

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ALBERT T. JONES,

Petitioner,

v.

THOMAS CARROLL, Warden, and
ATTORNEY GENERAL OF THE
STATE OF DELAWARE,

Respondents.

Civil Action No. 02-163-GMS

MEMORANDUM AND ORDER

Following a jury trial in the Delaware Superior Court, Albert T. Jones was convicted of unlawful sexual intercourse and continuous sexual abuse of a child. He is presently incarcerated at the Delaware Correctional Center in Smyrna, Delaware, serving a sentence of thirty-two years. Jones has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. As explained below, the court will dismiss Jones' petition as time barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1).

I. BACKGROUND

On October 10, 1997, a jury in the Delaware Superior Court found Albert T. Jones guilty of two counts of unlawful sexual intercourse in the first degree and one count of continuous sexual abuse of a child. The victim was the six-year-old daughter of his girlfriend. The Superior Court sentenced Jones on December 19, 1997, to thirty-two years imprisonment followed by a period of decreasing levels of supervision. On direct appeal, the Delaware Supreme Court

affirmed. *Jones v. State*, No. 28, 1998, 1998 WL 985334 (Del. Nov. 13, 1998).

On December 6, 1999, Jones filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. The Superior Court denied the motion on June 19, 2000. *State v. Jones*, Crim. A. No. IN96-01-0994 R1 (Del. Super. Ct. June 19, 2000). The Delaware Supreme Court affirmed the denial of postconviction relief. *Jones v. State*, No. 335, 2000, 2001 WL 306829 (Del. Mar. 27, 2001). Jones filed a timely motion for reargument, which the Delaware Supreme Court denied. *Jones v. State*, No. 335, 2000 (Del. Apr. 16, 2001).

Jones has now filed the current petition for federal habeas corpus relief, challenging his convictions on nine separate grounds. (D.I. 1.) He has also filed a motion seeking appointment of counsel. (D.I. 9.) The respondents argue that the petition is subject to a one-year period of limitation that expired before Jones filed it, and ask the court to dismiss it.

II. DISCUSSION

A. One-Year Period of Limitation

In the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Congress amended the federal habeas statute by prescribing a one-year period of limitation for the filing of habeas petitions by state prisoners. *Stokes v. District Attorney of County of Philadelphia*, 247 F.3d 539, 541 (3d Cir.), *cert. denied*, 122 S. Ct. 364 (2001). Effective April 24, 1996, the AEDPA provides:

(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. . . .

28 U.S.C. § 2244(d)(1).

Here, the Delaware Supreme Court affirmed Jones' conviction and sentence on direct appeal on November 13, 1998. Jones was then allowed ninety days in which to file a petition for a writ of certiorari with the United States Supreme Court. *See* Supreme Court Rule 13.1.

Although Jones did not seek review from the United States Supreme Court, the ninety-day period in which he could have filed such a petition is encompassed within the meaning of "the conclusion of direct review or the expiration of the time for seeking such review," as set forth in § 2244(d)(1)(A). *See Kapral v. United States*, 166 F.3d 565, 576 (3d Cir. 1999)(holding that on direct review, the limitation period of § 2244(d)(1)(A) begins to run at the expiration of the time for seeking review in the United States Supreme Court). Therefore, Jones' conviction became final on February 12, 1999, ninety days after the Delaware Supreme Court affirmed his conviction.

The court's docket reflects that Jones' petition was filed on March 4, 2002. (D.I. 1.) A pro se prisoner's habeas petition, however, is considered filed on the date he delivers it to prison officials for mailing to the district court, not on the date the court docket it. *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Jones has not provided the court with any documentation establishing the date he submitted his petition to prison officials for mailing. The petition itself, however, is dated March 2, 2002. (D.I. 1.) In the absence of proof respecting the date of delivery, the court deems Jones' habeas petition filed on March 2, 2002.

As the foregoing demonstrates, Jones' habeas petition was filed more than three years after his conviction became final. That, however, does not necessarily require dismissal of the

petition as untimely, because the one-year period of limitation may be either statutorily or equitably tolled. *See Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999).

B. Statutory Tolling

The AEDPA provides for statutory tolling of the one-year period of limitation as follows:

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)(2).

Here, Jones filed a Rule 61 motion for postconviction relief in the Superior Court on December 6, 1999. The Delaware Supreme Court affirmed the denial of postconviction relief on March 27, 2001, and denied his motion for reargument on April 16, 2001. The respondents correctly acknowledge that the one-year period was tolled while Jones' postconviction proceedings were pending in the state courts from December 6, 1999, through April 16, 2001. *See Nara v. Frank*, 264 F.3d 310, 319 (3d Cir. 2001)(stating that if a timely motion for reargument is filed, application is pending until the motion is denied). By the time Jones filed his Rule 61 motion, however, 296 days of the one-year period had lapsed. An additional 319 days lapsed after April 16, 2001, before Jones filed his federal habeas petition on March 2, 2002.

In sum, 615 days lapsed during which no state application for postconviction relief was pending before Jones filed his federal habeas petition. The court thus concludes that applying the statutory tolling provision does not render the petition timely.

C. Equitable Tolling

The one-year period of limitation is not jurisdictional and may be equitably tolled. *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir.), *cert. denied*, 122 S. Ct. 323 (2001); *Jones*, 195 F.3d at 159; *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998). According to the Third Circuit, equitable tolling applies:

only when the principles 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.

Miller, 145 F.3d at 618-19 (citations omitted). In other words, equitable tolling “may 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*, 195 F.3d at 159 (quoting *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998)).

The court has searched the record in an effort to discern why Jones failed to file his habeas petition within the one-year period of limitation. Despite the respondents’ request to dismiss the petition as untimely, Jones has not explained why he waited until March 2, 2002, to file his federal habeas petition. His only potential equitable tolling argument is that the respondents have “not demonstrated proof of service to the Petitioner of the state court’s termination of his postconviction appeal.” (D.I. 15 at 4.)

The court is not persuaded by this argument. Jones does not allege that he did not receive notice of the Delaware Supreme Court’s order denying his motion for reargument; rather, he

alleges only that the respondents have not demonstrated service of the order.¹ The court is unaware of any requirement imposed on the respondents to provide such proof of service.

The court is aware, however, that it cannot equitably toll the one-year period of limitation unless Jones demonstrates that he “exercised reasonable diligence in investigating and bringing [his] claims.” *Miller*, 145 F.3d at 618-19. The record establishes that Jones filed his motion for reargument on April 6, 2001, which the Delaware Supreme Court denied on April 16, 2001.

Apparently Jones took no further action **at all** until he filed his federal habeas petition nearly one year later on March 2, 2002. Even if Jones did not receive notice of the order, he would have learned that the Delaware Supreme Court denied his motion for reargument in plenty of time to file a timely federal habeas petition if he had exercised reasonable diligence. In the absence of a showing of reasonable diligence, the court cannot equitably toll the one-year period of limitation.

In short, the court cannot conclude that any extraordinary circumstances prevented Jones from complying with the one-year period of limitation. Accordingly, the doctrine of equitable tolling does not apply. The court will dismiss Jones’ habeas petition as untimely.

D. Motion for Appointment of Counsel

Jones asks the court to appoint counsel to represent him in this matter because he is incarcerated and unskilled in the law, and has limited access to the law library. (D.I. 9.) It is well established that Jones has no Sixth Amendment right to counsel in this habeas proceeding. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *United States v. Roberson*, 194 F.3d 408, 415 n.5 (3d Cir. 1999). A district court, however, may appoint counsel to represent an indigent

¹ Obviously, Jones received notice of the March 27, 2001 order affirming the denial of postconviction relief – he filed a timely motion for reargument on April 6, 2001.

habeas petitioner “if the interest of justice so requires.” Rule 8(c) of the Rules Governing Section 2254 Cases.

For the reasons stated, the court has determined that Jones’ petition is time barred. Accordingly, his motion for appointment of counsel will be denied as moot.

E. Certificate of Appealability

Finally, the court must determine whether a certificate of appealability should issue. *See* Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

When the court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the prisoner must demonstrate that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.*

As explained above, Jones’ federal habeas petition is barred by the one-year period of limitation. The court is convinced that reasonable jurists would not debate otherwise. Jones has, therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Albert T. Jones' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 1) is DISMISSED, and the relief requested therein is DENIED.
2. Jones' motion for appointment of counsel (D.I. 9) is DENIED.
3. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated: July 29, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE