

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

ALBERT W. DRAKE, III,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 03-160-KAJ
)	
THOMAS CARROLL,)	
Warden, and M. JANE)	
BRADY, Attorney General)	
of the State of Delaware,)	
)	
Respondents.)	

MEMORANDUM OPINION

Albert W. Drake, III. *Pro se* Petitioner.

Loren C. Meyers, Chief of Appeals Division, Delaware Department of Justice,
Wilmington, Delaware. Attorney for Respondent.

June 7, 2005
Wilmington, Delaware


JORDAN, District Judge

I. INTRODUCTION

Petitioner Albert W. Drake, III ("Drake") is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the Court is Drake's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Docket Item ["D.I."] 1.) For the reasons that follow, I will dismiss Drake's § 2254 petition as time-barred by the one-year period of limitations prescribed in 28 U.S.C. § 2244(d)(1).

II. FACTUAL AND PROCEDURAL BACKGROUND

In September 1993, Drake was arrested and charged with multiple counts of sex offenses. The charges were based on Drake's sexual abuse of his two daughters. Drake's oldest daughter had reported to a counselor that Drake had had sexual contact with her. After his arrest, Drake made a statement to the police admitting the offenses.

In October 1994, Drake pled guilty under former Superior Court Criminal Rule 11(e)(1)(c) to one count of first degree unlawful sexual intercourse (11 DEL. C. ANN. § 775 (Repl. 1995)) and one count of second degree unlawful sexual contact (11 DEL. C. ANN. § 768 (Repl. 1995)). Prior to sentencing, Drake moved to withdraw his plea under Superior Court Criminal Rule 32(d). The Superior Court conducted a hearing on this motion and denied it. *State v. Drake*, 1995 WL 654131 (Del. Super. Ct. Nov. 1, 1995). In November 1995, the Superior Court sentenced Drake to 27 years imprisonment, suspended after 15 years imprisonment, for a period of work release and probation.

Drake appealed, and the Delaware Supreme Court affirmed his conviction and sentence. *Drake v. State*, 682 A.3d 626 (table), 1996 WL 343822 (Del. June 13, 1996).

In July 1997, Drake filed in this Court¹ a petition for federal habeas relief pursuant to 28 U.S.C. § 2254. The Court determined that Drake's petition contained both exhausted and unexhausted claims, and, pursuant to *Rose v. Lundy*,² dismissed Drake's first § 2254 petition without prejudice for failure to exhaust state remedies. *Drake v. Brewington-Carr*, Civ. Act. No. 97-407-RRM (D. Del. Sept. 29, 1997).

Thereafter, in July 1999, Drake applied in the Delaware Superior Court for state post-conviction relief pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61 motion"). The Superior Court denied the motion, Drake appealed, and the Delaware Supreme Court affirmed the Superior Court's decision. *Drake v. State*, 790 A.2d 475 (table), 2002 WL 20961 (Del. Feb. 4, 2002).

In February 2003, Drake filed in this Court a form § 2254 petition asserting two claims: (1) the Delaware Supreme Court violated the Due Process Clause when it failed to follow state court precedent in interpreting a state penal statute; and (2) the phrase "voluntary social companion," as it is defined in 11 DEL. C. § 775(a)(4), is unconstitutionally vague. (D.I. 1, at ¶ 12B; D.I. 2, at 6-10).

The State acknowledges that Drake exhausted state remedies, but asks the Court to dismiss his § 2254 petition as untimely. (D.I. 13.) Drake's Reply asserts that the limitations period should be statutorily and equitably tolled. He also claims that the

¹Drake's first habeas petition was assigned to the Honorable Roderick M. McKelvie. The instant petition was assigned to the undersigned on February 12, 2003.

²In *Lundy*, the Supreme Court held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

instant petition should be deemed timely by “relating back” to the timely filed first petition under Federal Rule of Civil Procedure 15(c). (D.I. 18.)

Drake’s § 2254 petition is now ready for review.

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; habeas petitions filed in federal courts after that 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).

Drake’s § 2254 petition, dated February 3, 2003, 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 I 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 Drake'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, although the Delaware Supreme Court affirmed Drake's conviction and sentence on June 13, 1996, the ninety-day period began to run from the date the Delaware Supreme Court denied Drake's motion for re-argument: July 10, 1996. See U.S. Supr. Ct. R. 13.1, 13.3; Fed. R. Civ. P. 6(a). Thus, Drake's conviction became final on October 8, 1996, and to be timely, he had to file his § 2254 petition by October 1997. See, e.g., *Harris v. Snyder*, 2002 WL 47895 (D. Del. Jan. 11, 2002).

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); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Drake's petition is dated February 3, 2003, and presumably, he could not have delivered it to prison officials for mailing any earlier than that date. Therefore, I adopt February 3, 2003 as the filing date, which is years past the October 1997 deadline. See *Woods v. Kearney*, 215 F. Supp. 2d 458, 460 (D. Del. 2002). Drake's habeas petition is therefore 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). I 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). Thus, 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). Procedural requirements include the "form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Id.*; *Merritt v. Blaine*, 326 F.3d 157, 162 (3d Cir. 2003).

Here, even though Drake timely filed his Rule 61 motion under Delaware law, it has no tolling effect because he filed it approximately two years after the expiration of AEDPA's limitations period.³ Drake's first federal habeas petition also does not

³Drake argues that the time-period from July 10, 1996, the date on which the Delaware Supreme Court denied his motion for re-argument, until July 9, 1999, the date on which he filed his Rule 61 motion in the Delaware Superior Court, should be statutorily tolled. (D.I. 18). He contends that § 2244(d)(2) tolls the "entire time in which the state postconviction motion *could be filed* and subsequently is filed," and he cites *Carey v. Saffold*, 536 U.S. 214 (2002) to support this argument. (D.I. 18; D.I. 19)(emphasis added). However, under § 2244(d)(2), AEDPA's limitations period is only tolled while a properly filed application for state collateral review is "pending" in state

statutorily toll the limitations period. Section 2244(d)(2) applies only to state post-conviction proceedings, not federal habeas applications. *Duncan v. Walker*, 533 U.S. 167, 173-81 (2001)(“an application for federal habeas corpus is not an application for ‘State post-conviction or other collateral review’ within the meaning of 28 U.S.C. § 2244(d)(2)); *Slutzker v. Johnson*, 393 F.3d 373, 382 (3d Cir. 2004).

Statutory tolling does not render Drake’s habeas petition timely.

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.*

court. The Third Circuit has adopted the following definition for “pending”:
Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is “pending” from its inception until the rendition of final judgment. *An action is “pending” after it is commenced by either filing a complaint with the court or by the service of a summons.*

Swartz v. Meyers, 204 F.3d 417, 421 (3d Cir. 2000)(emphasis added).

Accordingly, a Rule 61 motion can only toll the federal habeas limitations period if it is filed before the expiration of AEDPA’s one-year limitations period. *See Long v. Wilson*, 393 F.3d 390, 394-95 (3d Cir. 2004)(“the state habeas petition had no effect on tolling [because AEDPA’s] limitations period had already run when it was filed”); *Crews v. Horn*, 360 F.3d 146, 150 (3d Cir. 2004); *Price v. Taylor*, 2002 WL 31107363, at *2 (D. Del. Sept. 23, 2002); *Gholdson v. Snyder*, 2001 WL 657722, at *3 (D. Del. May 9, 2001). Moreover, contrary to Drake’s belief, *Carey* does not dictate a different conclusion. The *Carey* Court determined that an application for collateral review is pending in state courts as “long as the ordinary state collateral review process is “in continuance – i.e., ‘until the completion’ of that process,” which includes the intervals from a state court decision on collateral review and the filing of any appeals for that decision. *Carey*, 536 U.S. at 219-20. Here, the interval between the Delaware Supreme Court’s denial of Drake’s motion for re-argument and the filing of his Rule 61 motion is not tolled because the motion for reargument was part of Drake’s direct review; it was not a state court decision on a collateral proceeding. *See Del. Supr. Ct. R. 18; Del. Supr. Ct. R. 19.*

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 equitably 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).

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).

Drake appears to request equitable tolling for two separate periods: (1) September 29, 1997, the date his first petition was dismissed, through July 9, 1999, the date he filed his Rule 61 motion in the Delaware Superior Court; and (2) July 2002, when his legal materials were allegedly seized, through February 3, 2003, the date he filed the instant petition. I will address these time-periods separately.

1. September 29, 1997 through July 9, 1999

Drake's arguments for equitably tolling the period from September 29, 1997 through July 9, 1999 stem from the dismissal of his 1997 petition. To reiterate, the Court dismissed Drake's 1997 petition without prejudice after determining that his petition contained both exhausted and unexhausted claims. The Court properly determined that Drake had only exhausted remedies for three of the six claims presented in his habeas petition, thus, its dismissal of the petition was proper under the "total exhaustion" rule of *Rose v. Lundy*. *Lundy*, 455 U.S. at 522. Further, as required by *Lundy*, the Court specifically instructed Drake "that he ha[d] the choice of returning to state court to exhaust any unexhausted claims, or of amending and resubmitting this petition to present only exhausted claims." *Drake v. Brewington-Carr*, No. 97-407-RRM, Order at 5 (D. Del. Sept. 29, 1997).

The Court dismissed Drake's 1997 petition on September 29, 1997. Drake did not file a Rule 61 motion in the Delaware Superior Court until July 9, 1999. Yet, Drake contends equitable tolling applies to this period because: (1) the Court's language misled him as to the legal effect of the dismissal; and (2) the Court should have warned him that AEDPA's one-year limitations period was close to expiring. (D.I. 18, at ¶ 2A.)

With respect to Drake's first contention, he correctly assumes that equitable tolling may be appropriate "where a court has misled a party regarding the steps that the party needs to take to preserve a claim." *Brinson v. Vaughn*, 398 F.3d 225, 230 (3d Cir. 2005)(citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151(1984));

but see Pliler v. Ford, 542 U.S. 225, 124 S. Ct. 2441, 2447 (2004)(declining to address whether a district court's affirmative misleading of a pro se petitioner justifies equitable tolling.) Here, however, the Court did not mislead Drake on how to preserve his habeas claims. The language used by the Court was taken directly from the *Lundy* opinion and was a correct statement of law. In 2004, the United States Supreme Court confirmed the propriety of this language by confirming *Lundy's* rule requiring district courts to dismiss mixed habeas petitions. *Pliler*, 124 S.Ct. at 2445. Moreover, the language at issue did not actively prevent Drake from either deleting the unexhausted claims or returning to state court within the nine day span left in the limitations period. I therefore conclude that the Court's statement does not trigger the equitable tolling doctrine because the Court properly dismissed Drake's petition as mixed and properly gave Drake the option of proceeding with his exhausted habeas claims. *Cf. Brinson*, 398 F.3d at 231 (finding that equitable tolling was warranted where the district court erred in concluding that petitioner had failed to exhaust a particular habeas claim and also failed to give petitioner the option of going forward with his other exhausted claims).

Drake also contends that the Court's failure to properly and fully inform him about the "status of his claim under the AEDPA one-year statute of limitation" was an "extraordinary circumstance" beyond his control warranting equitable tolling. (D.I. 18, at ¶ 2A.) This argument pre-supposes that a court has the duty to warn a petitioner about a limitations issue. However, the United States Supreme Court recently held that district courts are not required to advise *pro se* petitioners whether "AEDPA[s] limitation period has already run or will have run by the time the petitioner returns to federal

court.” *Pliler*, 124 S.Ct. at 2446-47. Thus, equitable tolling is not warranted on this ground.

Finally, even if Drake’s prior two arguments demonstrated the existence of extraordinary circumstances, equitable tolling is still not appropriate because Drake did not exercise due diligence in pursuing his claims. The Third Circuit has explained that the due diligence requirement “does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period [petitioner] is exhausting state remedies as well.” *LaCava v. Kyler*, 398 F.3d 271, 277 (3d Cir. 2005).

In the instant case, Drake filed his 1997 petition without first even attempting to exhaust state remedies. He has provided no reason for his failure to pursue state court remedies prior to filing his first habeas petition. If, perhaps, Drake mistakenly filed in federal court because he did not understand the exhaustion requirement, that mistake does not excuse his failure to exercise due diligence. *Jones v. Morton*, 195 F.3d 153, 160 (3d Cir. 1999)(finding that a petitioner’s “misunderstanding of the exhaustion requirement is insufficient to excuse his failure to comply with the statute of limitations.”).

Furthermore, when the Court dismissed Drake’s first habeas petition, there were still nine days remaining in AEDPA’s limitations period. While nine days did not leave Drake much time to file an application for collateral review in the Delaware courts, he did not file any motion in state court until July 1999, almost two years after the dismissal of his first petition. This unreasonable, two-year delay demonstrates a lack of due diligence.

In conclusion, none of Drake's arguments warrant equitably tolling the period from September 29, 1997 through July 9, 1999.

2. July 2002 through February 3, 2003

The Delaware Superior Court denied Drake's Rule 61 motion, and the Delaware Supreme Court affirmed that decision in July 2002. Drake, however, did not file the instant federal habeas petition until February 3, 2003. Drake appears to contend that equitable tolling of the period from July 2002 through February 3, 2003 is appropriate because: (1) the "D.O.C. at MPCJF seized three boxes of legal materials and law books in July 2002. Thereafter, they destroyed his property. This has greatly disadvantaged Drake in his ability to present his claims to the court." (D.I. 18 at ¶15.); and (2) AEDPA's one-year limitations period did not start until the Delaware Supreme Court affirmed the Superior Court's denial of his Rule 61 motion.⁴

Drake's present petition would be untimely even if the period after July 2002 were tolled.⁵ When the Court dismissed Drake's 1997 petition, there were only nine days left in AEDPA's limitations period. Consequently, assuming the entire period from September 29, 1997 through February 2, 2002 (the date on which the Delaware Supreme Court decided his post-conviction appeal) could be equitably and statutorily

⁴Drake's memorandum states that his "one year filing requirement will expire on February 19, 2003, one year after the issuance of the Delaware Supreme Court's mandate affirming Superior Court's judgment." (D.I. 2, at 3.)

⁵That it could be tolled is highly questionable. Drake does not explain how the seizure of legal materials after July 2002 prevented him from filing his habeas petition prior to July 2002. He was cognizant of the basis for his claims, and, thus, capable of at least filing a "basic habeas petition." See, e.g., *Brown v. Shannon*, 322 F.3d 768 (3d Cir.), cert. denied, - U.S. -, 123 S.Ct. 2617, 156 L. Ed. 2d 637 (2003).

tolled, Drake would still have had to file his habeas petition by February 11, 2002. Tolling the period from July 2002 to February 2003 simply would not save Drake's petition.

To the extent Drake believed that AEDPA's limitations period started after the denial of his post-conviction appeal, rather than on the date his conviction became final, his mistake does not warrant equitable tolling. See *Wilmer v. Carroll*, 2003 WL 21146750, at *5 (D. Del. May 16, 2003).

Accordingly, I conclude that equitable tolling is not warranted on the grounds asserted by Drake.

D. Relation Back

Drake's final argument is that the filing date of his current § 2254 petition should relate back to the timely filing date of his 1997 petition under Federal Rule of Civil Procedure 15(c). (D.I. 18). However, when, as here, a prior habeas petition is dismissed without prejudice, it is treated as if it never existed. *Jones v. Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999). The filing date of the instant petition cannot relate back to the filing date of Drake's 1997 petition because there is nothing for the instant petition to "relate back" to. *Id.*

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.*

I conclude that Drake’s petition for habeas relief is time-barred. 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, Drake’s petition for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate Order shall issue.

**IN THE UNITED STATES DISTRICT COURT
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ALBERT W. DRAKE, III,)	
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Petitioner,)	
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v.)	Civil Action No. 03-160-KAJ
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THOMAS CARROLL,)	
Warden, and M. JANE)	
BRADY, Attorney General)	
of the State of Delaware,)	
)	
Respondents.)	

ORDER

At Wilmington, this 7th day of June, 2005, consistent with the Memorandum Opinion issued today:

IT IS HEREBY ORDERED that:

1. Petitioner Albert W. Drake, III'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. 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).


UNITED STATES DISTRICT JUDGE