

"Petitioner's Response to District Attorney's Petition to Deny Without a Hearing of Petitioner's Habeas Corpus"), Petitioner's objections to Magistrate Judge Hart's Report and Recommendation (styled as "Petitioner's Motion in Opposition to Report and Recommendation from District Court"), Magistrate Judge Hart's Supplemental Report and Recommendation, Petitioner's Objections thereto, and Respondents' Response to Petitioner's Objections.¹ As the following discussion will explain, Petitioner's Petition for Writ of Habeas Corpus was untimely filed, is not subject to equitable tolling, and is, therefore, **DENIED**.

I. PROCEDURAL HISTORY

In July 1985, Petitioner was convicted of second degree murder, robbery and possessing an instrument of crime after a jury trial in the Court of Common Pleas for Philadelphia County before the Honorable Joseph T. Murphy. After denying post-verdict motions, Judge Murphy sentenced Petitioner to a mandatory life sentence for murder with a concurrent one- to two-year term of imprisonment for the weapons offense. Petitioner directly appealed, but his appeal was dismissed by the Superior Court on

¹ Also before the Court is Respondents' Motion for Clarification, requesting that this Court specifically rule on Petitioner's equitable tolling arguments or, in the alternative, provide further instruction as to how to proceed following the Third Circuit's opinion. Because this memorandum addresses those specific matters raised in Respondents' Motion for Clarification, that motion shall be rendered moot and, therefore, dismissed.

September 3, 1987 for failure to file a brief; Petitioner did not appeal that decision. During the pendency of his direct appeal, Petitioner also filed two petitions pursuant to Pennsylvania's Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9551 ("PCRA"), which were dismissed pending disposition of his direct appeal.

On August 10, 1988, Petitioner filed a third pro se petition for PCRA relief. Counsel was appointed and filed an amended petition. After several evidentiary hearings on Petitioner's claims of ineffective assistance of counsel in the PCRA court, the Honorable Joseph I. Papalini denied the petition on June 1, 1994. Petitioner appealed and, on August 24, 1995, the Superior Court affirmed the PCRA Court. Commonwealth v. Cooper, 669 A.2d 408 (Pa. Super. Ct. 1995). The Supreme Court of Pennsylvania denied Petitioner's allocatur petition on July 12, 1996. Commonwealth v. Cooper, 679 A.2d 227 (Pa. 1996).

On June 11, 1998, almost two years following the Pennsylvania Supreme Court's denial of allocatur, Petitioner filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this Court. Petitioner raised a juror misconduct claim, a claim that the prosecutor withheld exculpatory evidence and a claim that counsel rendered ineffective assistance in violation of the Sixth Amendment in failing to present a competent defense and in failing to pursue a direct appeal. The District Attorney of Philadelphia answered

the petition and contended that the claim was barred by the one-year statute of limitations under 28 U.S.C. § 2244(d)(1).

On October 27, 1998, Magistrate Judge Hart recommended that the petition be dismissed as time-barred. After independent consideration of Petitioner's petition, and review of Magistrate Judge Hart's Report and Recommendation and Petitioner's objections thereto, this Court approved and adopted Magistrate Judge Hart's Report and Recommendation as the opinion of the Court on November 23, 1998. Petitioner appealed this Court's decision to the Third Circuit.

On June 9, 1999, the Third Circuit granted a certificate of appealability and ordered the parties to show cause why the order should not be vacated and the matter summarily remanded for consideration of the appellant's equitable tolling arguments. Following submission of responses, the Third Circuit appointed counsel to represent Petitioner and the appeal proceeded to briefing.

On February 5, 2002, the Third Circuit vacated this Court's November 23, 1998 order dismissing Petitioner's habeas petition as untimely and remanded the matter for consideration of Petitioner's equitable tolling arguments. On March 25, 2002, Respondents filed a Motion for Clarification of this Court's ruling on Petitioner's equitable tolling arguments. This Court referred the case to Magistrate Judge Hart for consideration in

light of the Third Circuit's opinion. On April 3, 2002, Magistrate Judge Hart recommended that the habeas petition be dismissed as untimely filed and that equitable tolling not apply. After numerous requests for, and grants of, extensions of time to file objections to the Magistrate Judge's Supplemental Report and Recommendation, Petitioner filed his Objections on September 12, 2002. Respondents filed their response thereto on September 25, 2002.

III. DISCUSSION

A. AEDPA Statute of Limitations

The statute of limitations under AEDPA provides, in pertinent part, that:

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;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action

28 U.S.C. § 2244 (d). Petitioner's judgment became final on July 12, 1996 with the Pennsylvania Supreme Court's denial of his allocatur petition. Absent AEDPA's statutory tolling or equitable tolling of the statute of limitations, Petitioner should have filed his federal habeas petition on or before July

11, 1997. Petitioner, however, did not file his habeas petition until June 11, 1998, eleven months after the statute of limitations lapsed. Petitioner now seeks equitable tolling on two grounds, both of which will be explicitly addressed below.

B. Equitable Tolling²

Equitable tolling of AEDPA's statute of limitations should be sparingly applied, invoked "only when the principles of equity would make [the] rigid application [of a limitation period] unfair." Miller v. New Jersey State Dep't of Corrections, 145 F. 3d 616, 618 (3d Cir. 1998)(citation omitted). "Generally, this will occur when the petitioner has 'in some extraordinary way . . . been prevented from asserting his or her rights.'" Id. (citation omitted). Moreover, "[t]he petitioner must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims.' Mere excusable neglect is not sufficient." Id. at 618-619 (citations omitted).

The Third Circuit has recognized that equitable tolling "may

² Following the Third Circuit's instruction that this Court review Petitioner's equitable tolling arguments, this Court referred the matter to Magistrate Judge Hart for consideration. Magistrate Judge Hart provided a Supplemental Report and Recommendation to this Court, and Petitioner filed objections thereto and, thereafter, Respondents filed their Response to Petitioner's Objections. This Court will make a de novo determination of those portions of the Magistrate Judge's Report and Recommendation to which specific objections have been made. See Fed. R. Civ. P. 72(b).

be appropriate if (1) 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." Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citation omitted). "In the final analysis, however, 'a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.'" Id. (citations omitted). Moreover, "[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001).³

³ Although a non-capital case, Petitioner argues that the outcome in Fahy should apply to equitably toll the statute of limitations in his case since serving a life sentence is akin to receiving the death penalty. In Fahy, the Third Circuit stated that "[i]n a capital case . . . the consequences of error are terminal" and that therefore, a court should "pay particular attention to whether principles of 'equity would make the rigid application of a limitation period unfair' and whether the petitioner has 'exercised reasonable diligence in investigating and bringing the claims.'" Fahy, 240 F.3d at 245. The court allowed less than extraordinary circumstances to trigger equitable tolling because the consequences were "so grave" and the applicable state law was "so confounding and unsettled" at the time that the petitioner had acted with reasonable diligence in asserting his claims and strategic choices. Id. In the instant matter, a non-capital case, Petitioner's circumstances are insufficient to warrant application of Fahy's relaxed equitable tolling standard. See, e.g., Ayala v. Superintendent, No. 01-1410, 2002 WL 207173, at *1 (E.D. Pa. Feb. 8,

The merits of both of Petitioner's grounds for equitable tolling will now be addressed in turn.

1. Delayed Notice of Pennsylvania Supreme Court's Decision

Petitioner argues that equitable tolling is warranted in this matter as he did not learn of the Pennsylvania Supreme Court's July 12, 1996 decision denying allocatur until September 30, 1997. Petitioner also states that, despite numerous attempts to contact his court-appointed appellate attorney, Darryl A. Irwin, Esquire, about the status of his appeal, he was not informed of the Supreme Court's decision until he requested that information himself from the Supreme Court. In support of this factual assertion, Petitioner presented this Court with a copy of a letter dated September 30, 1997 from the Prothonotary of the Pennsylvania Supreme Court responding to his request for information regarding his appeal.⁴ (Ltr. of Prothonotary dated

2002)(Ludwig, J.)(finding that despite petitioner's four-time inquiry into status of PCRA petition and lack of response thereto from the PCRA court, that "these circumstances in non-capital cases are insufficient for equitable tolling").

⁴ Petitioner also presented this Court with new affidavits in support of his equitable tolling theories which he did not present with his habeas petition in 1998 or to Magistrate Judge Hart for consideration in 2002 following the Third Circuit's decision. Among these new documents is Petitioner's affidavit reiterating that he did not learn of the Pennsylvania Supreme Court's decision until September 30, 1997 and also specifically identifying the legal documents that were taken and destroyed during a sweep of his prison cell. (Pet.'s Aff. dated Jul. 26, 2002.) While Respondents object to the inclusion of

Sep. 30. 1997.)

In support of his legal argument, Petitioner cites to a recent decision, Knight v. Schofield, 292 F.3d 709 (11th Cir. 2002), wherein the Court of Appeals for the Eleventh Circuit upheld equitable tolling of the statute of limitations due to the petitioner's delayed notice of the Georgia Supreme Court's denial of his appeal until some eighteen months later. Knight, 292 F.3d at 710. Not only is the decision in Knight not binding upon this Court, but the facts of that case are easily distinguishable from the facts of Petitioner's case.

In Knight, at the time the petitioner filed an application for discretionary review by the Georgia Supreme Court, he specifically inquired of the clerk when he could expect a ruling and was assured that he would be notified as soon as a decision was issued. Id. However, when the court's decision finally issued, the clerk inadvertently sent notice of the decision to the wrong person and the petitioner was not properly informed. Id. Sixteen months after the court's decision, petitioner inquired as to the status of his case, and two months thereafter, received notice that his application had been denied. Id. In

this affidavit as contrary to the Third Circuit's instruction to consider only Petitioner's "reply to the respondent's answer and his objections to the Report and Recommendation," this Court will nevertheless consider it in the interest of thoroughly reviewing Petitioner's claim for equitable tolling. See Cooper v. Price, 28 Fed. Appx. 125, 126 (3d Cir. 2002).

reaching its decision to equitably toll the statute of limitations, the Eleventh Circuit cautioned:

We should note that not in every case will a prisoner be entitled to equitable tolling until he receives notice. Each case turns on its own facts. In this case [the petitioner] was assured that the court would contact him, then demonstrated diligence in pursuing information when it did not do so. These facts show that [the petitioner] is entitled to equitable tolling

Id.

In the instant matter, however, the Court is not persuaded that Petitioner exercised reasonable diligence in pursuing his claims. Even assuming that he did not learn of the Supreme Court's decision until he received the letter dated September 30, 1997, Petitioner claimed to have attempted contact with counsel to inquire as to the status of his case, but failed to specify dates, or even time periods, of the attempted contact. Further, there is no evidence that the Supreme Court failed to provide notice to Petitioner, or even inadvertently failed to notify the right party. In fact, counsel of record was served with a copy of the Supreme Court's order denying allocatur. (Ltr. of Prothonotary dated Jul. 12, 1996 and attached Order.) Moreover, Petitioner waited an additional eight and a half months, until June 11, 1998, to file his habeas petition. Such conduct does not rise to the level of reasonable diligence required for equitable tolling.

2. Removal of Legal Documents from Petitioner's Cell

In support of equitable tolling, Petitioner also argues that essential legal documents were taken from his cell and destroyed during a prison sweep of SCI-Pittsburgh on January 11, 1997. In support of his factual assertion, Petitioner provided the Court with the initial Inmate Grievance he filed on February 10, 1997 with the Commonwealth of Pennsylvania's Department of Corrections, his February 19, 1997 appeal, Superintendent James S. Price's response to Petitioner's appeal dated February 28, 1997 and Superintendent Price's letter to United States Senator Rick Santorum dated March 19, 1997.

Except for Petitioner's own account, there is no indication that Petitioner's legal documents were taken or destroyed. To the contrary, Superintendent Price's response states that "at no time did [the Correctional Emergency Response Team] indicate that any of your religious or legal material was destroyed." (Sup. Price's Resp. to Pet.'s Appeal of Grievance PIT-0036097, dated Feb. 28, 1997.) Furthermore, Superintendent Price's letter to Senator Santorum states that "[n]one of Mr. Cooper's legal material was destroyed." (Sup. Price's Ltr. to Sen. Santorum, dated Mar. 18, 1997.)⁵

⁵ Magistrate Judge Hart in his Supplemental Report and Recommendation stated that in a grievance response dated February 28, 1997, Petitioner was authorized reimbursement for the replacement of a Walkman radio that was mistakenly thrown away during the sweep of his jail cell. (Supp. Rep. and Recomm. at

Even assuming that legal documents were taken from his cell, Petitioner failed to identify which documents, or how the absence thereof, affected his ability to file a timely habeas petition. Even now, as Petitioner identifies for the first time the documents that were confiscated and destroyed, he fails to indicate how those documents affected his ability to file a timely petition.⁶ Despite the conclusory statement in his affidavit that he "did every thing humanly possible" to replace the destroyed materials, Petitioner provided no information as to any attempt to secure new documents or retrieve public records. Petitioner's argument that these documents were essential to the timely filing of his habeas petition seems disingenuous in light of the fact that he did ultimately file a petition, and without mention of the aforementioned "essential" documents. In considering these details, this Court is not persuaded that Petitioner exercised reasonable diligence in pursuing his claim.

3.) However, as Respondents point out in their Response to Petitioner's Objection, that authorization was directed not to Petitioner but to another inmate, Steven Northington. (Init. Rev. Resp. to Steven Northington, Grievance No. PIT-0065-97, dated Feb. 28, 1997.) Accordingly, that portion of the Supplemental Report and Recommendation shall not be adopted.

⁶ In his recent affidavit, Petitioner identified the documents alleged to have been destroyed, which include affidavits from former clients of Petitioner's trial counsel, various newspaper articles, Department of Health and Human Services documents and copies of correspondence to appellate counsel requesting information on the status of his Supreme Court appeal. (Pet.'s Aff. dated Jul. 26, 2002.)

III. CONCLUSION

As equitable tolling of AEDPA's statute of limitations is not warranted by the facts of this non-capital case, this Court need not reach the merits of Petitioner's claims for collateral relief. Accordingly, Petitioner's Petition for Writ of Habeas Corpus is hereby **DENIED** as untimely filed.

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

BRUCE A. COOPER : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
JAMES PRICE, et al. :
Defendant. : No. 98-3009

O R D E R

AND NOW, this day of October, 2002, upon careful and independent consideration of Petitioner's reply to Respondents' answer (styled as "Petitioner's Response to District Attorney's Petition to Deny Without a Hearing of Petitioner's Habeas Corpus") (Doc. No. 14), Petitioner's objections to the Magistrate Judge's Report and Recommendation (styled as "Petitioner's Motion in Opposition to Report and Recommendation from District Court") (Doc. No. 15), Respondents' Motion for Clarification (Doc. No. 29), Magistrate Judge Hart's Supplemental Report and Recommendation (Doc. No. 33), Petitioner's Objections thereto (Doc. No. 46) and Respondents' Response to Petitioner's Objections (Doc. No. 47), it is **ORDERED** that:

1. Petitioner's Objections to the Magistrate Judge's Supplemental Report and Recommendation are **OVERRULED**;
2. The Supplemental Report and Recommendation of Magistrate Judge Hart is **APPROVED** and **ADOPTED** as supplemented by memorandum;
3. The Petition for Writ of Habeas Corpus is **DENIED AS**

UNTIMELY; and

4. Respondents' Motion for Clarification is **MOOT** and, therefore, **DISMISSED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.