

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

DAVID ROBINSON,	:	
	:	
Petitioner,	:	CIVIL ACTION
	:	NO. 05-4970
v.	:	
	:	
JOSEPH SMITH, et al.,	:	
	:	
Respondents.	:	

MEMORANDUM

BUCKWALTER, S. J.

June 7, 2006

Presently before the Court is Petitioner’s Motion for Reconsideration (Docket No. 14). District courts should grant a party’s motion for reconsideration in only three situations: “(1) the availability of new evidence not previously available, (2) an intervening change in controlling law, or (3) the need to correct a clear error of law or to prevent manifest injustice.” Yang v. Astra Zeneca, No. 04-4626, 2005 U.S. Dist. LEXIS 18567, at *2 (E.D. Pa. Aug. 29, 2005) (quoting New Chemic (U.S.), Inc. v. Fine Grinding Corp., 948 F. Supp. 17, 18-19 (E.D. Pa. 1996)). Since the substance of Petitioner’s Motion does not fall into any of these three situations, Petitioner’s Motion for Reconsideration will be denied.

The Court will nevertheless review Petitioner’s untimely objections (Docket No. 13).

I. ANALYSIS OF OBJECTIONS

Petitioner’s first objection is that Magistrate Judge Hart’s Report and Recommendation contained faulty calculations and therefore incorrectly concluded that

Petitioner failed to file his petition in a timely manner. Magistrate Judge Hart calculated that Petitioner had until April 21, 2005 to file his habeas corpus petition. Petitioner insists that he could have filed as late as 146 days beyond that date. A review of the record indicates that Judge Hart's calculations are correct. Petitioner further alleges that he was afforded allocatur time while his *nunc pro tunc* appeal was pending with the Pennsylvania Supreme Court. Under 28 U.S.C. § 2244 (d)(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." According to Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005), state law determines whether a submission was timely and otherwise "properly filed" within the meaning of § 2244. Pennsylvania state law provides that "the court may not enlarge the time for filing a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review." Pa. R. App. P. 105(b). Applying this law, the Pennsylvania Supreme Court denied the *nunc pro tunc* appeal. Therefore, filing this appeal did not suspend the running of time for Petitioner to seek habeas corpus relief in federal court.

Petitioner's second objection is that his habeas corpus petition is timely pursuant to the doctrine of equitable tolling. Equitable tolling is appropriate "when the petitioner has 'in some extraordinary way . . . been prevented from asserting his or her rights.'" Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998) (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994)). The Third Circuit has held that "the law is clear that courts must be sparing in their use of equitable tolling." Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1998). One of the narrow exceptions

where equitable tolling may be appropriate is if there is a motion pending for the appointment of counsel. Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). Petitioner alleges that he filed an Application for Appointment of Counsel on July 14, 2004, to which he did not receive a reply. Yet, a search of Petitioner's federal and state dockets revealed no such motion in existence. Therefore, Petitioner is not entitled to equitable tolling.

Petitioner's third objection is that Magistrate Judge Hart operated under a conflict of interest since he was also the Magistrate Judge for Petitioner's arraignment and bail hearing in October 2004 on another federal matter. Petitioner claims that Magistrate Judge Hart's knowledge of his federal case while sitting as a Magistrate Judge for this habeas corpus petition was an abuse of discretion. Specifically, Petitioner implicitly alleges that Magistrate Judge Hart is aware of Petitioner's attempt to challenge his status as a career offender and its subsequent effect on his current federal sentence. Magistrate Judge Hart responded to the record before him and that any prior knowledge that Magistrate Judge Hart may have had of Petitioner did not affect his Report and Recommendation.

In a final objection contained in a document entitled "Certificate of Appealability" dated March 22, 2006, Petitioner claims to have new evidence that was not presented at his bench trial. Petitioner contends that the evidence is such that, if it were presented at trial, no reasonable jury would have convicted him. If there was new evidence that was not available at trial, under either Local Rule 7.1(g) or Federal Rule of Civil Procedure 59(e), Petitioner's claim of new evidence could be a valid objection. Furthermore, in order to be entitled to a Certificate of Appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner must show "that reasonable jurists could debate

whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” U.S. v. Martorano, No. 83-314-1, 2001 WL 1609840, at *3 (E.D. Pa. Dec. 11, 2001) (citation omitted). Petitioner fails to make any showing that there has been a denial of a constitutional right. His vague and unsubstantiated claim of new evidence does not meet the standards for either a Certificate of Appealability, a Local Rule 7.1(g) motion, or a FRCP Rule 59(e) motion. Accordingly, Petitioner’s final objection is without merit.

II. CONCLUSION

For the reasons stated above, the Court denies Petitioner’s Motion for Reconsideration and finds that Petitioner’s objections, even if they had been filed timely, are without merit. An order follows.

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ORDER

AND NOW, this 7th day of June, 2006, upon consideration of the Objections of Petitioner (Docket No. 13), and Petitioner's Motion for Reconsideration for Habeas Corpus (Docket No. 14), it is hereby **ORDERED** that Petitioner's Motion is **DENIED**.

This case is now **CLOSED**.

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.
RONALD L. BUCKWALTER, S.J.