

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

WILLIAM T. JOHNSON, JR.,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 03-546-JJF
	:	
THOMAS CARROLL, Warden, and	:	
M. JANE BRADY, Attorney	:	
General of the State of	:	
Delaware,	:	
	:	
Respondents.	:	

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William T. Johnson, Jr., Pro Se Petitioner.

Elizabeth R. McFarlan, Esquire, Deputy Attorney General of THE STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for Respondents.

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**MEMORANDUM OPINION**

May 4, 2004

Wilmington, Delaware

**Farnan, District Judge.**

Presently before the Court is a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (D.I. 1) filed by Petitioner, William T. Johnson, Jr. For the reasons set forth below, the Court will dismiss the Petition as time-barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d) (1).

**BACKGROUND**

In October 1998, Petitioner was convicted by a jury in the Delaware Superior Court of first degree robbery, second degree conspiracy and possession of a firearm during the commission of a felony. Petitioner was sentenced to twenty-three years imprisonment at Level V custody for the robbery and weapons offense convictions and one year of probation for his conspiracy conviction. Petitioner appealed, and the Delaware Supreme Court affirmed his convictions. Johnson v. State, 1999 WL 1098173 (Del. Nov. 2, 1999) ("Johnson I"). In December 1999, Petitioner filed a motion to vacate sentence pursuant to Superior Court Criminal Rule 35(a), which the Superior Court denied. Johnson v. State, 2000 WL 1177624 (Del. Aug. 11, 2000) ("Johnson II").

On August 25, 2000, Petitioner filed a federal habeas petition in this Court. The Court dismissed the petition without prejudice, because Petitioner failed to exhaust his available state remedies with respect to his ineffective assistance of counsel claim. Johnson v. Williams, 2001 WL 34368397 (D. Del.

Feb. 16, 2001). Although the Court gave Petitioner the option of voluntarily dismissing his unexhausted claim and refiling the Petition, Petitioner chose to pursue state post-conviction relief in the Delaware Superior Court.

The Delaware Superior Court denied Petitioner's motion for post-conviction relief, concluding that Petitioner's claims were either procedurally barred or meritless. State v. Johnson, 2002 WL 130537 (Del. Super. Ct. Jan. 31, 2002) ("Johnson III"). Petitioner appealed, and the Delaware Supreme Court affirmed the decision of the Delaware Superior Court. Johnson v. State, 2002 WL 1836684 (Del. Aug. 9, 2002) ("Johnson IV").

By his current federal habeas Petition, Petitioner raises seven claims for relief: (1) counsel provided ineffective assistance by failing to file motions for a speedy trial and to suppress evidence and failing to investigate a prosecution witness; (2) his speedy trial rights were violated; (3) the state violated discovery rules by failing to provide a police officer's notes to defense counsel; (4) petitioner's right to confront witnesses was violated as the result of the failure to provide certain discovery, and counsel was ineffective for failing to object on this basis; (5) the trial court failed to give the jury a proper limiting instruction concerning petitioner's prior convictions, and counsel was ineffective for failing to object to the use of his prior convictions; (6) the prosecutor's closing

argument was inappropriate, and counsel was ineffective for failing to object to it; and (7) the Court violated double jeopardy when it sentenced Petitioner, and trial counsel was ineffective for failing to object to Petitioner's sentence and his classification as a habitual offender. In their Answer Brief, Respondents contend that the Petition is time-barred under 28 U.S.C. § 2244(d), or in the alternative, Petitioner's claims are procedurally barred.

## DISCUSSION

### I. 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). In pertinent part, 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).

Petitioner's convictions were affirmed on direct appeal by

the Delaware Supreme Court on November 2, 1999. Where, as here, a petitioner has not filed a petition for certiorari before the United States Supreme Court, the judgment of conviction becomes final "on the date on which the petitioner's time for filing a timely petition for certiorari review expires." Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). Accordingly, Petitioner's conviction became final on January 31, 2000, 90 days from November 2, 1999. U.S. Supr. Ct. R. 13.1. Applying the one-year limitation period from this date, Petitioner was required to file his federal habeas petition on or before February 1, 2001.<sup>1</sup>

A petition is deemed filed on the date it is delivered to prison officials for mailing to the court. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). Petitioner does not indicate the date on which the Petition was delivered to prison authorities for mailing. However, absent proof of mailing, this Court has held that the date of the signatures within the petition is the date on which the petition is deemed filed. See Johnson v. Brewington-Carr, Civ. Act. No. 99-181-JJF, mem. op. at 4 (D. Del. Feb. 22, 2000).

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<sup>1</sup> The State contends that the Petition was due on February 1, 2001, but the Court calculates 365 days from the date Petitioner's conviction became final on January 31, 2000 to be January 30, 2001. However, the difference in the calculation is not significant, because the limitation period was statutorily tolled, thereby changing the due date for the Petition.

In this case, the Petition is dated June 4, 2003, which is well past the February 2001 filing deadline. Accordingly, the Court concludes that the Petition is time-barred under Section 2244(d), unless the limitation period has been statutorily or equitably tolled. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

## **II. 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).

In this case, Petitioner filed a motion under Superior Court Criminal Rule 35(a) on December 7, 1999. The motion was denied by the Delaware Superior Court on January 31, 2000, and Petitioner timely appealed. The Delaware Supreme Court affirmed the denial of Petitioner's Rule 35(a) motion on August 11, 2000. Because a post-conviction motion was pending during this time, the one-year limitations period was tolled. The 90-day period for seeking certiorari review does not apply to post-convictions motions, and therefore, the one-year period began to run on August 12, 2000. Stokes v. Dist. Attorney of Philadelphia, 247 F.3d 539, 542 (3d Cir. 2001); Swartz v. Meyers, 204 F.3d 417,

421-422 & n.5 (3d Cir. 2000).

On August 25, 2000, Petitioner filed his first federal habeas petition in this Court. However, a federal habeas petition is not considered an "application for state post-conviction relief or other collateral review" within the meaning of Section 2244(d)(2). Thus, the one-year limitation period is not tolled during the pendency of a Section 2254 petition. Duncan v. Walker, 533 U.S. 167, 181 (2001); Walker v. Carroll, 2003 WL 1700379, \*2 (D. Del. Mar. 24, 2003). As a result, the limitation period continued to run during the pendency of Petitioner's first federal habeas petition.

On April 5, 2001, Petitioner filed his Rule 61 motion in the Delaware Superior Court. At the time Petitioner filed this motion, 237 days of his 365 day limitation period elapsed.<sup>2</sup> During the pendency of this motion until the Delaware Supreme Court's affirmance on August 9, 2002, the limitation period was tolled. However, the limitation period does not begin to run anew as a result of Petitioner's state collateral attack. Gholdson v. Snyder, 2001 WL 657722, \*3 (D. Del. May 9, 2001); Johnson v. Brewington-Carr, Civ. Act. No. 99-181-JJF, mem. op. at

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<sup>2</sup> The State calculates that 236 days ran on the limitation period at the time Petitioner moved for state post-conviction relief, but the Court calculates 237 days, because there was a Leap Year in February 2000. Again, however, the one day difference is not significant in this case, because the untimeliness of the Petition is not a close question.

5-6. Thus, the limitation period resumed on August 10, 2002, and no further tolling occurred.

When Petitioner filed the instant federal habeas Petition on June 4, 2003, another 298 days had passed from the Delaware Supreme Court's decision affirming the superior court's denial of his Rule 61 motion. Because 237 days elapsed before he filed his Rule 61 motion and another 298 days elapsed between the denial of his Rule 61 motion and the filing of his federal habeas petition, a total of 535 days elapsed, which is well-past the one-year limitation period. Accordingly, the Court concludes that the statutory tolling provision cannot render the Petition timely filed.

### **III. Equitable Tolling**

Additionally, the one-year period of limitation 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). 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)).

In his Reply Brief, Petitioner contends that the limitation period should be tolled because the Court did not stay his Petition, but instead dismissed it so as to allow Petitioner to exhaust his unexhausted ineffective assistance of counsel claim.<sup>3</sup> In support of his claim, Petitioner relies upon the Second Circuit's decision in Zarvela v. Artuz, 254 F.3d 374, 382 (2d Cir.), cert. denied, 534 U.S. 1015 (2001).

In Crews v. Horn, 360 F.3d 146 (3d Cir. 2004), the Third Circuit recently adopted the approach set forth in Zarvela and concluded that petitions containing exhausted and unexhausted claims should be stayed where outright dismissal "'could jeopardize the timeliness of a collateral attack.'" Id. (quoting Zarvela, 254 F.3d at 380). The court further explained that "'the concern about excessive delays in seeking exhaustion and in returning to federal court after exhaustion can easily be

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<sup>3</sup> Petitioner presents this argument under the principles of both statutory and equitable tolling. However, it is well-established that federal habeas petitions do not toll the limitations period, and therefore, the Court believes this argument is more appropriately considered in the context of equitable tolling.

dispelled by allowing a habeas petitioner no more than reasonable intervals of time to present his claims to the state courts and to return to federal court after exhaustion.'" Id.

Specifically, the Third Circuit recommended that any stay should be conditioned upon initiation of the exhaustion proceedings in state court within 30 days and a return to the district court after exhaustion is completed within 30 days. Id. (citing Zarvela, 254 F.3d at 381).

In the Court's view, the circumstances in this case differ significantly from the circumstances in Crews. In Crews, the deadline for filing petitioner's federal habeas petition was November 30, 1998, but the district court gave the petitioner an extension of time until March 15, 1999 to file his habeas petition. Petitioner satisfied this deadline by filing a petition, but the petition contained unexhausted claims. The district court dismissed the petition without prejudice to allow exhaustion, and petitioner appealed raising the issue that any subsequent petition he filed would likely be time-barred since the limitation period already expired.

In this case, the limitation period was not expired at the time the Court dismissed the instant Petition. Rather, 176 days remained on the clock for Petitioner to initiate exhaustion proceedings and refile his federal habeas petition. As such, the timeliness of Petitioner's habeas petition was not jeopardized by

the Court's action, and therefore, the Court was not required to stay Petitioner's initial petition.

Petitioner also suggests that the Court should have reminded him of the one-year limitation period; however, compliance with the AEDPA is Petitioner's responsibility. Petitioner had more than enough time, 176 days from the Court's decision dismissing his first petition, in contrast to the total of 60 days contemplated by Crews for stayed petitions, to seek exhaustion in the state courts and refile his federal habeas petition. However, Petitioner waited approximately 48 days from the Court's decision dismissing his federal habeas petition just to file his Rule 61 motion in the state courts. Then, upon completion of the exhaustion proceedings on August 9, 2002, Petitioner still had 128 days to his file his federal habeas petition, but Petitioner waited 298 days, filing his Petition on June 4, 2003.<sup>4</sup>

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<sup>4</sup> Petitioner also contends that his Petition was ready for filing in February 2003, but that the Clerk's office prevented him from timely filing the Petition as a result of an unspecified error. Petitioner also contends that his mother had an agreement with a Delaware attorney to review the Petition, but that he could not pay the funds required by the agreement. Petitioner then contends that his mother attempted to file the petition on May 22, 2003, but that the Clerk's office would not accept the Petition because it was dated February 2, 2003. According to Petitioner, the Clerk's office instructed his mother to bring the Petition back to him so that he could properly date it, and therefore, the filing of the Petition was further delayed until June 4, 2003. These circumstances, however, are insufficient to justify equitable tolling, because the Petition was due by December 16, 2002, and despite the alleged errors by the Clerk's office, Petitioner acknowledges that his Petition was not ready for filing until February 2003. Accordingly, the

The Court did not prevent Petitioner from timely filing his federal habeas petition, and Petitioner had ample time remaining on the limitation clock in which to refile his Petition.<sup>5</sup> Yet, the amount of time that elapsed between the Delaware Supreme Court's decision on his post-conviction motion and the time that Petitioner filed his federal habeas Petition demonstrates that Petitioner did not exercise reasonable diligence in pursuing his claims. Petitioner also contends that his difficulty with the law library prevented him from completing his petition in a timely manner. In the Court's view, however, the circumstances alleged by Petitioner are insufficient to justify equitable tolling. Lawrence v. Carroll, 2003 WL 21402509, \*2 (June 10, 2003); Tomoney v. Warden, 2002 WL 1635008 (E.D. Pa. Jul. 17, 2002). Further, to the extent that Petitioner may have made a

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Petition was already time-barred at the time Petitioner alleges it was initially presented to the Clerk's office for filing.

<sup>5</sup> In the Court's view, this is also not a case in which the Court unintentionally misled Petitioner with regard to the limitation period. Although the Court's previous decision was silent with regard to the limitation period, Petitioner still had ample time to timely refile his petition and the majority of the delay in Petitioner's refiling was attributable to Petitioner's dilatory conduct. Cf. Mandarino v. United States, 1998 WL 729703 (S.D.N.Y. Oct. 16, 1998) (denying to equitably toll limitation period where petitioner was not informed of the denial of his motion for certiorari in a timely manner, but a brief period of time remained on the clock for petitioner to file a timely federal habeas petition); Smith v. Roe, 1998 WL 657667 (C.D. Cal. June 8, 1998) (denying to equitably toll limitation period where petitioner did not receive information from his attorney in a timely fashion, but petitioner still had four months to file his federal habeas petition).

mistake regarding the time period in which he had to file his federal habeas petition, the Court likewise concludes that such a mistake is insufficient to constitute an extraordinary circumstance justifying equitable tolling. Wilmer v. Carroll, 2003 WL 21146750, \*5 (D. Del. May 16, 2003). Accordingly, the Court will dismiss the Petition as time-barred.

#### **IV. Certificate of Appealability**

The Court must next 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 Petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, the prisoner must demonstrate that reasonable jurists 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.

For the reasons discussed above, the Court has concluded

that the Petition is barred by the one-year period of limitation. The Court is convinced that reasonable jurists would not debate otherwise. Because the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability.

#### **CONCLUSION**

For the reasons discussed, the Court will dismiss the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner, William T. Johnson, Jr., and deny the Writ of Habeas Corpus sought by Petitioner. In addition, the Court will not issue a certificate of appealability.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

WILLIAM T. JOHNSON, JR.,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 03-546-JJF
	:	
THOMAS CARROLL, Warden, and	:	
M. JANE BRADY, Attorney	:	
General of the State of	:	
Delaware,	:	
	:	
Respondents.	:	

**ORDER**

At Wilmington, this 4th day of May 2004, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. The Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (D.I. 1) filed by Petitioner, William T. Johnson, is DISMISSED and the Writ Of Habeas Corpus is DENIED.

2. The Court declines to issue a certificate of appealability for failure to satisfy the standard under 28 U.S.C. § 2253(c) (2).

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE