

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

WARREN L. HARRIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 98-682-GMS
	)	
ROBERT E. SNYDER,	)	
	)	
Respondent.	)	
	)	

**MEMORANDUM AND ORDER**

Following a jury trial in the Delaware Superior Court, Warren L. Harris was convicted of unlawful sexual intercourse in the first degree. He is presently incarcerated in the Delaware Correctional Center in Smyrna, Delaware, where he is serving a sentence of twenty-four years imprisonment. Harris has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. As explained below, the court will dismiss Harris' petition as time barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1).

**I. BACKGROUND**

On May 27, 1992, following a jury trial in the Delaware Superior Court, Warren L. Harris was convicted of unlawful sexual intercourse in the first degree. The victim was a four-year-old girl. Harris was sentenced to twenty-four years in prison followed by one year of probation. The Delaware Supreme Court affirmed Harris' conviction and sentence. *Harris v. State*, No. 314, 1992, 1993 WL

169138 (Del. May 10, 1993).

On August 11, 1995, Harris filed in state court a motion for postconviction relief pursuant to Rule 61 of the Delaware Superior Court Rules of Criminal Procedure. (D.I. 8, App. to Def. Opening Br., A-13.) After appointing counsel and conducting an evidentiary hearing, the Superior Court denied Harris' Rule 61 motion on the merits. *Harris v. State*, No. 91-10-0177, 1996 WL 769482 (Del. Super. Ct. Dec. 10, 1996). On appeal, the Delaware Supreme Court concluded that the appeal was "wholly without merit" and affirmed. *Harris v. State*, No. 532, 1996, 1997 WL 537286, \*\*2 (Del. Aug. 19, 1997).

Harris filed a second Rule 61 motion for postconviction relief on December 22, 1997. (D.I. 8, App. to State's Answering Br., B-12.) On January 8, 1998, the Superior Court denied Harris' second Rule 61 motion on the ground that it was untimely and that the claims presented therein were procedurally barred. (D.I. 8, State's Answering Br., Exh. D.) The Delaware Supreme Court affirmed "for the reasons assigned by the Superior Court." *Harris v. State*, No. 45, 1998, 1998 WL 700176, \*\*1 (Del. Aug. 19, 1998.)

Harris has now filed the current petition for a writ of habeas corpus. In his petition, Harris articulates four separate grounds for relief: (1) Harris did not knowingly or voluntarily waive his right to be indicted by a grand jury in violation of his right to due process; (2) He was not present at every stage of the trial in violation of the Confrontation Clause of the Sixth Amendment; (3) The Delaware Superior Court lacked jurisdiction because the state did not obtain, nor did Harris waive, an indictment; and (4) Counsel rendered ineffective assistance by failing to inform Harris of his right to appear for a preliminary hearing and by failing to investigate and challenge the prosecution's case. (D.I. 2 at 5-6.)

The respondents argue that the petition is subject to a one-year period of limitation that expired before Harris filed it. Thus, they urge the court to dismiss the petition as time barred. Alternatively, the respondents ask the court to deny the petition on the ground that each claim raised therein is procedurally barred.

## **II. TIMELINESS**

### **A. 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 § 2254 habeas petitions by state prisoners. *Stokes v. District Attorney of the County of Philadelphia*, 247 F.3d 539, 541 (3d Cir.), *cert. denied*, 122 S. Ct. 364 (2001). Effective April 24, 1996, 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). In order to avoid any impermissible retroactive application of the one-year period of limitation, state prisoners whose convictions became final prior to the enactment of the AEDPA were allowed to file their § 2254 petitions no later than April 23, 1997. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998)(prohibiting dismissal of petitions filed on or before April 23, 1997, as untimely under § 2244(d)(1)(A)).

Harris' conviction became final prior to the enactment of the AEDPA. He was convicted on May 27, 1992, and was sentenced on July 10, 1992. The Delaware Supreme Court affirmed the judgment of conviction on May 10, 1993. Harris was then allowed ninety days in which to file a petition for a writ of certiorari with the United States Supreme Court. *See* Supreme Court Rule 13. Although Harris did not file a petition with the United States Supreme Court, the ninety-day period in which he could have filed such a petition is encompassed within the meaning of "the conclusion of direct review or the expiration of the time for seeking such review," as set forth in § 2244(d)(1)(A). *See Kapral v. United States*, 166 F.3d 565, 576 (3d Cir. 1999)(holding that on direct review, the limitation period of § 2244(d)(1)(A) begins to run at the expiration of the time for seeking review in the United States Supreme Court). Therefore, Harris' conviction became final on August 8, 1993, ninety days after the Delaware Supreme Court affirmed his conviction, and well before the enactment of the AEDPA on April 24, 1996. Thus, he could have filed a timely habeas petition with this court not later than April 23, 1997. *See Burns*, 134 F.3d at 111.<sup>1</sup>

The court's docket reflects that Harris' petition was filed on December 3, 1998. (D.I. 2.) A pro se prisoner's habeas petition, however, is considered filed on the date he delivers it to prison officials for mailing to the district court. *Id.* at 113. The petition itself is dated September 15, 1998, and is stamped "Received" by the institution on that date. Because it appears that Harris delivered his

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<sup>1</sup> The court rejects Harris' contention that the one-year period of limitation does not apply to his habeas petition because he was convicted prior to the enactment of the AEDPA. *Burns* teaches that the one-year period of limitation applies to all habeas petitions filed on or after April 24, 1996, with a one-year grace period for prisoners whose convictions became final prior to the enactment of the AEDPA. *See Burns*, 134 F.3d at 111.

habeas petition to prison officials on September 15, 1998, the court deems his habeas petition filed on September 15, 1998.

Obviously Harris' habeas petition was filed beyond the April 23, 1997 deadline. That, however, does not end the inquiry because the one-year period of limitation may be either statutorily or equitably tolled. *See Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999).

### **B. Statutory Tolling**

The AEDPA provides for statutory tolling of the one-year period of limitation:

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). 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). As the Third Circuit has explained, “a properly filed application is 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).

Harris filed a Rule 61 motion for postconviction relief in the Delaware Superior Court on August 11, 1995, which was denied on December 10, 1996. The Delaware Supreme Court affirmed the order of denial on August 19, 1997. The respondents concede, and correctly so, that the filing of this “‘properly filed application” for postconviction relief tolled the one-year period of limitation. 28 U.S.C. § 2244(d)(2). For this reason, the court finds that the period of time from the enactment of the AEDPA on April 24, 1996, through August 19, 1997, does not count toward the one-year period of

limitation.<sup>2</sup> Even so, more than one year lapsed before Harris filed the current habeas petition on September 15, 1998.

That conclusion, however, does not necessarily render Harris' habeas petition untimely. As described above, Harris filed a second Rule 61 motion for postconviction relief on December 22, 1997. On January 8, 1998, the Superior Court denied Harris' second Rule 61 motion on the grounds that it was untimely and that the claims presented therein were procedurally barred. The Delaware Supreme Court affirmed on August 19, 1998. The respondents contend that Harris' second Rule 61 motion was not a "properly filed application" under § 2244(d)(2) because the state courts concluded that it was untimely. They argue that the one-year period was not tolled by the filing of Harris' second Rule 61 motion, and that his habeas petition should be dismissed as untimely.

The court must determine whether Harris' second Rule 61 motion was a "properly filed application" such that the one-year period was tolled until August 19, 1998, when the Delaware Supreme Court affirmed the Superior Court's order denying it. If so, Harris' habeas petition was timely filed on September 15, 1998. If not, the one-year period expired before Harris filed his habeas petition.

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<sup>2</sup> The court notes that the one-year period is tolled during the time between the Superior Court's denial of Harris' first Rule 61 motion and his appeal to the Delaware Supreme Court. *See Swartz v. Meyers*, 204 F.3d 417, 420 (3d Cir. 2000). The court also notes that Harris could have filed, but did not file, a petition for a writ of certiorari with the United States Supreme Court within ninety days of the Delaware Supreme Court's order. *See* Supreme Court Rule 13. As explained above, on direct review that ninety-day period is excluded from the one-year period of limitation. *See Kapral*, 166 F.3d at 576. In postconviction proceedings, however, the time during which a state prisoner may file a petition in the United States Supreme Court does *not* toll the one-year period, and the ninety-day period is counted. *Stokes*, 247 F.3d at 543.

In determining whether Harris' second Rule 61 motion was "properly filed," the court is guided by *Fahy v. Horn*, 240 F.3d 239 (3d Cir.), *cert. denied*, 122 S. Ct. 323 (2001). In *Fahy*, the petitioner filed in state court a fourth petition for postconviction relief. *Id.* at 242. The state court dismissed the petition as time-barred under state law. *Id.* The Pennsylvania Supreme Court affirmed on the ground that the petition was untimely. *Id.* In considering whether the petition was "properly filed" for the purpose of statutory tolling under § 2244(d)(2), the Third Circuit explained that federal courts "must look to state law governing when a petition for collateral relief is properly filed." *Id.* at 243. According to *Fahy*, "[t]he AEDPA requires us to interpret state law as we do when sitting in diversity cases, and we therefore must defer to a state's highest court when it rules on an issue." *Id.* at 243-44. Based on the Pennsylvania Supreme Court's ruling that the state petition was untimely as a matter of state law, the Third Circuit concluded that the state petition was not "properly filed," and that the one-year period was not statutorily tolled under § 2244(d)(2). *Id.* at 244.

The relevant circumstances of *Fahy* are similar to those in the matter at hand. Here, the Delaware Superior Court ruled that Harris' second Rule 61 motion was untimely and procedurally barred under state law. The Delaware Supreme Court affirmed for the same reasons. *Fahy* requires this court to defer to the Delaware Supreme Court's ruling. Because Harris' second Rule 61 motion was untimely and thus not properly filed, the one-year period of limitation was not tolled while it was pending. Therefore, the period of time from December 22, 1997, until August 19, 1998, must be counted against Harris.

In sum, the court finds that the statutory tolling provision applies to the period of time during which Harris' first Rule 61 motion was pending. It does not, however, apply to the period of time

during which his second Rule 61 motion was pending. Because more than one year lapsed during which no “properly filed application” was pending, the statutory tolling provision does not render Harris’ habeas petition timely filed.

### **C. Equitable Tolling**

Additionally, the one-year period of limitation prescribed in § 2244(d) may be subject to equitable tolling. *Fahy*, 240 F.3d at 244; *Jones*, 195 F.3d at 159; *Miller v. New Jersey State Dep’t of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998). The doctrine of 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) 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).

Harris attempts to invoke the doctrine of equitable tolling in two ways. First, he notes that his second Rule 61 motion was pending in the Delaware courts for approximately eight months. According to Harris, this “unnecessary delay” prevented him from filing his habeas petition within the one-year period of limitation. (D.I. 10, Petitioner’s Supplement at ¶ 8(c).) The court cannot agree that a period of eight months constitutes an unnecessary delay. This argument simply does not warrant the application of equitable tolling.

Harris' second equitable tolling argument is that he was prevented from presenting each of his claims in his first Rule 61 motion because he was deprived of portions of the record until December 1997. Once he received the complete record, he asserts, he filed a second Rule 61 motion in an effort to exhaust the claims he was unable to present in his first Rule 61 motion. While the court can conceive of circumstances in which the denial of access to the record might warrant equitable tolling, Harris has failed to articulate any such circumstances. He does not specify the portions of the record to which he was denied access. He does not identify any particular claims he could not present in his first Rule 61 motion due to the lack of access to the complete record. *See Gassler v. Bruton*, 255 F.3d 492, 495 (8th Cir. 2001)(refusing to apply equitable tolling where petitioner failed to identify any particular claims he was prevented from raising due to the lack of a complete transcript). He has not explained why the missing portions of the record were necessary to prepare a single Rule 61 motion presenting all of his claims. *See United States v. Van Poyck*, 980 F. Supp. 1108, 1111 (C.D. Cal. 1997)(refusing to find "extraordinary circumstances" where petitioner failed to explain why transcripts were necessary to prepare motion). Although Harris' desire to have access to a complete record is understandable, the court cannot conclude that the lack of a complete record prevented him from raising each of his claims in his first Rule 61 motion.

An examination of the claims Harris raised in his second Rule 61 motion supports the conclusion that he could have presented each claim in his first Rule 61 motion. In his second Rule 61 motion, Harris presented the following claims: (1) He did not knowingly or voluntarily waive his right to be indicted by a grand jury; (2) Counsel rendered ineffective assistance by failing to inform Harris of his right to a preliminary hearing; and (3) He was denied the right to be present at every stage of the trial.

(D.I. 8, App. to State’s Answering Br. at B-14.) If these alleged errors occurred, Harris would have known about them when they occurred. The court is persuaded that the lack of a complete record did not prevent Harris from presenting each of his claims in his first Rule 61 motion.

In short, the court cannot discern any extraordinary circumstances that warrant applying the doctrine of equitable tolling. Harris’ habeas petition will be dismissed as untimely.<sup>3</sup>

### **III. CERTIFICATE OF APPEALABILITY**

Finally, the court must 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 the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

When the court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the prisoner must demonstrate 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. *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, Harris’ habeas petition is barred by the one-year period of

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<sup>3</sup> Because Harris’ petition will be dismissed as untimely, the court does not reach the respondents’ alternative argument that his claims are procedurally barred.

limitation. The court cannot conclude that the period should be statutorily or equitably tolled to render the petition timely. The court is convinced that reasonable jurists would not find its assessments debatable. Harris has, therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

#### **IV. CONCLUSION**

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Harris' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED, and the relief requested therein is DENIED.
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).

IT IS SO ORDERED.

Dated: January 11, 2002

Gregory M. Sleet  
UNITED STATES DISTRICT JUDGE