

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

JOHN A. PACE,	:	CIVIL ACTION
Petitioner,	:	99-6568
	:	
v.	:	
	:	
DONALD VAUGHN, et al.,	:	
Respondent	:	

MEMORANDUM

Giles, C.J.

March 29, 2002

I. Introduction

John A. Pace (“Mr. Pace”), a state prisoner who pled guilty to second-degree murder and possession of an instrument of crime, petitions for a writ of habeas corpus under 28 U.S.C. § 2254. This court had referred Mr. Pace’s petition to United States Magistrate Judge M. Faith Angell for a Report and Recommendation. She recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act (“AEDPA”) includes a statute of limitations that requires that federal habeas petitions be filed within one year of the date that a petitioner’s conviction becomes final in state court. See 28 U.S.C. §2244(d)(1). The Recommendation accurately noted that petitioners whose convictions became final before the enactment of AEDPA’s statute of limitations on April 24, 1996, have one year from that date to file their petitions. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir 1998). It concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not submitted according to the state’s procedural requirements, and thus, was not “properly filed” for purposes of tolling the federal habeas statute. (Report and Recommendation at 7.) The Recommendation reasoned that petitioner had only until April 23, 1997 to file his federal habeas petition. This

§ 2254 petition was filed by December 24, 1999 and was, therefore, seen as time-barred.

Petitioner filed objections to the Report and Recommendation claiming that his second state court petition, pursuant to the Pennsylvania Collateral Relief Act (“PCRA”), should have tolled AEDPA’s statute of limitations either because his state court petition was “properly filed” or because this court should apply “equitable tolling” pursuant to the third circuit’s opinion in Miller v. New Jersey Dep’t of Corrs., 145 F.3d 616 (3d Cir. 1998). The Commonwealth of Pennsylvania responded, opposing the objections. In Pace v. Vaughn, 151 F. Supp.2d 586, 591 (E.D. Pa. 2001), this court held that Mr. Pace’s state court petition was “properly filed” for purposes of tolling the federal habeas statute of limitations, and that, even if it had not been “properly filed,” petitioner was entitled to equitable tolling while his second state court PCRA petition was pending.

On June 22, 2001, the respondents moved for reconsideration or permission to appeal. Oral argument was heard on January 29, 2002. For the following reasons, the motion for reconsideration is denied and the motion for permission to appeal is granted.

II. Background

A. *State Court Proceedings*

On February 13, 1986, petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession of an instrument of crime and the second-degree murder of Randolph Baldwin. Petitioner, who was then seventeen years old, was sentenced to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw the guilty plea and he did not file a direct appeal.

Six months later on August 21, 1986 petitioner filed a pro se petition under the Pennsylvania Post Conviction Hearing Act (“PCHA”), 42 PA. CONS. STAT. ANN. § 9541, et seq. Through appointed counsel, petitioner eventually filed an amended petition claiming both trial court error and ineffective assistance of trial counsel. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA court’s decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

The PCHA was replaced by the PCRA in 1988. The PCRA was amended in 1995 and those amendments became effective on January 16, 1996. Act of Nov. 17, 1995, P.L. 1118 No. 32 (Spec. Sess. No.1), § 1.

On November 27, 1996, petitioner filed a second pro se application for collateral relief under the PCRA. The PCRA court appointed counsel and allowed petitioner to amend his application. Mr. Pace’s second application alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) the guilty plea was entered involuntarily; and (3) all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet. at 5-5A.) On July 23, 1997, the PCRA court denied the petition on its merits. Petitioner appealed to the Superior Court of Pennsylvania.

While petitioner’s appeal was pending, the Superior Court decided Commonwealth v. Alcorn, 703 A.2d 1054, 1057 (Pa. Sup. Ct. Dec. 17, 1997). It held, for the first time, that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after an underlying conviction became final, even if the conviction became final and the first petition was filed before the enactment of the 1996 amendments. Alcorn, 703 A.2d at 1056

(finding that “our research has indicated no prior decisions...interpreting this section [9545(b)]; therefore, its applicability to this case presents a question of first impression”).

The Commonwealth wrote a letter brief to the Superior Court concerning the pending appeal of the denial of Mr. Pace’s second PCRA petition. It argued that based on Alcorn the petition was time-barred. The Superior Court agreed and, on December 3, 1998, it dismissed the petition as time-barred.

By motion, petitioner requested re-argument, contending there for the first time that prison officials had wrongfully destroyed legal documents, and that that conduct entitled him to an exception to the PCRA’s new statute of limitations, pursuant to 42 PA. CONS. STAT. ANN. §9545(b)(1)(i) (“the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim...”). (Pet.’s Objs. to Magis. Rep. and Recommendation, Ex B, App. for Re-argument at 3.) On February 8, 1999, without stating reasons, the Superior Court denied the request for re-argument. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was denied on July 29, 1999.

B. Federal Proceedings

On December 24, 1999, petitioner filed this federal habeas petition, pro se. In it, he claimed that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) his sentence was meted out pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of the Due Process Clause of the United States Constitution. (§ 2254 Pet. at 8.)

As discussed supra, Magistrate Judge Angell recommended that the § 2254 petition be

dismissed as time-barred. This court declined to follow the Report and Recommendation and, in an opinion dated June 7, 2001, found that Mr. Pace's petition was "properly filed" for purposes of tolling the federal habeas statute of limitations and that, even if it had not been properly filed, petitioner was entitled to equitable tolling while his second PCRA petition was pending.

Respondents filed a motion for reconsideration on the grounds that this court's holding is directly contrary to Fahy v. Horn, 240 F.3d 239 (3d Cir. 2000), which, they argue, is binding authority as to both the statutory and equitable tolling issues raised by Mr. Pace. (Resps.' Pet. at 2.) Since the June 7, 2001 order and opinion in Pace, there have been relevant circuit case law developments on the issue of whether a state PCRA petition, ultimately declared untimely by the state's highest court, may be "properly filed" for purposes of the federal habeas statute. Also, the third circuit has rendered decisions which clarify that court's position on equitable tolling. Nevertheless, while this court denies the respondents' motion for reconsideration, it grants permission for an immediate appeal because there are important legal questions involved which perhaps should most appropriately be answered by the third circuit at this stage of the proceedings.

III. Discussion

A. *Standard for a Motion for Reconsideration and for Interlocutory Appeal*

1. *Motion for Reconsideration*

Reconsideration of a judicial ruling is appropriate if (1) there has been an intervening change in controlling law; (2) there is new evidence not previously available; or (3) there is a need to correct a clear error of law or fact or to prevent a manifest injustice. Public Interest

Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 116-117 (3d Cir. 1997).

2. *Interlocutory Appeal*

The appropriate standard for an order granting permission for an interlocutory appeal is whether (1) the order “involves a controlling question of law as to which there is substantial ground for difference of opinion” and (2) “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b).

B. *Mr. Pace’s Second PCRA Petition Statutorily Tolled AEDPA’s Statute of Limitations*

1. *AEDPA’s Statute of Limitations*

A state prisoner must file his or her federal habeas corpus petition within one year after the completion of the state court proceedings. 28 U.S.C. § 2244(d)(1). The following section became effective on April 24, 1996, when the Antiterrorism and Effective Death Penalty Act of 1996 was signed into law:

Title 28 U.S.C. § 2244(d) provides in relevant part:

(d)(1) 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 period 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;...

(2) 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. § 2244(d).

AEDPA’s statute of limitations is subject to statutory and equitable tolling. Miller, 145

F.3d at 618. In addition, the third circuit has held that it would be impermissibly retroactive to “bar the filing of a habeas petition before April 23, 1997, where the prisoner’s conviction became final before April 24, 1996...” Burns, 134 F.3d at 111. Mr. Pace’s conviction became final in 1986. He had one year from the enactment of AEDPA, plus any additional time, for which he can show statutory or equitable tolling is appropriate, within which to file a federal habeas petition.

2. *Pennsylvania’s PCRA Statute*

When petitioner filed his second PCRA petition on November 27, 1996, the Pennsylvania collateral relief statute had recently been amended. The amendments placed new time limits on PCRA petitions. The relevant part of the amended limitation subsection reads:

(b) Time for filing petition.--

(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. ANN. § 9545.

The 1995 PCRA amendments were accompanied by a Note concerning legislative intent. The Note stated that “a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under [42 PA. CONS. STAT. ANN. §

9545(b)] if the petitioner’s first petition is filed within one year of the effective date of the act.” Sec. 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32. On its face, § 9545(b) of the PCRA states that a petition must be filed within one year of the date that a petitioner’s conviction becomes final, unless the petition falls within one of its enumerated exceptions, or the petitioner’s conviction became final before the effective date of the amendments and the petitioner is filing a first application.

3. *Pace’s Second PCRA Petition was “Properly Filed” Under Federal Law*

The Supreme Court held in Artuz v. Bennett, that a state habeas petition is “properly filed” for purposes of § 2244(d)(2) and statutorily tolls the federal habeas statute

when its delivery and acceptance are in compliance with the applicable laws and rules governing filing. 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. 531 U.S. 4, 8 (2000) (quoting Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998)).

“[T]he question whether an application has been ‘properly filed’ is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar.” Artuz, 531 U.S. at 9. Artuz distinguishes between state statutes or statutory provisions which set forth “a condition to filing” as opposed to “a condition to obtaining relief.” Id. at 11.

However, Artuz specifically left open the question “whether the existence of certain exceptions to a ‘timely’ filing requirement in a state collateral relief statute can prevent a late application from being considered ‘improperly’ filed” for federal habeas purposes. Id. at 9 n.2. Although the third circuit has not directly answered this question, other circuits which have decided the issue have found that “if a state’s rule governing the timely commencement of state

post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as ‘properly filed.’” Such a statute “does not impose an absolute bar to filing” and is a “condition to obtaining relief” rather than a “condition to filing.” Dictado v. Ducharme, 244 F.3d 724, 728-29 (9th Cir. 2001); Smith v. Ward, 209 F.3d 383, 384-85 (5th Cir. 2000) (holding that a petition is “properly filed,” even if eventually dismissed as untimely, when the state statute governing timely filings contains certain exceptions which require some level of judicial review); but see Brooks v. Walls, No. CIV.A.01-1584, 2002 WL 126606, at *2 (7th Cir. Feb. 2, 2002) (holding that a “plain error exception” to a state statute’s timely filing requirement does not prevent a late application from being “improperly” filed for federal habeas purposes).¹

¹ Pennsylvania’s PCRA statute differs materially from the Illinois PCRA statute which the seventh circuit treats as a procedural filing requirement even though Illinois state court judges “cast at least a sidelong glance at the merits in order to determine whether to excuse failure to meet the deadline.” Brooks, 2002 WL 126606, at *1. The Illinois PCRA statute states in relevant part:

(c) No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 725 IL. COMP. STAT. 5/122-1(c).

The seventh circuit found that the Illinois statute “lacks the merits-related exceptions that the [AEDPA] applies to federal courts.” Brooks, 2002 WL 126606, at *3. Instead, an Illinois state court may excuse a late filing if the petition demonstrates “plain error.” Id. Conversely, the “merits-related” exceptions to the timeliness requirement in Pennsylvania’s PCRA statute are virtually identical to those contained in the AEDPA. Compare 42 PA. CONS. STAT. ANN. § 9545(b)(1)(i)-(iii) with 28 U.S.C. 2244(d)(1)(B)-(D).

The seventh circuit described the approach of Illinois trial judges in evaluating untimely

Current third circuit precedent is entirely consistent with the approach that the ninth and fifth circuits have employed. In Nara v. Franks, the third circuit discussed the flexible approach that it has adopted in determining whether a state collateral petition is “properly filed” for purposes of § 2244(d)(2) and statutorily tolls AEDPA. See Nara v. Frank, 264 F.3d 310, 315 (3d Cir. 2001). In determining that petitioner Nara’s state post-conviction petition was properly filed for purposes of federal law, it applied the distinction discussed in Artuz between whether a state collateral petition meets the “conditions for filing” as contrasted to an inquiry as to whether the claims in the petition meet all of the “conditions for obtaining relief” under state law. Id.²

Nara is consistent with its earlier decision in Lovasz which held that the question of whether a state court petition is “properly filed” does not depend upon the state court’s ultimate ruling on the merits of the application. Nara, 264 F.3d at 315 (quoting Lovasz, 134 F.3d at 149 (a meritless PCRA petition can still constitute a “properly filed application” under § 2244(d))). Lovasz found that if a state allows petitioners to file second or successive petitions for post-conviction relief, federal courts should not undermine the state’s decision by refusing to

PCRA petitions as follows: “Thus any state prisoner whose delay was not caused by his own ‘culpable negligence’ (which forecloses any consideration of an untimely filing) receives either plenary review or a judicial response along the lines of ‘this petition is late; and because it does not demonstrate a miscarriage of justice, I have decided not to excuse the untimeliness.’” Brooks, 2002 WL, 126606, at *1.

Although the seventh circuit has characterized its review as “non-merits based,” it is respectfully suggested that as the “sidelong glance at the merits” is meant to be meaningful and not a frivolous judicial exercise, it is a “merits-based” review system. The merits are considered, however cursorily, with a deliberate eye trained to determine if the untimeliness of the petition should be excused to avoid a miscarriage of justice in a particular case.

² Petitioner Nara had filed a motion to withdraw a guilty plea nunc pro tunc which the third circuit noted is akin to an application for state post-conviction or other collateral review. Id. at 316.

toll the one year period of limitation of § 2244(d)(1) while a second or successive petition is pending in the state court system. Lovasz stated that “[w]hile we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent petitions, Pennsylvania allows for the filing of second or subsequent PCRA petitions, and courts occasionally grant relief in such proceedings.(citations omitted)” Lovasz, 134 F.3d at 148-149.

As discussed above, § 9545(b)(1) of the PCRA statute sets forth strict rules or conditions for obtaining relief under Pennsylvania law. However, this statute is not an absolute bar to filing a second or successive petition more than one year after a conviction became final. The statute contains exceptions that require “some level of judicial review” to examine the merits of the petition before it can be dismissed as time-barred. At the very least, a state court must examine a PCRA petition to determine whether the petition alleges any of the enumerated exceptions to the one year time-limit: (i) that the failure to raise the claim previously was the result of interference by a government official; (ii) that the facts upon which the claim is predicated were unknown to the petitioner; or (iii) that the right asserted is a newly recognized and retroactive constitutional right. 42 PA. CONS. STAT. ANN. § 9545(b)(1).

Therefore, this court sees § 9545(b)(1) of the PCRA statute, as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. See Rosado v. Vaughn, No. CIV.A.00-5808, 2001 WL 1667575, at *3 (E.D. Pa. Dec. 28, 2001) (finding that § 9545(b) “discourages late PCRA petitions by strictly limiting the availability of relief, but, given its exceptions, it does not impose an absolute bar to filing a late application: it is not a procedural filing requirement.”); Cooper v. Vaughn, No. CIV.A.00-6016, 2001 WL 1382492, at *3 (E.D. Pa. Nov. 6, 2001) (same). Mr. Pace’s second PCRA petition was untimely under Pennsylvania

law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was “properly filed” for purposes of federal law and tolled AEDPA’s statute of limitations since it complied with the relevant factors set forth in Lovasz. 134 F.3d at 148.

4. *Fahy Does Not Preclude a Finding That Pace’s Second PCRA Petition Was Properly Filed*

Respondents argue that Fahy controls the issue and requires a finding that Mr. Pace’s second PCRA petition was not “properly filed.” (Resp.’s Mot. at 2.) However, in a decision after Fahy, the third circuit specifically declined to reach the issue of whether a second PCRA petition, clearly untimely under Pennsylvania law, was necessarily not “properly filed” under § 2244(d)(2) for federal purposes. See Banks v. Horn, 271 F.3d 527, 534 (3d Cir. 2001) [Banks IV]³. The third circuit stated:

[w]hile we could explore this concept [whether an untimely state petition is necessarily not properly filed] under the applicable Pennsylvania law and under the federal habeas case law, Artuz, we need not do so, because we conclude that, even were we to decide that the late filing of Banks’s second PCRA rendered it not ‘properly filed,’ the District Court appropriately called on equitable principles to toll the one-year AEDPA requirement given this unusual fact pattern.(citations omitted) Id.

Fahy does not control an issue which the third circuit recognized had not been decided as of October 31, 2001, the date of the Banks IV decision.

³ There are numerous relevant and important opinions in the various Banks proceedings. While we designate the opinions for purposes of this opinion, they are not consistent with how other courts have numbered the various decisions. Banks v. Horn, 126 F.3d 206 (3d Cir. 1997) [Banks I]; Banks v. Horn, 63 F. Supp.2d 525 (M.D. Pa. 1999) [Banks II]; Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999) [Banks III]; Banks v. Horn, 271 F.3d 527 (3d Cir. 2001) [Banks IV].

Respondents further contend that Fahy stands for the proposition that an untimely PCRA petition cannot be “properly filed” under federal law. (Resps.’ Mot. at 10.) Actually what Fahy holds is that a federal court, in determining whether a state PCRA petition was “properly filed,” must interpret state law as it does when sitting in a diversity case and must defer to a state’s highest court when it rules on an issue. 240 F.3d at 243-244. The Fahy panel observed that the Pennsylvania Supreme Court had specifically ruled that Fahy’s petition was not properly filed as a matter of state law and that that determination by the highest state court was binding on a federal court. Id.

For factual and legal reasons, Fahy does not apply to the matter at hand. Factually, this case is materially different from Fahy. Here, there has not been a similar determination by Pennsylvania’s highest court that Mr. Pace’s second PCRA petition was improperly filed as a matter of state law. Here, the PCRA court did not dismiss Mr. Pace’s second PCRA petition as time-barred when it was filed on November 27, 1996. Here, the PCRA court appointed counsel to represent Mr. Pace, gave appointed counsel an opportunity to amend the petition, and on July 23, 1997, denied the petition on its merits. Petitioner timely appealed to the Superior Court. While the appeal was pending, the Commonwealth sent a letter brief to the Superior Court arguing that Mr. Pace’s petition should be dismissed as time-barred, based on Alcorn. In seeking reconsideration of the court’s rejection of his petition as time-barred, petitioner made a new factual claim that squarely came within one of the exceptions to the PCRA’s new statute of limitations. The Superior Court denied petitioner’s request for re-argument without stating reasons.

The court acknowledges the argument that Mr. Pace waived his right to raise the

governmental interference exception to the PCRA statute of limitations raised to the superior court because he did not make that allegation initially when he filed his second PCRA petition. 42 PA. CONS. STAT. ANN. § 9544(b) (Resp. to Petitioner’s Objs. to R & R at 5.). However, given that the Pennsylvania Supreme Court had previously allowed merits review of technically defaulted claims, see Commonwealth v. Lawson, 549 A.2d 107, 111-112 (Pa. 1988), Mr. Pace had a good faith basis in believing that that court would review this technically waived issue, which had fundamental constitutional dimensions.

It is noticed that while Fahy was filed (Feb. 9, 2001) after the Supreme Court’s decision in Artuz, (Nov. 7, 2000), the third circuit did not cite to that decision or attempt to reconcile it to the facts and circumstances of Fahy. Notably, subsequently, Nara, the most recent third circuit opinion on the issue of statutory tolling (Aug. 30, 2001), did cite and follow Artuz. Therefore, as a matter of precedent, Nara, not Fahy, controls disposition of this case.

Further, the Fahy panel relied on a ninth circuit case, Dictado v. Ducharme, 189 F.3d 889 (9th Cir. 1999) [Dictado I] which was subsequently reversed by Dictado v. Ducharme, 244 F.3d 724 (9th Cir. 2001) [Dictado II]. The ninth circuit reversed to make Dictado I consistent with Artuz. The third circuit had cited the Dictado I opinion for its language: “Had Congress intended to toll the statute of limitations for the period during which even improper applications were pending in state court, it would not have included the ‘properly filed’ limitation.” Fahy, 240 F.3d at 243 (quoting Dictado I, 189 F.3d 889, 892 (9th Cir. 1999)). This is the very language that the ninth circuit decided to disavow in light of Artuz. Dictado I was withdrawn after Artuz distinguished between state statutes which are “conditions to filing” as opposed to state statutes which are “conditions to obtaining relief,” and left open the question whether the existence of

certain exceptions to a timely filing requirement can prevent a late state post collateral petition from being considered “improperly filed.” Dictado II, 244 F.3d 724, 727 (2001) (quoting Artuz, 531 U.S. at 9 n.2). That is precisely the question now at issue in this case.

In Dictado II, the ninth circuit held that “if a state’s rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as “properly filed.” Id. at 727-28. Had the third circuit panel relied on Dictado II, an opinion consistent with Artuz, the panel might have reached a conclusion consistent with Dictado II.

C. *Pace’s Second PCRA Petition Equitably Tolled AEDPA’s Statute of Limitations*

1. *Standard For Equitable Tolling*

The one year “period of limitation” under 28 U.S.C. § 2244(d)(1) to file a federal habeas corpus petition is a statute of limitations subject to equitable tolling. See Miller, 145 F.3d at 618. The Miller opinion explained that the one year federal habeas statute of limitations can be equitably tolled

only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. 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.

The Fahy panel enumerated three circumstances which permit equitable tolling: “(1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been

prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.” Fahy, 240 F.3d at 244 (quoting Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999)).

2. *Mr. Pace Has Been Prevented From Asserting His Federal Rights in an Extraordinary Way*

The recent third circuit decision, Banks IV, is instructive for determining whether Mr. Pace has in some extraordinary way been prevented from asserting his rights. See Banks IV, 271 F.3d at 534. There, the court approved the district court’s reasons for equitably tolling the federal statute of limitations: (1) “the state of Pennsylvania law regarding the nature of the filing requirement [42 PA. CONS. STAT. ANN. § 9545(b)] was unclear, and Banks could reasonably have viewed the state limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court, later held..., a jurisdictional requirement” and (2) viewing the Pennsylvania Supreme Court ruling as a bar to filing a federal habeas petition “would result in unfair forfeiture [of petitioner’s federal rights] without notice.” Id. at 534. The court found that these factors provide “a basis for us to call on equitable principles in application of our own federal time parameters—the one year AEDPA requirement.” Id. These fairness factors are replicated here.

a. *The Uncertain Nature of the PCRA Filing Requirement*

i. *Statutory Language and Legislative Note*

When Mr. Pace filed his PCRA petition in November 1996, it was not known how Pennsylvania courts would interpret the amendments to the PCRA statute that had become effective on January 16, 1996 and had placed a new one year time-limit on PCRA petitions.

From the language of the statute itself, it is not clear that the time-limit is jurisdictional.

The Banks II district court decision held that while § 9545 is captioned “[j]urisdiction and proceedings,” it is not clear from the statute that all of the subsections involve jurisdiction⁴ or that subsection (b), stating the one year time-limit and the exceptions to it, was intended to be jurisdictional in nature. See Banks v. Horn, 63 F. Supp.2d 525, 532-33 (M.D. Pa. 1999) [Banks II]. The limitations subsection (b) states that a petition “shall be filed within one year of the date the judgment becomes final...” with certain exceptions. The subsection does not use “standard jurisdictional language” that “no court will have the authority to entertain an untimely petition.” Id. at 534. The district court in Banks II concluded that “it cannot be said that § 9545(b) is necessarily jurisdictional in nature, as opposed to a statute of limitations subject to equitable tolling.” Id. This court, like the third circuit in Banks IV, 271 F.3d at 534, finds the reasoning of the district court in Banks II persuasive and determinative.

Since Mr. Pace’s conviction occurred prior to the enactment of the PCRA amendments, it also could not have been clear how, if at all, the amendments would apply to his second PCRA petition which was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note regarding legislative intent. The Note stated that “a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under [42 PA. CONS. STAT. ANN. § 9545(b)] if the petitioner’s first petition is filed within one year of the effective date of the act.” Section 3(1) of Act 1995 (Spec. Sess.

⁴ Subsection (a) states that original jurisdiction is in the Court of Common Pleas. Section (c) limits the jurisdiction of the state courts to issue a stay of execution. Section (d) states standards governing admissibility of evidence, discovery, and privilege during and relating to an evidentiary hearing. 42 PA. CONS. STAT. ANN. § 9545. Discovery and privilege are normally not considered jurisdictional matters. Banks II, 63 F.Supp.2d at 533.

No. 1), Nov., 17, P.L. 1118, No. 32. The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their first petition since the amendments, had one year after its enactment within which to file a collateral relief petition.

ii. Relaxed Waiver Practice of Pennsylvania State Courts

Although Mr. Pace's case is not a death penalty case, the general practice of Pennsylvania's state courts to provide merits review to technically defaulted claims in death penalty cases ("the relaxed waiver doctrine") increased the uncertainty of the PCRA one year time-limit during the period when Mr. Pace had to decide whether to file for collateral relief in state or federal court. State courts allowed merits review for claims barred by the statutory time-limit of the amended PCRA for capital, and in some instances non-capital cases, if the claims alleged (1) the failure to raise the claim earlier was caused by ineffective assistance of counsel, or (2) the failure to address the merits of the claim could result in a miscarriage of justice. See Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998) (a PCRA petitioner's waiver will only be excused upon a demonstration of ineffectiveness of counsel in waiving the issue and only in a capital case); but see Commonwealth v. Beasley, 678 A.2d 773, 777 (Pa. 1996) (stating that generally a second or successive post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred but this showing is not required in a capital case). Beasley was decided on June 18, 1996, five months after the PCRA time-bar went into effect.

The third circuit itself has determined that it was not clear until Commonwealth v. Banks,

726 A.2d 374, 375-76 (Pa. Mar. 2, 1999) [Banks III] that the state PCRA statute of limitations was jurisdictional and not waivable, and that Pennsylvania state courts would discontinue the long-held practice of allowing merits review for claims barred by the PCRA time-bar. See Fahy, 240 F.3d at 245. Further, the third circuit has found that the uncertainty in the application of the relaxed waiver rule extended beyond capital cases. The third circuit stated that as of January 16, 1998, it was not clear that Pennsylvania's courts would bar merits review of a PCRA petition in a non-capital case even if that petition were untimely under the PCRA's statutory time-bar and did not meet any of the enumerated exceptions. See Lambert v. Blackwell, 134 F.3d 506, 521 & n.26 (3d Cir. 1998) ("...Pennsylvania courts have expressed a willingness to depart from the PCRA's stringent waiver standards, for non-capital, as well as capital cases..."). In 1997 the third circuit stated that "it is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of Johnson v. Mississippi. That time, however, has not yet been reached." Banks v. Horn, 126 F.3d 206, 214 n.3 (3d Cir. 1997) [Banks I].

b. Treating Mr. Pace's Second PCRA Petition As Untimely And a Bar to Filing a Federal Habeas Petition Would Result in Unfair Forfeiture Without Notice

It was not until the Pennsylvania Supreme Court decided Banks III in 1999 that it was sufficiently clear for federal review purposes that § 9545(b)(1) was jurisdictional and could operate as a bar to federal habeas review. Fahy, 240 F.3d at 245; Banks IV, 271 F.3d at 534. In Banks IV, the court noted that viewing the Pennsylvania Supreme Court's 1999 decision as a jurisdictional bar to a petitioner filing a pre-1999 federal habeas petition "would result in unfair

forfeiture without notice.” Banks IV, 271 F.3d at 534. Similarly, barring Mr. Pace from filing his pre-1999 federal habeas petition would result in forfeiture of his federal rights without notice. Mr. Pace could not, for federal habeas purposes, be said to have had knowledge that the PCRA time-limit was jurisdictional on April 23, 1997, the date that he would have had to file in federal court to protect his federal rights.

Pace’s second PCRA petition, filed on November 27, 1996, alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) his guilty plea was **entered involuntarily**; and (3) **that all counsel were ineffective, resulting in a denial of due process.** (§ 2254 Pet. at 8.) Mr. Pace’s second PCRA petition alleged claims that traditionally had overcome the PCRA statutory time-bar. On July 23, 1997, the PCRA court denied Mr. Pace’s petition on the merits, giving him no notice that his petition was jurisdictionally time-barred. Although the Superior Court dismissed the second PCRA petition as time-barred, Mr. Pace still had no absolute notice that that ruling meant the time-limit was jurisdictional and not waivable due to the nature of the claims that he raised to that court. When on March 2, 1999 Pennsylvania made it clear that the PCRA time-limit was jurisdictional, Mr. Pace had a motion pending before the Pennsylvania Supreme Court requesting Allocatur from the denial for the motion for re-argument by the Superior Court, discussed supra. That motion for re-argument had invoked one of the statutory exceptions to the PCRA time-bar, that is, “the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim...” 42 PA. CONS. STAT. ANN. § 9545(b)(i). Mr. Pace, therefore, had no timely notice, while his second PCRA petition was in the state court system, that his failure to file a habeas petition in federal court would deny him his right to federal review.

3. *Mr. Pace Exercised Reasonable Diligence in Bringing His Claims*

a. *Pace Would Not Have Been Allowed to File His Petition in Federal Court At The Time Respondents Contend He Would Have Had To In Order To Protect His Federal Rights*

Mr. Pace would not have been allowed to proceed on a petition in federal court within the one year AEDPA statute of limitations because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. Mr. Pace filed his second PCRA petition in November 1996. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they were thought to be excluded by the 1995 amendments to the PCRA. See Banks I, 126 F.3d at 211-14; see also Hammock v. Vaughn, No. CIV.A.96-3463, 1998 WL 163194, at *6 (E.D. Pa. April 7, 1998) (“There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments]. This lack of certainty requires dismissal of the petition.”); Peterson v. Brennan, No. CIV.A.97-2477, 1998 WL 470139, at *6 (E.D. Pa. Aug. 11, 1998) (same). Only recently have the state courts interpreted the 1995 amendments to the PCRA conclusively enough that federal courts do not have to dismiss federal habeas petitions for failure to exhaust state remedies. See Lines v Larkins, 208 F.3d 153, 164 (3d Cir. 2000) (“It is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed.”); Holman v. Gillis, 58 F.Supp. 587, 594-96 (July 21, 1999) (finding that the ambiguity relating to whether the one year statute of limitations is a procedural bar to all untimely PCRA petitions that do not qualify for the enumerated exceptions was only

remedied in December 1998).

The third circuit stated in Fahy:

When the state law is unclear regarding the operation of a procedural filing requirement, the petitioner filed in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of the state petition up to the highest reviewing court.” 240 F.3d at 245.

It was objectively reasonable for Mr. Pace to believe that if he filed a § 2254 petition at the time he filed his second PCRA petition, the federal petition would have been dismissed without prejudice as unexhausted. There has been no abuse of process by Mr. Pace and he has diligently and reasonably asserted his claims. See Fahy, 240 F.3d at 244.

This court equitably tolls AEDPA’s statute of limitations while petitioner’s second PCRA petition was pending from November 27, 1996 until July 29, 1999, because Mr. Pace meets the relevant factors discussed in Miller, Jones, Fahy, and Banks IV. In an “extraordinary way,” the confluence of the following factors caused the petitioner to be prevented from asserting his federal rights: (1) the uncertainty of Pennsylvania law at the time that Mr. Pace had to choose whether to file a state or federal habeas petition; (2) lack of notice of forfeiture to Mr. Pace of his right to federal review of his conviction and sentence; (3) the fact that Mr. Pace would not have been allowed to proceed in federal court at the time he would have been required to file his federal habeas petition in order to preserve his federal rights; (4) Mr. Pace has diligently and reasonably asserted his claims; and (5) Mr. Pace’s sentence is life without the possibility of parole.

4. Fahy Does Not Preclude a Finding that Petitioner’s Second PCRA

Petition Equitably Tolloed the AEDPA Statute of Limitations

Fahy held that equitable tolling was appropriate in a capital case even where extraordinary circumstances were not established. 240 F.3d at 245. Respondents argue that Fahy stands for the proposition that uncertainty in Pennsylvania law cannot constitute extraordinary circumstances. (Resps.’ Mot. at 18.) Extraordinary circumstances exist in this case, not based solely on the uncertainty of Pennsylvania law, but also on the unusual confluence of factors that left Mr. Pace, who is serving life in prison without the possibility of parole, without notice of the forfeiture of his federal rights.

Petitioner’s sentence, life without the possibility of parole, was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, “[i]n a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of ‘equity would make rigid application of a limitation period unfair.’” Fahy v. Horn, 240 F.3d at 245 (citing Miller, 145 F.3d at 618). The Fahy court went on to state, “[w]e elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process.” Fahy, 240 F.3d at 245. Mr. Pace’s case calls for leniency too because the consequences facing him, the certainty of spending the rest of his life in prison, are extremely grave.⁵ Should the court not toll AEDPA’s statute of limitations, petitioner will have to spend the rest of his life in prison without being allowed federal review to correct what could be serious deprivations of federally protected constitutional rights. Accordingly, this court finds AEDPA’s one year statute of limitations was equitably tolled while petitioner’s second PCRA

⁵ The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence “is far more severe” than a life sentence and that only “capital punishment...exceeds it.” Solem v. Helm, 463 U.S. 277, 297 (1983).

petition was pending.

IV. Conclusion

This court finds that petitioner was entitled to statutory tolling and equitable tolling while his second PCRA petition was pending. Because petitioner's conviction became final before the enactment of AEDPA, he had one year from April 24, 1996, plus the period in which the statute statutorily or equitably tolled, to file his federal habeas petition. See Burns, 134 F.3d at 111.

The federal statute of limitations ran from April 24, 1996 to November 26, 1996 (the day before petitioner filed his second PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when petitioner filed his federal habeas petition. Given the one year statute of limitations, petitioner had until December 24, 1999 to file his federal habeas petition. Petitioner dated his federal habeas petition December 22, 1999. The Clerk of Court marked petitioner's habeas petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. See Burns, 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes petitioner gave his petition to prison officials by December 24, 1999 making his federal habeas petition timely filed.

For the reasons discussed above, the motion for reconsideration is denied. This opinion reaches the same conclusions on statutory and equitable tolling as previously stated in the June 7, 2001 opinion. However, it supercedes the previous opinion to reflect the Supreme Court's

decision in Artuz and other relevant cases subsequently decided.

The respondents' motion for permission for immediate appeal is granted on the following issues since they involve controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this opinion and order may materially advance the earliest efficient resolution of the litigation. The questions of law are

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS. STAT. ANN. § 9545(b)(1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. §2244(d)(2)?
2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal habeas petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal habeas petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

The court stays review of the substantive merits pending outcome of the appeal.

An appropriate order follows.

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

JOHN A. PACE,	:	CIVIL ACTION
Petitioner,	:	99-6568
	:	
v.	:	
	:	
DONALD VAUGHN, et al.,	:	
Respondent	:	

ORDER

AND NOW, this ____ day of March 2002, upon consideration of Respondents' Motion for Reconsideration, or in the Alternative for Permission to Appeal, Docket # 20, and the responses thereto, it is hereby ORDERED that Respondent's Motion, is DENIED in part and GRANTED in part. The motion for reconsideration is denied and the motion for an immediate appeal is granted.

The court certifies that this order involves controlling questions of law on which there are substantial grounds for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

In finding petitioner's federal habeas petition was timely filed, this Court decided two questions of controlling law:

1. Do the enumerated exceptions to Pennsylvania's PCRA

statute of limitations, 42 PA. CONS. STAT. ANN. § 9545(b)(1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. §2244(d)(2)?

2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations:
(1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal habeas petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal habeas petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

Answers to these questions will determine whether consideration of the substantive issues raised in the petition is appropriate.

Proceedings are stayed in the district court pending the action by the court of appeals on this certification.

BY THE COURT:

JAMES T. GILES C.J.

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