

Farnan, District Judge

I. INTRODUCTION

Petitioner Larry Austin is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, 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. 1.) 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 March 1999, a Delaware Superior Court grand jury indicted Petitioner on charges of possession with intent to deliver cocaine, possession of a controlled substance within 1000 feet of a school, possession of a controlled substance within 300 feet of a park, and resisting arrest. Petitioner did not appear on the second day of his March 2000 jury trial. The jury convicted Petitioner, in absentia, of all four counts of the indictment. He was subsequently apprehended in July 2000.

For the possession with intent to deliver conviction, the Superior Court sentenced Petitioner to thirty years imprisonment at Level V, to be suspended after a minimum mandatory fifteen years for decreasing levels of supervision. For the remaining three charges, the court sentenced him to a total of thirty months imprisonment at Level V, to be suspended for probation.

Petitioner appealed, and the Delaware Supreme Court affirmed his convictions and sentences. See Austin v. State, 782 A.2d 262 (Del. 2001). In September 2002, Petitioner filed a motion for state post-conviction relief pursuant to Superior Court Criminal Rule 61. The Delaware Superior Court denied post-conviction relief, which was affirmed on appeal. Austin v. State, 827 A.2d 30 (Del. 2003).

III. DISCUSSION

Petitioner's pro se petition for federal habeas relief asserts the following claims: (1) trial counsel provided ineffective assistance because he failed to provide Petitioner with requested trial transcripts for his pro se direct appeal; (2) trial counsel was ineffective because there was a conflict between counsel and Petitioner; (3) the trial court erred in failing to inquire into Petitioner's request for a continuance to retain new counsel; and (4) the trial court erred by allowing an expert witness to testify when the prosecution had failed to disclose such witness in discovery. (D.I. 1 at 5-6.)

In their Answer, Respondents correctly acknowledge that Petitioner has exhausted state remedies. They further contend that the entire petition is time-barred and ask the Court to dismiss it as untimely. (D.I. 16.)

Petitioner filed a Reply Brief, asserting that Respondents incorrectly calculated the statutory tolling period by failing to

exclude holidays. (D.I. 11.)

Petitioner's habeas Petition is now ripe for review.

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).

Petitioner does not allege, nor can the Court discern, any facts triggering the application of § 2244(d)(1)(B), (C), or (D). As such, 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 [90-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 August 6, 2001. Consequently, Petitioner’s conviction became final 90-days later, on November 5, 2001.¹ The limitations period ended one-year later, in November 2002.² Petitioner filed his § 2254 Petition on August 31, 2003,³ well past the November 2002 filing date. Thus, absent statutory or equitable tolling, Petitioner’s habeas

¹The 90-day period for certiorari review ended on November 4, 2001, which was a Sunday. Thus, because Petitioner actually had until Monday, November 5, 2001 to apply for a writ of certiorari, See SUP. CT. R. 30(1), his conviction did not become final until November 5, 2001.

²The actual day in November 2002 is irrelevant because, in this case, the filing date is changed by statutory tolling.

³A 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); Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). Petitioner’s Petition is dated August 31, 2003, and presumably, he could not have delivered it to prison officials for mailing any earlier than that date. Therefore, the Court adopts August 31, 2003 as the filing date. See Woods v. Kearney, 215 F. Supp. 2d 458, 460 (D. Del. 2002).

petition is time-barred. 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). 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 August 12, 2002. The Superior Court rejected the motion, and sent Petitioner a notice of "non-compliance" for

failing to use the correct form. (D.I. 10, Super. Ct. Crim. Dkt. dated 6/10/2003, Entry #72.) As such, this first motion was not "properly filed" under § 2244(d)(2) and does not toll the limitations period.

Subsequently, Petitioner properly filed a state post-conviction motion on September 18, 2002. This Rule 61 motion was pending until the Delaware Supreme Court affirmed the Superior Court's denial of the Rule 61 motion on July 7, 2003. See Swartz v. Meyers, 204 F.3d 417, 421-22 & n.5 (3d Cir. 2000). As such, the limitations period was tolled from September 18, 2002 through July 7, 2003. However, when Petitioner properly filed his Rule 61 motion, 317 days of AEDPA's limitations period had already expired,⁴ leaving only 48 days in the filing period when the

⁴Respondents and Petitioner assert that the limitations period began to run on November 6, 2001. (D.I. 8, at 4; D.I. 11, at 2.) Presumably, both parties have designated this date according to Federal Rule of Civil Procedure 6(a), which states that "the day of the act, event, or default from which the designated period of time begins to run shall not be included [in the computation of a prescribed time period]." Applying the method under Rule 6(a) would exclude the date on which a petitioner's conviction becomes final (here, November 5, 2001) from the one-year period. The relevance here is that, under Rule 6(a), 316 days, rather than 317 days, would have expired when Petitioner filed his Rule 61 motion on September 18, 2002.

The Third Circuit Court of Appeals has not explicitly addressed the applicability of Rule 6(a) to the determination of the first day of AEDPA's limitations period. See Monkalis v. Mobay Chemical, 827 F.2d 937, 938 (3d Cir. 1987) (holding that the method in Fed. R. Civ. P. 6(a) should be used to determine the **final** date of the limitations period in non-diversity cases) (emphasis added); see also Patterson v. Stewart, 251 F.3d 1243, 1246 n.4 (9th Cir. 2001) (stating that the Third Circuit has not specifically addressed the applicability of Fed. R. Civ. P.

limitations period started again on July 8, 2003. Consequently, Petitioner had to file his federal habeas Petition by the end of the day on August 25, 2003 to be timely. Petitioner, however, did not file his Petition until August 31, 2003. As such, the doctrine of statutory tolling does not render the Petition timely.

Petitioner contends, however, that the statutory tolling period should be extended 7 days because "under AEDPA, holidays do not count in any term of tolling." (D.I. 11, at 2 n.1.) Although he fails to provide any authority for this statement, Petitioner appears to rely on Federal Rule of Civil Procedure 6(a), which states that "when the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

The Third Circuit has not explicitly addressed the applicability of Fed. R. Civ. P. Rule 6(a) to AEDPA's limitations

6(a) to AEDPA's one-year grace period). However, in Kapral, the Third Circuit held that "the statute of limitations begins to run[] **on the date on which the time for filing such an appeal expired.**" Kapral, 166 F.3d at 577 (emphasis added). This holding indicates that the date on which a petitioner's conviction becomes final should be included in the computation of the one-year period. Accordingly, the Court finds that AEDPA's limitations period began to run on November 5, 2001.

Admittedly, the one day difference does not alter the Court's conclusion that Petitioner's habeas Petition is time-barred. Under the Court's calculation the Petition was filed 6 days too late, and under the parties' calculation it was filed 5 days too late. Nevertheless, given the short time period by which Petitioner is time-barred, the Court felt it necessary to clarify its computation.

period. See supra note 4; see also, Douglas v. Horn, 359 F.3d 257, 261 n. 5 (3d Cir. 2004) ("In Burns v. Morton, we indicated that a petition filed 'on or before April 23, 1997, may not be dismissed for failure to comply to 224(d)(1)'s time limit.' Arguably we should have used April 24, 1997, rather than April 23, 1997, as the cut-off date") (internal citations omitted) (citing Fed. R. Civ. P. 6(d)); see e.g., Carter v. Vaughn, 2002 WL 1565229, at *2 n.1 (E.D. Pa. July 10, 2002) ("In the Third Circuit, however, Federal Rule of Civil Procedure 6 does not apply in calculating the statute of limitations under the AEDPA"). Nevertheless, Petitioner's argument fails under the terms of Rule 6(a) because the rule only excludes holidays from the computation of a time-period if the period is "less than 11 days." AEDPA's limitations period is 365 days; thus, Rule 6(a) would not require crediting any legal holidays in the limitations period.

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). In general, federal courts invoke the doctrine of equitable tolling "only sparingly," See United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998), and

the Third Circuit permits equitable tolling in only 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 [in a Title VII action] 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).

Moreover, "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).

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). Moreover, although Petitioner alleges that he did not receive adequate records to properly appeal his conviction, he has not identified any particular records denied

or demonstrated how the lack of these records affected his ability to timely file a habeas petition. See Harris v. Snyder, 2002 WL 47895, at *4 (D. Del. Jan. 11, 2002). In order to be certain no such information is available, the Court will allow Petitioner twenty (20) days to address whether the one-year period of limitations should be equitably tolled due to his inability to obtain records to properly pursue his appeal because it affected his ability to timely file a habeas petition. Petitioner may provide the Court with relevant documents and a supplemental memorandum regarding this issue.

IV. CONCLUSION

For the reasons stated, the Court will permit Petitioner twenty (20) days to provide the Court with documents and a supplemental memorandum addressing whether the one-year period of limitations should be equitably tolled because Petitioner's inability to obtain records to properly pursue his appeal affected his ability to timely file a habeas petition. If these materials are produced, Respondents will be allowed twenty (20) days to respond.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LARRY W. AUSTIN, :
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 Petitioner, :
 :
 v. : Civil Action No. 03-854-JJF
 :
 THOMAS CARROLL, :
 Warden, and M. JANE :
 BRADY, Attorney General :
 of the State of :
 Delaware, :
 :
 Respondents. :

ORDER

At Wilmington, this 23rd day of June, 2004, consistent with the Memorandum Opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Larry W. Austin shall file and serve a supplemental memorandum and supporting documents addressing whether the one-year period of limitations should be equitably tolled because his inability to obtain records to properly pursue his appeal affected his ability to timely file a habeas petition. Petitioner's memorandum and documents must be filed and served no later than July 14, 2004.

2. If Petitioner files and serves a supplemental memorandum and supporting documents regarding equitably

tolling the limitations period, Respondents shall file and serve a Response with this Court no later than August 4, 2004.

3. After receiving and considering the parties' supplemental memoranda, the Court will notify the parties if further submissions or proceedings are required.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE