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

LEROY SHELLEY, III,	:	
Petitioner,	:	
v.	:	
	:	**CIVIL ACTION**
LOUIS FILINO; PATRICK MEEHAN,	:	**NO. 04-2510**
The District Attorney of the County	:	
of Delaware; and MIKE FISHER,	:	
The Attorney General of the State	:	
of Pennsylvania,	:	
Respondents.	:	

DUBOIS, J. **FEBRUARY 25, 2005**

MEMORANDUM

I. INTRODUCTION

Petitioner, Leroy Shelley, III, is a state prisoner currently incarcerated in the State Correctional Institution in Waynesburg, Pennsylvania. He was convicted of two counts of robbery, one count of simple assault, and one count of criminal conspiracy to commit robbery on March 28, 1998 in the Delaware County Court of Common Pleas.

On June 9, 2004, petitioner filed a *pro se* petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254. On June 15, 2004, the Court referred the petition to United States Magistrate Judge Linda K. Caracappa for a Report and Recommendation. Respondents then filed a response to the petition. On August 31, 2004, Judge Caracappa issued a Report and Recommendation, recommending that the petition be dismissed on the ground that it was untimely under 28 U.S.C. § 2244(d)(1).

Petitioner filed a document entitled "Response" dated September 27, 2004, which the

Court will treat as his Objections to the Report and Recommendation. In the Objections, petitioner argues that the Court should equitably toll the statute of limitations because of his attorney's misconduct. The Court concludes that petitioner is not entitled to equitable tolling under applicable law and therefore overules his Objections and adopts the Magistrate Judge's Report and Recommendation.

II. PROCEDURAL HISTORY

Petitioner was convicted on March 28, 1998, on four counts stemming from robbery of a clothing store in Springfield, Pennsylvania. He was sentenced to two consecutive terms of sixty to one-hundred twenty months for the robbery convictions, a consecutive term of eighteen to sixty months for criminal conspiracy, and two years concurrent probation for the simple assault. On July 29, 1999, the Superior Court of Pennsylvania denied petitioner's direct appeal. Commonwealth v. Shelley, 742 A.2d 1151 (Pa. Super. Ct. 1999) (table). On December 28, 1999, the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal. Commonwealth v. Shelley, 747 A.2d 900 (Pa. Sup Ct. 1999) (table).

Petitioner filed a *pro se* petition for collateral relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S. §9451 et seq., on January 16, 2003.[1] The PCRA court appointed counsel, but granted counsel's motion to withdraw on May 23, 2003 after petitioner stated he wished to proceed *pro se*, and directed petitioner to file an amended petition. Petitioner filed an amended

[1] Petitioner alleged in the PCRA petition that: (1) the affidavit of probably cause contained false statements; (2) he was denied due process of law; and (3) he was interrogated about other crimes after his arrest, which amounted to an illegal search and seizure.

petition on July 3, 2003.[2] Thereafter, the PCRA court entered a Notice of Intent to Dismiss Without a Hearing on July 10, 2003, specifically informing petitioner that his PCRA petition was untimely under state law, and giving petitioner an opportunity to respond. Petitioner responded to the Notice by letter dated July 26, 2003. On August 25, 2003, the PCRA court dismissed his petition, ruling that his "Motion for Post Conviction Collateral Relief ha[d] not been timely filed as required by 42 Pa.C.S.A. §9545(b)(1)."[3] Petitioner then appealed to the Superior Court. On April 2, 2004, the Superior Court dismissed petitioner's appeal because he failed to submit a brief.

On June 9, 2004, petitioner filed a petition for Writ of Habeas Corpus in this Court, pursuant to 28 U.S.C. §2254. In the federal petition he raised two grounds for relief: (1) that affidavit of probable cause contained falsified statements; and (2) he was subject to an illegal search and seizure. (Pet. at 9). Respondents argued in response that the petition was untimely and should be dismissed.

III. STANDARD OF REVIEW

Where a court refers a habeas petition to a magistrate judge, "the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . [and] the court may accept, reject, or modify, in

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[2] In his amended petition, petitioner claimed his sentence was excessive and alleged police corruption and prosecutorial misconduct.

[3] The Court notes that PCRA court's Order dated August 25, 2003, does not specify whether the court dismissed petitioner's original or amended petition or both. See Commonwealth v. Shelly, No. 2202-97, Order of August 25, 2003 (Ct. C.P.). However, in its opinion following petitioner's appeal of this decision, dated December 30, 2003, the PCRA court cited petitioner's original petition as untimely. See Commonwealth v. Shelly, No. 2202-97, Opinion of December 30, 2003 (Ct. C.P.).

whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. §636(b)(1)(C) (italics added).

IV. DISCUSSION

A. Timeliness

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2244(d)(1) (enacted April 24, 1996), provides, in relevant part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation 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. . .[4]

Moreover, if petitioner's direct review of a criminal conviction ended before enactment of the AEDPA, the one-year statute of limitations begins to run on the date of the statute's enactment on April 24, 1996. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998).

The AEDPA permits tolling, providing, "[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 shall not be counted toward any period of limitation under this subsection." 28 U.S.C. §2244(d)(2). The Third Circuit defines a "properly filed application," as "submitted in accordance with the state's procedural requirements.. . [P]etitioners therefore must file their state claims promptly and properly under state law in order to preserve their right to litigate constitutional claims that are more than one year old in federal court." Fahy v. Horn, 240 F.3d 239, 243 (3d Cir. 2001) (citing Lovasz v. Vaughn, 134 F.3d 146 (3d Cir. 1998)). A state

[4] Judge Caracappa noted that petitioner did not allege, nor did she find, any facts suggesting that this Court should consider other potential starting dates for the limitations period as provided under 28 U.S.C. §2244(d)(1). (Report & Recommendations at 3 n.1).

habeas petition is not "properly filed" where the state court dismisses it as untimely under state law. Schlueter v. Varner, 384 F.3d 69, 78 (3d Cir. 2004) (citing Merritt v. Blaine, 326 F.3d 157 (3d Cir. 2003)); Fahy, 240 F.3d 243 (3d Cir. 2001).[5]

Magistrate Judge Caracappa concluded that, because petitioner's conviction became final on December 28, 1999 (when the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal), he had until December 28, 2000 to file the instant Writ of Habeas Corpus. Therefore, having filed his petition three and a half years later on June 9, 2004, the petition was time barred. Judge Caracappa also concluded that petitioner's PCRA petition, filed on January 16, 2003, did not toll the statute of limitations because this petition was also untimely and thus was not "properly filed." See Merritt, 326 F.3d at 165-66. Further, Judge Caracappa concluded that petitioner was not entitled to equitable tolling. Thus, the Magistrate Judge recommended that the habeas petition be dismissed on this ground.

B. Petitioner's Objections

In his Objections, Petitioner argues that, because of his attorney's misconduct, the Court

[5] The Court notes that in Nara v. Frank, 264 F.3d 310 (3d Cir. 2001), the Third Circuit held that a motion to withdraw a guilty *nunc pro tunc* filed in state court eleven years after state conviction qualified as a "properly filed application." However, in light of the Supreme Court's more recent ruling in Carey v. Saffold, 536 U.S. 214 (2002) (deferring to state "reasonableness" standard for timeliness of state habeas petitions in determining whether application was properly filed), the Third Circuit has subsequently held that "to be properly filed an application for collateral review in state court must satisfy the state's timeliness requirements. This means that decisions such as [Nara], to the extent they hold that petitions untimely under state rules nonetheless may be deemed properly filed, were wrongly decided." Merritt v. Blaine, 326 F.3d 157, 166 (3d Cir. 2003); Phillips v. Vaughn, 55 Fed. Appx. 100, 101 (3d Cir. 2003) ("[T]he Supreme Court [in Carey] effectively overruled that portion of Nara which held that petitions untimely under state rules nonetheless may be deemed properly filed."). See also Schlueter v. Varner, 384 F.3d 69, 78 (3d Cir. 2004) (holding that court should "defer[] to a state court's ruling dismissing a PCRA petition as untimely," in determining whether to toll the period during state collateral proceedings).

should equitably toll the statute of limitations and rule on the merits of his petition.[6] In so doing, he argues that his case qualifies for equitable tolling as an "extraordinary" one under U.S. v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998), and Seitzinger v. Reading Hosp. and Med. Ctr., 165 F.3d 236 (3d Cir. 1999). (Pet. Obj. at 3).

Petitioner alleges that his attorney, Scott D. Galloway, Esq.,[7] affirmatively deceived him by stating in a letter dated February 8, 1999 that he would "keep [petitioner] informed of any decisions that the Superior Court renders with regard to this matter," (Pet. Obj., Ex. 1), and then subsequently failing to inform petitioner that the Superior Court denied his direct appeal on July 29, 1999 and that the Supreme Court denied his Petition for Allowance of Appeal on December 28, 1999. Petitioner submitted a computer-generated list of his legal correspondence maintained by the prison to demonstrate that Mr. Galloway last wrote to him on April 17, 1999 (Id., Ex.2) and enclosed with that letter a copy of the district attorney's brief in the Superior Court. (Id. at 2).

Petitioner further avers that, after waiting roughly six months following Mr. Galloway's February 8, 1999 letter, he "manifested due diligence by writing his attorney every three months up until the point [petitioner] filed his [PCRA petition]." (Id. at 6). He says he no longer possesses copies of these letters, because he sent them to the trial court and "attorney ethics,"

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[6] Petitioner does not specify the period for which he seeks equitable tolling. Reading his *pro se* petition liberally, the Court concludes that he requests equitable tolling for the period between December 28, 1999 (when the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal) and December 17, 2002 (when he alleges he learned of the denial), a period of almost three years. Equitably tolling the statute of limitations for this period would make his PCRA petition timely when filed on January 16, 2003, and qualify petitioner for tolling pursuant to 28 U.S.C. §2244(d)(2) until final disposition of his state petition and appeal on April 2, 2004. Thus, petitioner's instant petition, filed June 9, 2004, would also be timely.

[7] Scott D. Galloway, Esq. was appointed to represent petitioner on May 5, 1998.

which now have the letters in their records. (Id. at 4). He also claims he repeatedly contacted an individual whom he refers to as the "clerk of the appellate court" to inquire about the status of his case, and that the clerk referred him to his attorney under the Pennsylvania Rules of Court.[8] (Id. at 4-5).

Petitioner avers that, in the absence of updates from Mr. Galloway, he did not learn the status of his case until December 17, 2002, using a network-linked computer system which the prison installed "in the beginning of 2002." (Id. at 3). During the intervening period, he alleges he "was left to think that the matters were still undecided by the courts which have been known to take years to rule on certain issues." (Id.).

C. Analysis of Petitioner's Objections

The AEDPA's statute of limitations is subject to equitable tolling in the rare instances where "principles of equity would make the rigid application of a limitation period unfair." Miller v. New Jersey, 145 F.3d 616, 618 (3d Cir. 1998) (internal quotations and brackets omitted). The Third Circuit has held that a court may permit equitable tolling under three circumstances: "(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." U.S. v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998) (internal quotations omitted). With regard to the second circumstance, the Third Circuit ruled that, "[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other

[8] Petitioner states that the clerk cited the Pennsylvania Rules of Court as follows:

> "25, (c) when the appellate court renders a decision a copy is to be sent to the trial court, the district attorney, the clerk of courts, the attorney of record"

mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." Fay v. Horn, 240 F.3d 239, 244 (3d Cir. 2001). "[E]quitable tolling is to be used sparingly, particularly in the context of attorney default," and should not be applied to a "garden variety claim of excusable neglect by an attorney." Seitzinger v. Reading Hosp. and Med. Ctr., 165 F.3d 236, 238 & 241 (3d Cir. 1999) (quoting Irwin v. Dept. of Veteran Affairs, 498 U.S. 89 (1990)).

In Seitzinger, a case relied upon by petitioner, the Third Circuit ruled that attorney misconduct constituted an extraordinary circumstance rising above the "garden variety" where an attorney affirmatively misrepresented to his client that he filed her complaint on time. Id. at 241. In that case, the attorney told plaintiff that he had already filed her complaint when she called him to check prior to the deadline. Id. at 238. In fact, the attorney failed to file the complaint until one day after the deadline. Id. Subsequently plaintiff repeatedly requested a copy of the complaint and inquired into the status of her case. Id. The Third Circuit held that the attorney's "direct lies" constituted an extraordinary circumstance, and in light of this circumstance, three additional circumstances weighed in favor of equitable tolling: (1) plaintiff lacked actual or constructive notice of the filing deadline; (2) plaintiff was "extremely diligent in pursuing her claim"; and (3) defendants "proffered no evidence of prejudice" resulting from the one-day filing delay. Id. at 241-42.

Petitioner argues that Seitzinger controls his case. (Pet. Obj. at 4). First, he argues that Mr. Galloway, by his letter dated February 8, 1999, affirmatively misrepresented that he would inform petitioner of the status of his case. (Id. at 4). Second, petitioner asserts that, like the plaintiff in Seitzinger, he demonstrated diligence by repeatedly writing his attorney and the "clerk

of the appellate court," initiating his PCRA action once he discovered his Petition for Allowance of Appeal had been denied, and complying with deadlines set by the PCRA court and this Court. (Id. at 6). Finally, petitioner argues that equitable tolling would not prejudice the respondents because his claims are simple and the government will rely on transcripts of trial testimony–not DNA evidence or "victims' memories which grow cloudy with time." (Id. at 8).

Petitioner's argument ignores the Third Circuit's more recent holdings in Schlueter v. Varner, 384 F.3d 69 (3d Cir. 2004), and LaCava v. Kyler, 2005 WL 326832 (3d Cir. Feb. 11, 2005). In Schlueter, the Third Circuit held that an attorney's misconduct did not rise to the level of an extraordinary circumstance where that attorney did not keep his promise to file petitioner's PCRA petition on time and failed to communicate further with petitioner about the status of his petition. Id. at 72. The court distinguished that misconduct from the affirmative misrepresentation made by the attorney in Seitzinger, holding that "[petitioner's] situation differ[ed] sharply from that of the Seitzinger plaintiff who was misled by what the attorney said he had done, not by what he said he would do." Id. at 76. See also Parisi v. Carrol, 2004 WL 2323007, at *4 (D. Del. Oct. 6, 2004) ("Defense counsel's failure to respond to petitioner's letters does not constitute an affirmative misrepresentation, thus, it does not constitute an 'extraordinary circumstance.'"). The court also found that, unlike the plaintiff in Seitzinger, the petitioner was aware of the deadline for filing his PCRA petition. Id. at 76-77. Additionally, the court held in Schlueter that, although petitioner did write to his attorney, reminding him of the deadline, he failed to exercise the requisite diligence by further inquiring about the filing of the petition. Id. at 77. Finally, the court regarded as significant the fact that, unlike Seitzinger, where the plaintiff only requested a one-day equitable tolling period, petitioner in Schlueter filed his federal petition

three and a half years after the AEDPA statute of limitations had run and eleven years after his conviction (which petitioner did not appeal), although the court did not specifically cite any evidence of prejudice resulting from this delay. Id.

In LaCava, the most recent Third Circuit decision on this issue, the court refused to equitably toll the statute of limitations for a petitioner who waited twenty-one months after filing his Petition for Allowance of Appeal before inquiring about the status of his case with his attorney or the Prothonotary's Office of the Pennsylvania Supreme Court. LaCava, 2005 WL 326832, at *3-6. The court held that the attorney's failure to notify petitioner of the state court's disposition of his case did not rise to the level of an extraordinary circumstance. Id. at 3. Moreover, the court ruled that, even assuming, *arguendo*, that the this conduct did constitute an extraordinary circumstance, petitioner failed to demonstrate the requisite diligence to warrant equitable because "[w]hile we certainly avoid drawing bright lines when it comes to equitable tolling, we hold that the twenty-one months of inactivity involved here crosses the line of what constitutes due diligence for purposes of employing that principle to save an otherwise untimely filing." Id. at 4.

The Court concludes that the petitioner in this case fails to allege attorney misconduct which would qualify as an extraordinary circumstance under the Third Circuit ruling in Seiztinger. By contrast, the alleged misconduct and other circumstances in this case more closely resemble those in Schlueter and LaCava, where equitable tolling was denied. As in Schlueter, *pro se* petitioner in this case argues that he was misled "by what [his attorney] said he would do"

and not "by what [his] attorney said he had done." Schlueter, 384 F.3d at 77.[9] Id. Further, in the absence of such an affirmative misrepresentation, Mr. Galloway's failure to notify petitioner of the status of his case also does not constitute an extraordinary circumstance. LaCava, 2005 WL 326832, at *3.

Additionally, like the petitioner in Schlueter, although respondents have not proffered evidence of prejudice, petitioner in this case filed his PCRA petition over three years after the statute of limitations had run (and four and a half years after his conviction became final), in contrast to one-day period in Seitzinger. Id Moreover, even if, as alleged, petitioner did persistently write to his attorney and the clerk of court to request information about his case beginning roughly six months after Mr. Galloway's promise to keep him informed, he acknowledges that he did not access the prison computer system to check on the status of his case until December 17, 2002, almost one year after the prison installed the system (according to petitioner, in "the beginning of 2002"), and did not explain that delay in his submissions. Although this period does not equal the twenty-one months of inactivity by the petitioner in LaCava, 2005 WL 326832, at *4, it similarly demonstrates that petitioner failed to exercise sufficient diligence to warrant equitable tolling when viewed in light of the other circumstances presented.[10]

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[9] The Court notes that, in support of his position that his case qualifies as an extraordinary one under Seitzinger, petitioner argues that Mr. Galloway engaged in additional misconduct by incorrectly recommending, in his letter dated February 8, 1999, that petitioner only had one viable issue to pursue on appeal. The Court concludes that such alleged conduct constitutes "attorney error, miscalculation, inadequate research" of a sort which does not warrant equitable tolling. Fay, 240 F.3d at 244.

[10] The Court notes that petitioner in this case, like that in Seitzinger, claims he did not know of the deadline for filing his PCRA petition triggered by denial of his Petition for

Therefore, the Court concludes that petitioner has failed to demonstrate that the attorney misconduct he alleges constituted an extraordinary circumstances which prevented him from exercising his rights in a manner which would warrant equitable tolling.

V. CONCLUSION

For all of the reasons set forth above, the Court overules petitioner's Objections and adopts the Magistrate Judge's Report and Recommendation, and dismisses the Petition for Writ of Habeas Corpus with prejudice.

An appropriate Order follows.

Allowance of Appeal. However, the Court does not view that similarity to Seitzinger to be dispositive.

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Petitioner,	:	
v.	:	
	:	**CIVIL ACTION**
LOUIS FILINO; PATRICK MEEHAN,	:	**NO. 04-2510**
The District Attorney of the County	:	
of Delaware; and MIKE FISHER,	:	
The Attorney General of the State	:	
of Pennsylvania,	:	
Respondents.	:	

ORDER

AND NOW this 25th day of February, 2005, upon careful and independent consideration of the Petition for Writ of Habeas Corpus, and after review of the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa dated August 31, 2004, and Petitioner's Response, which will be treated by the Court as Petitioner's Objections to the Report and Recommendation, **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Linda K. Caracappa dated August 31, 2004, is **APPROVED** and **ADOPTED**;

2. Petitioner's Response, treated by the Court as Petitioner's Objections to the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa dated August 31, 2004, is **OVERRULED**;

3. The Petition for Writ of Habeas Corpus filed by Leroy Shelley, III, is **DISMISSED WITH PREJUDICE**; and,

4. A certificate of appealability will not issue on the ground that petitioner has not made

a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c).

BY THE COURT:

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JAN E. DUBOIS, J.