and Recommendation dated July 20, 2001 (Document No. 9, filed July 20, 2001), Petitioner's Objections to the Magistrate's Report and Recommendation (Document No. 11, filed August 2, 2001), and all related submissions, **IT IS ORDERED** as follows:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport dated July 20, 2001, is **APPROVED** and **ADOPTED** consistent with the foregoing Memorandum;
3. The Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is **DISMISSED** without an evidentiary hearing; and

4. Because petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for issuing a certificate of appealability.

**BY THE COURT:**

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**JAN E. DuBOIS, J.**