



  
ROBINSON, Chief Judge

**I. INTRODUCTION**

Currently before the court is petitioner Virgil Ray Morris, Jr.'s application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 1.) Petitioner was serving the probationary portion of his Level V sentence when he filed his § 2254 application. For the reasons that follow, the court will dismiss petitioner's § 2254 application as time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2244(d)(1).

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On May 16, 2001, a Delaware Superior Court jury convicted petitioner of driving under the influence (21 Del. C. Ann. § 4177(a)). For sentencing purposes, the Superior Court considered the May 2001 conviction to be petitioner's fourth lifetime DUI offense, and sentenced him to five years imprisonment at Level V, suspended after completion of a six month minimum-mandatory term and the Level V Key Program, followed by residential treatment and probation.

Petitioner appealed his conviction and sentence to the Delaware Supreme Court on two grounds: (1) the Superior Court improperly amended the indictment on the morning of trial; and (2) the Superior Court erred in using his prior misdemeanor convictions to enhance his sentence. The Delaware Supreme Court

affirmed petitioner's conviction and sentence. Morris v. State, 2002 WL 1241270 (Del. June 4, 2002).

In February 2004, petitioner filed a motion for state post-conviction relief pursuant to Delaware Superior Court Criminal Rule 61. His motion asserted four claims: (1) an officer's testimony was erroneously admitted because it constituted hearsay; (2) his sentence was illegal because it exceeded the statutory maximum; (3) the conditions of his confinement were unconstitutional; and (4) his sentence was illegal because the 2001 DUI offense was not his fourth DUI offense. The Superior Court denied the motion by letter order dated May 27, 2004. State v. Morris, ID No. 0010008090, Stokes, J. (Del. Super. Ct. May 27, 2004). Petitioner did not appeal this decision.

In February 2004, petitioner filed in this court a form § 2254 application asserting seven claims: (1) the Superior Court should not have sentenced him to complete the Key/Crest substance abuse programs due to his medical problems, which were also disregarded by the prison medical staff; (2) the Superior Court abused its discretion by allowing the State to amend the indictment on the morning of trial; (3) the trial court erred in finding that a prior uncounseled misdemeanor conviction could be used to elevate his conviction to a felony and enhance his sentence for a felony conviction of driving under the influence; (4) the conditions at the Violation of Probation center are

unconstitutional and in violation of Delaware law; (5) defense counsel failed to object to, and the trial judge failed to prevent the admission sua sponte of, inadmissible hearsay evidence; (6) the second modification of his sentence exceeds the statutory maximum; and (7) his prior D.U.I. convictions by guilty pleas should not have been used to enhance his sentence because the convictions were not within five years of his May 16, 2001 conviction. (D.I. 1, at 5-6a)

The State asks the court to dismiss his entire § 2254 application as untimely.<sup>1</sup> (D.I. 13, at 4-6)

Petitioner's "Reply" contends that he was not notified when the Delaware Supreme Court judge signed the decision for his direct appeal, thereby demonstrating why he did not file a timely § 2254 application. (D.I. 10) He also asserts that he was not notified of the Superior Court's denial of his Rule 61 motion, thereby constituting cause for his procedural default of claims four-seven. Id.

Petitioner's § 2254 application is now ready for review.

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<sup>1</sup>The State also correctly asserts that petitioner has only exhausted state remedies for claims two and three. Claim one has never been presented to any state court, and is procedurally barred from further state review. Similarly, even though petitioner presented claims four-seven to the Superior Court in his Rule 61 motion, he procedurally defaulted the claims by failing to appeal the Superior Court's denial to the Delaware Supreme Court, thereby barring any further state review of these claims. (D.I. 13, at 3-4)

### III. DISCUSSION

#### A. One-Year Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law by the President on April 23, 1996, and habeas petitions filed in federal courts after this date must comply with AEDPA's requirements. See generally Lindh v. Murphy, 521 U.S. 320, 336 (1997). AEDPA prescribes a one-year period of limitations for the filing of habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). The one-year limitations period begins to 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;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Petitioner's § 2254 application, dated February 24, 2004, is subject to the one-year limitations period contained in § 2244(d)(1). See Lindh, 521 U.S. at 336. He does not allege, nor can the court discern, any facts triggering the application of §§

2244(d)(1)(B), (C), or (D). Accordingly, the one-year period of limitations began to run when petitioner's conviction became final under § 2244(d)(1)(A).

Pursuant to § 2244(d)(1)(A), if a state prisoner appeals a state court judgment but does not seek certiorari review, the judgment of conviction becomes final, and the one-year period begins to run, upon expiration of the ninety-day time period allowed for seeking certiorari review. See Kapral v. United States, 166 F.3d 565, 575, 578 (3d Cir. 1999); Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999). Here, the Delaware Supreme Court affirmed petitioner's conviction and sentence on June 4, 2002. Petitioner did not apply for certiorari review, thus, his conviction became final on September 3, 2002.<sup>2</sup> See Kapral, 166 F.3d at 575, 578 (3d Cir. 1999). Accordingly, to comply with the one-year limitations period, petitioner had to file his § 2254 application by September 3, 2003.

Petitioner filed his habeas application on February 24, 2004,<sup>3</sup> approximately five months too late. Therefore, his habeas

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<sup>2</sup>The ninety-day certiorari filing period actually ended on September 2, 2002, the legal holiday Labor Day. Thus, pursuant to Fed. R. Civ. P. 6(a), the filing period ended on the next day, September 3, 2002.

<sup>3</sup>A pro se prisoner's habeas application is deemed filed on the date he delivers it to prison officials for mailing to the district court. See Longenette v. Krusing, 322 F.3d 758, 761 (3d Cir. 2003); Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998); Woods v. Kearney, 215 F.Supp.2d 458, 460 (D.Del. 2002) (date on petition is presumptive date of mailing, and thus, of filing).

application is time-barred and should be dismissed, unless the time period can be statutorily or equitably tolled. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999). The court will discuss each doctrine in turn.

**B. Statutory Tolling**

Section 2244(d)(2) of AEDPA specifically permits the statutory tolling of the one-year period of limitations:

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 should not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). A properly filed state post-conviction motion tolls AEDPA's limitations period during the time the action is pending in the state courts, including any post-conviction appeals. Swartz v. Meyers, 204 F.3d 417, 424-25 (3d Cir. 2000). "An application is properly filed when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz v. Bennett, 531 U.S. 4, 8 (2000). However, even if a state post-conviction motion is properly filed under state procedural rules, it will not toll or revive AEDPA's limitations period if the state post-conviction motion itself is not filed within the federal one-year filing period. See Long v. Wilson, 393 F.3d 390, 394-95 (3d Cir. 2004) ("the state habeas

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Petitioner's application is dated February 24, 2004 and, presumably, he could not have delivered it to prison officials for mailing any earlier than that date.

petition had no effect on tolling [because AEDPA's] limitations period had already run when it was filed"); Price v. Taylor, 2002 WL 31107363, at \*2 (D. Del. Sept. 23, 2002).

Here, when petitioner filed his Rule 61 motion on February 24, 2004, AEDPA's limitations period had already expired on September 3, 2003. Thus, his Rule 61 motion has no tolling effect. The court will now consider the doctrine of equitable tolling.

### **C. Equitable Tolling**

It is well-settled that a federal court may, in its discretion, equitably toll AEDPA's limitations period. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616 (3d Cir. 1998); United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998); Thomas v. Snyder, 2001 WL 1555239, at \*3-4 (D. Del. Nov. 28, 2001). Courts are to "sparingly" apply equitable tolling, and "only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (quoting Midgley, 142 F.3d at 179).

In order to trigger equitable tolling, the petitioner must demonstrate that he "exercised reasonable diligence in investigating and bringing [the] claims" and that he was prevented from asserting his rights in some extraordinary way; mere excusable neglect is insufficient. Miller, 145 F.3d at 618-

19 (citations omitted); Schlueter v. Varner, 384 F.3d 69, 77 (3d Cir. 2004). Consistent with these principles, the Third Circuit has specifically limited equitable tolling of AEDPA's limitations period to the following circumstances:

- (1) where the defendant actively misled the plaintiff;
- (2) where the plaintiff was in some extraordinary way prevented from asserting his rights; or
- (3) where the plaintiff timely asserted his rights mistakenly in the wrong forum.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999).

Petitioner admits that he received a copy of the Delaware Supreme Court's opinion affirming his conviction and sentence. However, he contends that his copy of the opinion was not signed, and that the Delaware Supreme Court never notified him of the actual date the judge signed the opinion. Petitioner asserts that he only received such notice on August 8, 2004 when he received a copy of the State's Answer to the instant habeas application. (D.I. 10, at 1-2). In essence, petitioner is asking the court to equitably toll the limitations period through August 2004 because that is the date he became aware of the signed opinion's existence.

This argument fails to trigger equitable tolling. As an initial matter, the record contains a Delaware Supreme Court decision signed and dated June 4, 2002, demonstrating that petitioner's case was "finally determined" under Delaware law on that date. See Del. Supr. Ct. R. 19. Petitioner was represented

by counsel during his appeal, thus, the "signed, sealed, and attested" mandate would have been mailed to his attorney, not to him . Id.

Moreover, the fact that petitioner questioned the validity of the unsigned opinion he received, yet did nothing about it, demonstrates a failure to exercise the requisite due diligence to justify equitable tolling. See LaCava v. Tyler, 398 F.3d 271, 277 (3d Cir. 2005) (noting that due diligence obligation exists during exhaustion of state remedies). If petitioner had a question about the effect of an unsigned opinion, he could have researched that issue or, at the very least, asked if a signed copy existed or was to be forthcoming. Petitioner, however, made no such inquiries for two years.<sup>4</sup> He does not assert, and the record does not indicate, that he was extraordinarily prevented from making these inquiries. To the extent petitioner made a mistake or miscalculation regarding the one-year filing period, such mistakes do not warrant equitably tolling the limitations period. See Simpson v. Snyder, 2002 WL 1000094, at \*3 (D. Del. May 14, 2002).

Accordingly, equitable tolling is not justified under these

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<sup>4</sup>Interestingly, petitioner's Rule 61 motion lists the date of his appeal decision as June 4, 2002, the date contained on his "unsigned" state appellate decision and on the signed appellate decision. Petitioner has offered no explanation as to why he considered June 4, 2002 the relevant "date of decision" for filing his Rule 61 motion, but did not consider it the correct date for determining when to file his § 2254 application.

circumstances. The court will dismiss petitioner's habeas application as time-barred.

#### **IV. CERTIFICATE OF APPEALABILITY**

When a district court issues a final order denying a § 2254 petition, the court must also decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability is appropriate when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

If a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates 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. Id. "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.

The court finds that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is time-barred. Reasonable jurists would not find this conclusion to be unreasonable. Consequently, the court declines to issue a certificate of appealability.

**V. CONCLUSION**

For the reasons stated, petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

VIRGIL RAY MORRIS, JR., )  
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 Petitioner, )  
 )  
 v. ) Civ. No. 04-116-SLR  
 )  
 ANGIE SHOCKLEY, )  
 Probation and Parole )  
 State Service Center, )  
 and M. JANE BRADY, )  
 Attorney General for )  
 the State of Delaware, )  
 )  
 Respondents. )

**ORDER**

At Wilmington, this 8<sup>th</sup> day of June, 2005, consistent with the Memorandum Opinion issued this same date;

IT IS HEREBY ORDERED that:

1. Petitioner Virgil Ray Morris, Jr.'s application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED, and the relief requested therein is DENIED.

(D.I. 1.)

2. 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).

  
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UNITED STATES DISTRICT JUDGE