

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEAN CORNELIUS BLACK,)
)
 Petitioner,)
)
 v.) Civ. A. No. 02-144-KAJ
)
 THOMAS L. CARROLL, Warden,)
)
 Respondent.)

MEMORANDUM OPINION

Dean Cornelius Black. *Pro se* Petitioner.

Elizabeth McFarlan, Deputy Attorney General, Delaware Department
of Justice, Wilmington, Delaware. Attorney for Respondent.

June 4, 2004
Wilmington, Delaware

Jordan, District Judge

I. INTRODUCTION

Petitioner Dean Cornelius Black is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the Court is Black's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2.) For the reasons that follow, the Court concludes that Black's application is time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2244(d)(1). Accordingly, the Court will dismiss the petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

In March 1985, a Delaware Superior Court jury found Black guilty of two counts of attempted first degree rape; the victim was his 7 year old daughter. Black was sentenced to a total of 25 years imprisonment, suspended for 10 years of probation after 15 years.

The Delaware Supreme Court affirmed Black's convictions on direct appeal. *Black v. State*, 511 A.2d 1 (Del. 1986). Black applied for federal habeas corpus relief, which this Court¹ denied in April 1991. See *Black v. Redman*, Civ. Act. No. 89-547-JRR, Rept. & Rec. (D. Del. Jan 4, 1991) (adopted Apr. 26, 1991).

¹The Honorable Jane R. Roth adopted the Report and Recommendation of then United States Magistrate Sue L. Robinson. *Black v. Redman*, Civ. A. No. 89-547-JRR, Order (D. Del. Apr. 26, 1991).

Black served his mandatory prison term and he was released on parole in 1993.² (D.I. 14, State's Sept. 20, 1999 Ans. Br. in *Black v. State*, No. 242, 1999, at 6.) He still had 10 years deferred probation to serve after successfully completing parole. (*Id.*) Black violated his probation terms by changing his residence and by failing to inform his supervising probation office. Consequently, at a June 10, 1997 violation of probation ("VOP") hearing, the Superior Court revoked Black's probation and sentenced him to ten years imprisonment, suspended after 9 ½ years for Level IV work release. See generally, *State v. Black*, 1999 WL 1568385 (Del. Super. Ct. Feb. 2, 1999). Black did not appeal this decision.

Thereafter, Black filed numerous motions in the Delaware Superior Court, all of which challenged his original conviction and the sentence that was re-imposed. The first three motions included: (1) a letter dated February 19, 1998, which, after construing it to be a motion to correct an illegal sentence, the Superior Court denied on May 21, 1998; (2) a motion to reduce or modify his sentence, which the Superior Court denied on August 5, 1998; and (3) a December 8, 1998 motion for a new trial pursuant to Rule 33 of the Delaware Superior Court Criminal Rules, which

²The state records and Black's submissions interchangeably use the terms "parole" and "conditional release" to refer to the same type of release. In this Opinion, I use the term "parole."

the Superior Court denied on February 2, 1999. Black did not appeal any of the these decisions.

The remaining motions filed by Black include: (1) an application for a pardon to the Board of Pardons filed on July 27, 1998; (2) a motion for state post-conviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure ("Rule 61 motion"), filed on April 1, 1999, and denied by the Superior Court on April 12, 1999.³ (D.I. 14, Del. Super. Ct. Dkt. Item #s 42, 43.); (3) a Rule 35(a) motion for correction of sentence filed on May 19, 1999, denied by the Superior Court on June 1, 1999, and affirmed by the Delaware Supreme Court on November 2, 1999. *See Black v. State*, 741 A.2d 1025 (Del. 1999); (4) a Rule 33 motion for new trial filed on August 3, 1999 and denied on May 11, 2000. *State v. Black*, 2000 WL 710088 (Del. Super. Ct. May 11, 2000); (5) another Rule 61 motion filed on October 6, 1999, and denied on January 12, 2000 as procedurally barred under Rule 61(i)(1)-(4). *State v. Black*, 2000 WL 307746 (Del. Super. Ct. Jan. 12, 2000); (6) a petition for a writ of prohibition, which the Superior Court denied on July 13, 2000, and the Delaware Supreme Court affirmed on October 26, 2000. *Black v. State*, 763 A.2d 90 (Del. 2000); (7) another Rule 61 motion filed on November 27, 2000 and withdrawn on January 29,

³Although Black did file an appeal with respect to the Superior Court's denial of this motion, he subsequently withdrew it.

2001; (8) a motion for modification of sentence filed on July 20, 2001 and denied on August 27, 2001; (9) a petition for a writ of mandamus filed in the Delaware Supreme Court on November 6, 2001 and dismissed on December 7, 2001; and (10) a petition for a state writ of habeas corpus filed on November 6, 2001, denied on November 19, 2001, and affirmed on January 17, 2002. *Black v. State*, 797 A.2d 678 (Del. 2002).

Presently before the Court is Black's *pro se* petition for federal habeas relief. (D.I. 2.) His petition asserts 4 claims: (1) the Superior Court could not find Black in violation of his probation while he was on parole because he had not yet begun to serve his probationary term and he was not convicted of any new criminal charges; (2) the state court's reliance on a 1989 Delaware Supreme Court decision constitutes an *ex post facto* violation, a due process violation, an eighth amendment violation, and a violation of the Delaware constitution; (3) the Superior Court did not have jurisdiction to "increase[] the severity of punishment" when he was sentenced for violating the conditions of probation; and (4) the Delaware Department of Corrections illegally increased the length of Black's sentence by failing to give good time credit earned prior to the revocation of parole in July 1997. (D.I. 2 at 5-6.)

The State contends that the petition is time-barred and asks the Court to dismiss the petition as untimely.⁴ (D.I. 10.) Black's habeas petition is now ready for review.

III. DISCUSSION

A. One-Year Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("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).

⁴As an alternative, the State argues that two of the claims are procedurally barred due to Black's procedural default at the state level. The fact that the petition is time-barred is a sufficient ground for dismissal. I therefore will not discuss the procedural default but note that, by raising this issue, the State has not waived the exhaustion/procedural default issue as an affirmative defense.

As an initial matter, Black contends that AEDPA does not apply to his habeas petition, purportedly because "the statute reveals Congress's intent to apply the amendments to chapter 153 only to such cases as were filed after the statute's enactment." (D.I. 15.) It is not clear why Black believes he is exempt from AEDPA's requirements. AEDPA became effective on April 24, 1996, and it applies to § 2254 petitions filed after that date. See *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Black's habeas claims are based on the June 1997 violation of probation,⁵ which occurred after AEDPA's effective date. Moreover, as explained

⁵Claim four in Black's form petition mentions a loss of good time credits upon the revocation of his parole in July 1997, which is clearly different from his revocation of probation in June 1997. (D.I. 2.) However, in Black's supporting memorandum, the parole violation hearing is discussed to support his argument that the Superior Court did not have jurisdiction over his VOP hearing. (*Id.*) Similarly, he mentions the loss of good time credits with respect to his being "resentenced altogether" to a longer sentence than allegedly permissible by law. I therefore conclude that Black's parole violation claim is inextricably intertwined with his probation violation claims and essentially goes to the heart of his probation arguments. Thus, I will use the date of Black's VOP hearing, June 10, 1997, as the relevant date for timeliness purposes.

Nevertheless, if Black's parole revocation claim is separate and distinct from his VOP claims, this habeas claim is still time-barred. The limitations period would only be extended by 35 days for this claim, which is not enough to render it timely. The Board revoked Black's parole on July 15, 1997, making August 14, 1997 the "final" date for timeliness purposes. August 14, 1998 would then be the requisite filing date. Even applying all the statutory tolling (described *infra* at 9-12) to these "revised" dates, the limitations period expired on March 5, 1999. Black's filing in 2002 was still too late.

below, Black did not file his habeas petition until 2002. Clearly, AEDPA's statute of limitations does apply to Black.

Black does not allege, nor can I discern, any facts triggering the application of § 2244(d)(1)(B), (C), or (D). Thus, the one-year period of limitations began to run when Black's conviction became final under § 2244(d)(1)(A).

Pursuant to § 2244(d)(1), if a state prisoner does not appeal a state court judgment, the state court criminal judgment becomes "final," and the statute of limitations begins to run, on the "date on which the time for filing such an appeal expired." *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999); *Swartz v. Meyers*, 204 F.3d 417, 421 n.4 (3d Cir. 2000); see 28 U.S.C. § 2244(d)(1). In the present case, the Delaware Superior Court sentenced Black for his violation of probation on June 10, 1997. Black did not appeal this decision.

In Delaware, a notice of appeal must be filed within thirty days after a sentence is imposed. See *Cornish v. Snyder*, Civ. Act. No. 99-448 (D. Del. Dec. 21, 1999); Del. Supr. Ct. R. 6(a). Consequently, Black's violation of probation sentence became final for the purposes of § 2244(d)(1) on July 10, 1997. Thus, to timely file a habeas petition with this Court, Black needed to file his § 2254 petition no later than July 10, 1998.

A *pro se* prisoner's habeas petition 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) (the date on which a prisoner transmitted documents to prison authorities is to be considered the actual filing date). Black's habeas petition is dated February 5, 2002. (D.I. 2.) Accordingly, I adopt February 5, 2002 as the presumptive filing date. See *Woods v. Kearney*, 215 F. Supp. 2d 458, 460 (D. Del. 2002); *Gholdson v. Snyder*, 2001 WL 657722, at *3 (D. Del. May 9, 2001).

With February 5, 2002 as the filing date, Black filed his petition almost 4 years too late. His habeas petition is thus 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). It cannot be.

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). The Third Circuit views a properly filed application for state post-conviction review as "one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998).

A properly filed state post-conviction motion tolls AEDPA's limitations period during the time a petitioner pursues his state post-conviction remedies, including any post-conviction appeals.⁶ *Swartz v. Meyers*, 204 F.3d 417, 424-25 (3d Cir. 2000). If a timely post-conviction appeal is not filed, then the limitations period is only tolled until the time to appeal expires under state law. *Id.* However, a properly filed state post-conviction motion can only toll the federal habeas limitations period if the post-conviction motion itself is filed within the federal one-year limitations period. See *Price v. Taylor*, 2002 WL 31107363, at *2 (D. Del. Sept. 23, 2002); *Gholdson*, 2001 WL 657722, at *3.

Here, Black filed numerous motions in the Delaware Superior Court that could possibly trigger the statutory tolling doctrine of § 2244(d)(2). The first motion was actually a February 19, 1998 letter which the Superior Court construed as a motion to correct an illegal sentence. (D.I. 14, Del. Super. Ct. Dkt. Item # 33.) This Court has previously held that a Rule 35(a) motion to correct an illegal sentence triggers the statutory tolling doctrine of § 2244(d)(2), provided that it is "properly filed." See *Boyd v. Garraghty*, 202 F. Supp. 2d 322, 328-29 (D. Del. 2002). Here, even though the State does not address whether this

⁶However, the 90-day period during which a state prisoner may file a petition for a writ of certiorari in the United States Supreme Court from the denial of his post-conviction motion does not toll AEDPA's limitations period. *Stokes v. Dist. Att'y of the Cnty. of Phila.*, 247 F.3d 539, 543 (3d Cir. 2001).

motion was properly filed under state procedural rules, nothing in the record indicates otherwise. Thus, because the Superior Court denied the motion on May 21, 1998, and Black never appealed, this motion statutorily tolls the filing period until June 22, 1998, the date on which the 30-day appeal period expired.

The next motion to consider for statutory tolling purposes is a motion for reduction/modification of sentence that the Superior Court denied on August 5, 1998.⁷ (D.I. 14, Del. Super. Ct. Dkt. Item #39.) Because Black did not appeal the Superior Court's August 5, 1998 denial of the motion, the limitations period is tolled through September 5, 1998. Although the Superior Court docket does not indicate the filing date for this motion, it must have been filed soon after the Superior Court's May 21, 1998 denial of the motion to correct Black's sentence. In the absence of any proof to the contrary, I presume that the reduction/modification motion was filed on May 21, 1998. Given that filing date, the entire period from February 19, 1998 (the date on which the Rule 35(a) motion was filed) through September 5, 1998 is tolled.

⁷A properly filed motion to modify/reduce a sentence tolls AEDPA's limitations period. See *McNeil v. Snyder*, 2002 WL 202100, at *3 (D. Del. Feb. 8, 2002). Once again, nothing in the record indicates that this motion was not properly filed.

When Black filed his motion to correct sentence on February 19, 1998, 224 days of AEDPA's limitations period had already expired. Accordingly, when the filing period started again on September 6, 1998, Black had only 141 days left to timely file a habeas petition. In other words, Black had to file his habeas petition, or another state post-conviction motion, by January 29, 1999.

Black did file a Rule 33 motion for a new trial on December 8, 1998. (D.I. 14, Del. Super. Ct. Dkt. Item # 40.) However, this motion was not "properly filed" under Delaware's procedural rules because he did not file this motion within the 7-day time period required by Delaware Superior Court Criminal Rule 33. *State v. Black*, 1999 WL 1568385, at *2 (Del. Super. Ct. Feb. 2, 1999). The Rule 33 motion therefore does not statutorily toll the limitations period.

The one-year limitations period continued to run without interruption until its expiration on January 29, 1999. None of Black's post-conviction motions filed after this date statutorily toll the limitations period. Thus, Black's habeas petition is time-barred unless the one-year time period is equitably tolled.

C. Equitable Tolling

A court, in its discretion, may equitably toll the one-year filing period when "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." *Miller*

v. New Jersey State Dep't of Corrs., 145 F.3d 616 (3d Cir. 1998) (internal citations omitted). Federal courts invoke the doctrine of equitable tolling "only sparingly." See *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998). The Third Circuit permits equitable tolling in four narrow circumstances:

- (1) where the defendant actively misled the plaintiff;
- (2) where the plaintiff was in some extraordinary way prevented from asserting his rights;
- (3) where the plaintiff timely asserted his rights mistakenly in the wrong forum; or
- (4) where the claimant received inadequate notice of his right to file suit, a motion for appointment of counsel is pending, or the court misled the plaintiff into believing that he had done everything required of him.

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

Generally, "a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." *Id.* (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"; mere excusable neglect is insufficient. *Miller*, 145 F.3d at 618-19 (citations omitted).

Black has not alleged, and I cannot discern, any "extraordinary circumstances" that warrant an equitable tolling of the one-year limitations period. To the extent Black made a mistake or miscalculation regarding the one-year filing period, such mistakes do not justify equitable tolling. See *Simpson v.*

Snyder, 2002 WL 1000094, at *3 (D. Del. May 14, 2002).

Accordingly, I conclude that the doctrine of equitable tolling is not available to Black on the facts he has presented and, therefore, I will dismiss his § 2254 petition as untimely.

IV. CERTIFICATE OF APPEALABILITY

Finally, I must decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued 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).

When 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.*

I conclude that Black's habeas petition must be dismissed as untimely. Reasonable jurists would not find this conclusion to be unreasonable. Consequently, I decline to issue a certificate of appealability.

V. CONCLUSION

For the reasons stated, Black'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**

DEAN CORNELIUS BLACK,)	
)	
Petitioner,)	
)	
v.)	Civ. A. No. 02-144-KAJ
)	
THOMAS L. CARROLL, Warden,)	
)	
Respondent.)	

ORDER

At Wilmington, this 4th day of June, 2004, consistent with the Memorandum Opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Dean Cornelius Black's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED, and the relief requested therein is DENIED. (D.I. 2.)

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).

Kent A. Jordan
UNITED STATES DISTRICT JUDGE