

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

GEORGE JOHNSON, :  
 :  
 Petitioner, :  
 :  
 v. : Civil Action No. 03-1104-JJF  
 :  
 RICHARD KEARNEY, :  
 Warden, and M. JANE :  
 BRADY, Attorney General :  
 of the State of :  
 Delaware, :  
 :  
 Respondents. :

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George Johnson. Pro Se Petitioner.

Gregory E. Smith, Deputy Attorney General, Delaware Department of  
Justice, Wilmington, Delaware. Counsel for Respondents.

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**MEMORANDUM OPINION**

December 9, 2004  
Wilmington, Delaware

**Farnan, District Judge**

**I. INTRODUCTION**

Petitioner George Johnson is a Delaware inmate in custody at the Sussex Correctional Institution in Georgetown, Delaware. Currently before the Court is Petitioner's Application For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 ("Petition"). (D.I. 2; D.I. 3.) For the reasons that follow, the Court concludes that Petitioner's Petition is time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2244(d)(1).

**II. BACKGROUND**

In June 1998, during an argument with Marcus D. Walston, Petitioner fired a gun twice into the air and told Walston that their dispute was not over. Later that same week, Petitioner was out driving his mother's car when he spotted Walston fishing with several friends in Sussex County, Delaware. Petitioner stopped the car, and he and Walston became engaged in a heated verbal argument. Walston turned his back and started to walk away, but Petitioner exited his car and fired multiple shots. At least one bullet struck Walston, collapsing his right lung and lodging in his spinal cord. Within fifteen minutes of the shooting, Walston lost twenty percent of his blood and now remains paralyzed from the chest down. Petitioner fled Delaware, and he was captured in Virginia almost one year later.

In September 1999, a Delaware Superior Court jury convicted

Petitioner of attempted murder in the first degree (11 Del. C. Ann. § 636(a)(1)) and one count of possession of a firearm during the commission of a felony (11 Del. C. Ann. § 1447A(a)). The Delaware Superior Court sentenced Petitioner to a total of 35 years at Level V incarceration, suspended for decreasing levels of work release and probation after 25 years of imprisonment. Petitioner appealed, and the Delaware Supreme Court affirmed his convictions and sentences. Johnson v. State, 760 A.2d 163 (Del. 2000).

On September 10, 2002, Petitioner filed a motion for post-conviction relief in the Delaware Superior Court pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61 motion"). The Superior Court denied his motion. State v. Johnson, No. 9806010948 (Del. Super. Ct. Dec. 30, 2002). Petitioner did not appeal this decision.

### **III. DISCUSSION**

Petitioner's pro se petition for federal habeas relief, dated November 30, 2003, asserts the following claims: (1) the Superior Court violated due process by denying his motion for a continuance to locate alibi witnesses; (2) the prosecution improperly used evidence of Walston's injuries to ignite the passions of the jury; (3) his trial attorney provided ineffective assistance by failing to contact alibi witnesses; and (4) the State violated Petitioner's right to a fair trial by coercing one

its witnesses to testify falsely. (D.I. 2; D.I. 3.)

Respondents ask the Court to dismiss the Petition as time-barred. (D.I. 16, at 2-4.) Alternatively, Respondents contend that Petitioner's various procedural defaults at the state court level bar federal habeas review of his § 2254 petition.

**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 the AEDPA's requirements. See generally Lindh v. Murphy, 521 U.S. 320, 336 (1997). The AEDPA prescribes a one-year period of limitations for the filing of habeas petitions by state prisoners, which 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 Petition, dated November 2003, was filed

after the AEDPA's enactment in 1996. As such, his Petition is subject to the one-year limitations period contained in § 2244(d)(1). See Lindh, 521 U.S. at 336. Petitioner does not allege, nor can the Court 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 Petitioner's conviction became final under § 2244(d)(1)(A).

Pursuant to § 2244(d)(1)(A), when a state prisoner appeals a state court judgment, the state court criminal judgment becomes "final," and the statute of limitations begins to run, "at the conclusion of review in the United States Supreme Court or when the [ninety-day] time [period] for seeking certiorari review expires." Kapral v. United States, 166 F.3d 565, 575, 578 (3d Cir. 1999); see Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

In the present case, the Delaware Supreme Court affirmed Petitioner's conviction and sentence on September 20, 2000. Petitioner's conviction became final ninety days later, on December 19, 2000. Accordingly, the limitations period expired in December 2001. Petitioner's § 2254 Petition, however, is dated November 30, 2003, and the Court adopts this date as the presumptive date of filing. 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); Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998); Woods v. Kearney, 215 F. Supp. 2d 458, 460 (D. Del. 2002).

Thus, Petitioner filed his Petition approximately two years after the expiration of the limitations period.

The fact that Petitioner filed his Petition too late does not necessarily require dismissal of the Petition because the AEDPA's limitations period may be subject to statutory or equitable tolling. 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 the 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); see also Artuz v. Bennett, 531 U.S. 4, 8 (2000) ("[a]n application [for state post-conviction relief] is '**properly** filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings"). However, a properly filed state post-conviction

motion will only toll the federal habeas limitations period if the post-conviction motion itself is filed within the federal one-year filing period. See Price v. Taylor, 2002 WL 31107363, at \*2 (D. Del. Sept. 23, 2002).

Here, Petitioner filed a Rule 61 motion for post-conviction relief on September 10, 2002. The limitations period had already expired in December 2001. Thus, Petitioner's Rule 61 motion does not toll the limitations period.<sup>1</sup>

### **C. Equitable Tolling**

It is well-settled that AEDPA's limitations period may be subject to equitable tolling, but federal courts apply this doctrine sparingly. 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). The one-year limitations period will be tolled "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).

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<sup>1</sup>The record reveals that Petitioner also filed a Motion for Sentence Reduction in the Delaware Superior Court on February 4, 2000. (D.I. 18, Motion for Sentence Reduction, dated Jan. 30, 2000.) The Superior Court denied this Motion on February 8, 2000. (D.I. 18, Letter Order dated Feb. 8, 2000 in Cr. A. No. S98-07-0240,0241.) The one-year limitations period had not even started when Petitioner filed the Motion for Sentence Reduction, thus, the Motion does not toll the limitations period.

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 has not alleged any extraordinary circumstances that warrant equitably tolling the one-year limitations period. To the extent Petitioner made a mistake or miscalculation regarding the one-year period, such mistakes do not justify equitable tolling. See Simpson v. Snyder, 2002 WL 1000094, at \*3 (D. Del. May 14, 2002).

In short, the doctrines of statutory and equitable tolling do not apply in this situation. Accordingly, the Court will dismiss Petitioner's § 2254 Petition as time-barred.

#### **D. Request for the Appointment of Counsel**

Petitioner asks the Court to appoint counsel, citing Rule



6(a) of the Rules Governing Habeas Corpus Cases Under Section 2254, 28 U.S.C. foll. 2254. (D.I. 3, at 2.) It is well-settled that Petitioner does not have a 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). However, Rule 6(a) of the Rules Governing Habeas Corpus Cases requires a court to appoint counsel if the petitioner qualifies under 18 U.S.C. 3006(A) and the appointment of counsel is "necessary for effective discovery." See Rule 6(a) of the Rules Governing Habeas Corpus Cases Under Section 2254, 28 U.S.C. foll. § 2254.

As explained above, the Court is dismissing Petitioner's § 2254 Petition. In these circumstances, the appointment of counsel is not necessary for effective discovery, nor is such appointment necessary to satisfy the "interests of justice." See 18 U.S.C. § 3006A(a)(2)(B). Thus, the Court will deny as moot Petitioner's request for the appointment of counsel.

#### **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, a certificate of appealability will not be issued.

## **V. CONCLUSION**

Petitioner's Application For A Writ Of Habeas Corpus

Pursuant To 28 U.S.C. § 2254 will be denied.<sup>2</sup> An appropriate Order will be entered.

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<sup>2</sup>Although Respondents offer alternative bases for dismissing Petitioner's § 2254 Petition, the Court's conclusion that Petitioner failed to comply with the AEDPA's statute of limitations obviates the need to discuss those alternatives.

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**ORDER**

At Wilmington, this 9th day of December, 2004,  
consistent with the Memorandum Opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner George Johnson'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. 2; D.I.  
3.)

2. Petitioner's request for the appointment of counsel  
is DENIED. (D.I. 3.)

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).

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE