

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

AARON JOHNSON	:	CIVIL ACTION
	:	
	:	
v.	:	No. 03-4676
	:	
	:	
LOUIS FOLINO ET AL.	:	

MEMORANDUM AND ORDER

Savage, J.

July 21, 2005

Aaron Johnson (“petitioner”), a state prisoner incarcerated at SCI-Greene, has filed a Petition for Writ of *Habeas Corpus* alleging a panoply of constitutional violations during his trial and the appellate process. His petition contains both exhausted and unexhausted claims. The unexhausted claims are procedurally defaulted; and, the exhausted claims are untimely. Therefore, the petition must be dismissed.

Procedural History

On October 5, 1994, the petitioner was convicted by a jury in Pennsylvania state court of aggravated assault, robbery, criminal conspiracy and carrying a firearm in public. *Com. v. Johnson*, 815 A.2d 1127 (Pa. Super. Ct. Oct. 10, 2002) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. E at 1). On November 29, 1994, after his post-trial motions were denied, petitioner was sentenced to 25-50 years in prison. *Id.* Immediately following the sentencing, the petitioner’s attorney moved to withdraw from his representation because the petitioner had indicated that he was going to pursue ineffective assistance of counsel claims in post-sentence proceedings. *Com. v. Johnson*, Nos. 9307-0436 through 9307-0445 (Pa. Com. Pl.), Sentencing Tr. 11/29/1994 at 29-31 (Resp. to Pet. for Writ of

Habeas Corpus, Ex. A). However, when questioned by the trial judge, the petitioner provided equivocal responses regarding his intentions. *Id.* at 31. The trial judge advised the petitioner that he had ten days to file motions to reconsider the denial of post-trial motions and the sentence, and to notify her if he wished to have counsel appointed for a direct appeal. *Id.* at 30-32.

No direct appeal was taken. Thus, the petitioner's conviction became final on December 29, 1994. *Com. v. Johnson*, 815 A.2d 1127 (Pa. Super. Ct. Oct. 10, 2002) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. E at 1).

On August 20, 1996, petitioner's retained counsel filed a timely PCRA.¹ *Com. v. Johnson*, 742 A.2d 1145 (Pa. Super. Ct. 1999) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. C at 1). The petition raised four issues, all relating to the alleged ineffective assistance of his trial counsel. *Id.*

The trial court denied the PCRA petition on July 21, 1997. *Com. v. Johnson*, Nos. 9307-0436 through 9307-0445, slip. op. at 2 (Pa. Com. Pl. Dec. 31, 1997) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. B). Represented by new appellate counsel, petitioner filed an appeal to the Pennsylvania Superior Court. Instead of pursuing the four ineffective assistance of counsel claims originally presented to the PCRA trial court, the petitioner raised six alleged trial errors. *Com. v. Johnson*, 742 A.2d 1145 (Pa. Super. Ct. 1999) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. C at 1-2). On July 30, 1999, the Pennsylvania Superior Court affirmed the lower court's decision. *Id.* at 1. Noting that the

¹ Under the amended Pennsylvania Collateral Relief Act ("PCRA"), all first PCRA petitions challenging convictions which became final prior to the effective date of the amended statute were deemed timely if filed prior to January 16, 1997. See *Com. v. Camps*, 772 A.2d 70, 73 (Pa. Super. Ct. 2001).

six issues were deemed waived because they had not been raised in his PCRA petition, the appellate court still considered the six claims and found none of them cognizable under the PCRA. *Id.* at 3-6. On January 19, 2000, the Pennsylvania Supreme Court denied *allocatur*. *Com. v. Johnson*, 749 A.2d 467 (Pa. 2000) (Table).

Eleven months later, on December 18, 2000, the petitioner filed a *pro se* second PCRA petition, which was denied as untimely on May 1, 2001. *Com. v. Johnson*, 815 A.2d 1127 (Pa. Super. Ct. Oct. 10, 2002) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. E at 2). The Superior Court agreed with the trial court that, absent a showing that any of three statutory exceptions applied,² it lacked jurisdiction to consider the merits of the untimely second PCRA petition. *Com. v. Johnson*, 815 A.2d 1127 (Pa. Super. Ct. Oct. 10, 2002) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. D at 7). Finding that petitioner met none of the exceptions, the Superior Court affirmed on October 10, 2003. *Id.* at 3-7. A petition for reargument was denied on December 18, 2002, and the Pennsylvania Supreme Court denied *allocatur* on May 6, 2003. *Com. v. Johnson*, 825 A.2d 1260 (Pa. 2003). An application for reconsideration was denied on June 26, 2003. *Com. v. Johnson*, 825 A.2d 1260 at n.1 (Pa. 2003) (Table).

The Petition for Writ of *Habeas Corpus*

Under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), a prisoner has one year from the date his conviction becomes final to file a timely petition for *habeas* relief. 28 U.S.C. § 2244(d). AEDPA was enacted on April 24, 1996. 28 U.S.C. § 2244.

² In this appeal, the petitioner, for the first time, raised the issue that he was entitled to reinstatement of his direct appeal rights *nunc pro tunc* because counsel he retained in 1996 was hired to file a direct appeal but instead filed the petitioner’s first PCRA. *Com. v. Johnson*, 815 A.2d 1127 (Pa. Super. Ct. Oct. 10, 2002) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. C at 5).

Prisoners whose convictions had become final prior to its enactment had one year from the enactment date to file a timely petition, that is, until April 23, 1997. See *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998). The one year period is tolled during the time a properly filed timely petition for state collateral relief is pending. *Merritt v. Blaine*, 326 F.3d 157, 166-67 (3d Cir. 2003); 28 U.S.C. § 2244(d)(2).

The petitioner's AEDPA clock started ticking on April 24, 1996, because his conviction had been final prior to AEDPA's enactment. He filed his first PCRA in state court on August 20, 1996, 118 days after the time started running, stopping the AEDPA clock. Time resumed running on March 19, 2000, when the time the petitioner had to seek review of the denial of his PCRA petition with the United States Supreme Court expired. Thus, at that point, petitioner had 247 days, or until November 21, 2000, in which to file a timely *habeas* petition.

The petitioner failed to file a timely *habeas* petition by November 21, 2000, and filed a *second* PCRA petition in state court on December 18, 2000, which was dismissed as untimely by the state court on May 1, 2001.³ Nearly three years after the expiration of the time he had to file a timely *habeas* petition, petitioner filed the present petition on August 13, 2003. The petition was referred to former Chief Magistrate Judge James R. Melinson for a Report and Recommendation. Chief Magistrate Judge Melinson recommended denying the petition as untimely and finding that the petitioner did not satisfy any of the requirements that would entitle him to equitable tolling of the limitations period.

³ Even if the petitioner still had time remaining under AEDPA, the petitioner's second PCRA petition did not toll the limitations period because it was untimely. *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1811-13 (2005).

The petitioner filed objections on November 12, 2003, arguing that because he made an oral motion to appeal his sentence in open court, his conviction could not have become final on December 29, 1994,⁴ and that he is entitled to equitable tolling. The sentencing transcript does not support the petitioner's contention that he made an oral motion. Even if he did make such a motion, his *habeas* petition is still untimely.

Equitable Tolling

The doctrine of equitable tolling provides an exception to the AEDPA one year limitation. It is applied only "in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." *Schlueter v. Varner*, 384 F.3d 69, 75 (3d Cir. 2004) (quoting *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999)). This generally occurs when the petitioner has, in some extraordinary way, been prevented from asserting his or her rights. The petitioner bears the burden of showing that he exercised reasonable diligence in investigating and bringing his claims. *Schlueter*, 384 F.3d at 76. Mere excusable neglect is insufficient to meet this burden. *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001). In non-capital cases, attorney error is not a sufficient basis for equitable tolling. *Schlueter*, 384 F.3d at 76.

The petitioner has presented no evidence that excuses his failure to file this petition before November 21, 2000, the date the AEDPA statute of limitations expired. He emphasizes the delays in state court but does not explain why he waited until August 13, 2003, to file his *habeas* petition in federal court. He received an unfavorable decision on his first PCRA petition on January 19, 2000. Instead of filing a federal *habeas* petition, he

⁴ The petition does not specifically state when the petitioner contends his conviction became final.

chose to file an untimely second PCRA petition. Then, after the second petition was denied, he waited over two years to file this *habeas* petition.

Former Chief Magistrate Judge Melinson noted the petitioner's present claims, based on events which took place during his trial, were discoverable through the exercise of due diligence. *Report and Recommendation* at 5, Oct. 29, 2003 (Document No. 9) (citing *Miller v. New Jersey Dept. of Corr.*, 145 F.3d 616, 618-19 (3d Cir. 1998) (stating that a petitioner must show that he exercised reasonable diligence in investigating and bringing the claim to be entitled to equitable tolling; excusable neglect is not sufficient)). Therefore, because he has not identified any extraordinary circumstance which prevented him from asserting these claims in a timely petition, he is not entitled to equitable tolling.

Procedural Default

In addition to his exhausted untimely claims, the petitioner raises several new issues in his petition which have never been fairly presented to the state court. These claims are now procedurally defaulted.

Procedurally defaulted claims are those which have never been raised in a collateral state court proceeding but are now procedurally barred by state law from being considered on the merits there. *Villot v. Varner*, 373 F.3d 327, 334 (3d Cir. 2004). There is no question that a new PCRA petition filed with the state court would be deemed untimely unless one of the exceptions under the PCRA excused the late filing. The three statutory exceptions are: (1) governmental interference with the petitioner's ability to bring a claim; (2) newly discovered facts which would have changed the outcome of the proceedings; and, (3) a new constitutional law which, applied retroactively, would exonerate the petitioner. 42 PA. CONS. STAT. ANN. § 9545(b)(1)(i-iii).

Without using the term “governmental interference,” the petitioner argues that the trial judge’s failure to appoint counsel intentionally delayed the proceedings which led to his time for filing a direct appeal to expire.

The petitioner did not raise the governmental interference argument until his second PCRA petition, which was deemed untimely by the Superior Court. *Com. v. Johnson*, 815 A.2d 1127 (Pa. Super. Ct. Oct. 10, 2002) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. E at 5). In denying the petition, the Superior Court stated that where there is a failure to file a direct appeal, those appellate rights can be reinstated *nunc pro tunc* if raised in a timely filed PCRA petition. *Id.* (quoting *Com. v. Lantzy*, 736 A.2d 564, 572 (Pa. 1999)). However, if a petition seeking reinstatement of direct appeal rights is untimely, the petitioner is not entitled to reinstatement regardless of the merits of his contentions. *Id.* (citing *Com. v. Murray*, 753 A.2d 201, 203 n.1 (Pa. 2000)). Accordingly, the Superior Court refused to consider the petitioner’s *nunc pro tunc* request because it was presented in an untimely PCRA. *Com. v. Johnson*, 815 A.2d 1127 (Pa. Super. Ct. Oct. 10, 2002) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. E at 6).

Even assuming that the petitioner’s version of events is true and the trial judge ignored his request for the appointment of counsel, the petitioner can not identify any resulting prejudice. If anyone, petitioner’s retained first PCRA counsel, and not the trial judge, prejudiced him by failing to request reinstatement of the petitioner’s direct appeal rights. When the petitioner retained counsel, the time for direct appeal had already expired. The petitioner never attempted to preserve his direct appeal rights by filing a *pro se* appeal or a PCRA petition. The petitioner was not deprived of his direct appeal rights due to governmental interference, as he would like the court to believe. These facts do not

entitle the petitioner to state PCRA relief pursuant to one of the three PCRA exceptions.

A federal court cannot grant a state prisoner *habeas* relief until he has exhausted his remedies in the state court, giving the state courts a “full and fair opportunity” to decide the issues first. *O’Sullivan v. Boerkel*, 526 U.S. 838, 842, 845 (1999); 28 U.S.C. § 2254(b)(1)(A). Exhaustion requires that a petitioner “fairly present” his federal claims at all state court levels in such a way that the state court is put on notice of the federal claims being asserted so that it has an opportunity to rule on the factual and legal merits of the claims. *Cristin v. Brennan*, 281 F.3d 404, 410 (3d Cir. 2002).

The petitioner did not present the “new” *habeas* claims to the state court in a timely PCRA petition. Hence, he cannot do so in a federal petition for *habeas corpus* unless he can demonstrate cause for the default and resulting actual prejudice, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Cristin*, 281 F.3d at 410-412. Demonstrating cause requires a showing that some objective factor prevented the petitioner from complying with the state procedural requirements. *Cristin*, 281 F.3d at 412.⁵ A showing of cause requires a petitioner to identify an impediment beyond the control of an attorney which made compliance with a state’s procedural rules impossible. *Murray v. Carrier* 477 U.S. 478, 488 (1986).

Prejudice means there is a “reasonable probability” that the prisoner may not have been convicted. *Strickler v. Greene*, 527 U.S. 263 (1999). The prisoner must show that he had been deprived of “fundamental fairness” at trial as a result of the alleged violation

⁵ A petitioner may also avoid procedural default if the Pennsylvania courts would consider the merits of a claim despite the fact that a petitioner did not comply with the state’s procedural requirements. *Hull v. Kyles*, 190 F.3d 88, 103 (3d Cir. 1999). However, because the state courts have given no indication that they would consider the merits of the petitioner’s claims, the waiver argument is inapplicable.

of federal law. *Murray*, 477 U.S. at 494. “Actual prejudice” results from alleged trial errors that “so infected the entire trial that the resulting conviction violated due process.” *United States v. Frady*, 456 U.S. 152, 168-69 (1982).

The fundamental miscarriage of justice threshold requires the prisoner to demonstrate actual innocence through the presentation of new evidence of his innocence. *Keller v. Larkins*, 251 F.3d 408, 415-16 (3d Cir. 2001). To support a newly discovered evidence claim, the prisoner must show that the evidence could not have been discovered before the time of presenting it to the state court had expired. *Id.*

Construing the petitioner’s *pro se* pleadings liberally, I conclude that the petitioner does not satisfy the cause and prejudice test. If anything, the loss of his direct appeal rights was his own fault or the fault of his attorney. The Pennsylvania Superior Court stated in a footnote that the petitioner’s attorney had caused him “severe prejudice” by not seeking reinstatement of his direct appeal rights. *Com. v. Johnson*, 815 A.2d 1127 (Pa. Super. Ct. Oct. 10, 2002) (Table) (Resp. to Pet. for Writ of *Habeas Corpus*, Ex. C at 6 n.4). However, attorney ignorance, error or inadvertence is not a basis for “cause.” *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). The petitioner has not identified any objective factor beyond his control or the control of his attorney which made compliance with the state’s procedural rules impossible. Therefore, the petitioner has not demonstrated cause and resulting prejudice sufficient to excuse the procedural default.

Although he cites no new evidence, the petitioner presumably is arguing that he is actually innocent. Whether a petitioner is actually innocent involves a factual inquiry into his guilt and the burden is on the petitioner to produce new evidence which would exonerate him. *Cristin*, 281 F.3d at 420, 422. The actual innocence standard requires a

petitioner to persuade “the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 329 (1995). The petitioner has not presented any new evidence challenging the factfinder’s findings. Therefore, his unsupported claim of actual innocence cannot excuse the procedural default.

Conclusion

The petitioner’s untimely *habeas* petition contains both exhausted and unexhausted claims. There are no extraordinary circumstances which would excuse his failure to assert the exhausted claims in a timely petition, and the unexhausted claims are procedurally defaulted. Accordingly, we shall adopt the Report⁶ and Recommendation and dismiss the petition.

⁶ The Report and Recommendation incorrectly identifies the filing date of the prisoner’s first PCRA petition as August 20, 1994. *Report and Recommendation* at 1, Oct. 29, 2003 (Document No. 9). In fact, the petitioner’s initial PCRA was filed on August 20, 1996. While this typographical error does not affect the findings and the conclusions of the magistrate judge, we shall adopt the R&R only to the extent that it is consistent with our recitation of the facts and procedural history.

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ORDER

AND NOW, this 21st day of July, 2005, upon consideration of the Petition for Writ of *Habeas Corpus* (Document No. 1), the Response to the Petition for Writ of *Habeas Corpus*, the Reply to Respondent's Brief, the Report and Recommendation of former Chief Magistrate Judge James R. Melinson, the petitioner's objections to the Report and Recommendation, and after a thorough and independent review of the record, it is **ORDERED** that:

1. The Report and Recommendation of former Chief Magistrate Judge James R. Melinson is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of *Habeas Corpus* is **DENIED** and **DISMISSED**;
3. There is no probable cause to issue a certificate of appealability; and,
4. The Clerk of Court shall **CLOSE** this action statistically.

_____/s/_____
TIMOTHY J. SAVAGE, J.