

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES RIVA,)	
Petitioner,)	
)	
v.)	C.A. No. 01-12061-MLW
)	
EDWARD FICCO)	
Respondent.)	

MEMORANDUM AND ORDER

WOLF, D.J.

March 28, 2007

I. INTRODUCTION

Petitioner James Riva seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254. He makes four claims, each premised on a theory of ineffective assistance of counsel: that trial counsel failed: (1) to object to Riva's forced medication during trial; (2) to object to the trial court's restriction of Riva to the prisoner's dock during trial; (3) to prepare the expert defense witnesses adequately; and (4) to challenge the material misrepresentations of the Commonwealth's expert witness.¹ Respondent Edward Ficco moves to dismiss the petition on various procedural grounds.

Of central importance to Riva's current petition is whether or

¹ In his original pro se petition, Riva raised two additional issues: (1) trial counsel's failure to request a manslaughter instruction and (2) trial counsel's failure to object to the trial court's instruction that "the defendant must be proven innocent." See Riva Opposition at 17, n.8. In his opposition to the motion to dismiss, represented by new counsel, Riva waives these two claims. Id.

not his mental incapacity tolls the applicable one-year statute of limitations and serves as cause and prejudice to excuse procedural default in state court. Because it does neither, and for the reasons discussed in this Memorandum, the petition is being dismissed.

II. BACKGROUND

After a trial and an unsuccessful inanity defense, a jury convicted Riva of second degree murder of his grandmother and the arson of his grandmother's house. Commonwealth v. Riva, 18 Mass. App. Ct. 713, 714-16 (App. Ct. 1984). Prior to trial, Riva was held for a time at the Plymouth County House of Correction. Id. at 716. Riva's mother, Janet Jones, visited twice during this period. Id. Jones "asked him how he was feeling, and he said his brain was on fire, that he was sick, his stomach hurt . . . that he had to talk to somebody, his lawyer told him not to talk with anyone, but he had to talk to someone, and that the voices were really bad in his head." Id. As quoted by his mother, Riva then said that he "had been a vampire for more than four years, that was when the voice came out of the sun in the marsh and told me I had to be a vampire, and I have had to drink blood for a long time. . . ." Id. at 716 n.2. He claimed to have "been talking to the devil for a long time." Id. His mother asked him, "how do you talk to the devil and do you actually hear the voices, do you talk out loud" Id. Riva replied "no, it is just in my head, I ask questions, the voice answers me, and, you know, it is the devil

that answers my questions." Id.

Riva also described to his mother shooting his grandmother and setting her on fire. Id. at 716 n.3. In addition, he told her that he had considered committing suicide, but that the voice dissuaded him. Id. Riva explained that the bullet "had to be painted gold because, if they weren't gold, they wouldn't find their mark." Id. He went on to say, "I didn't stab her and didn't hit her on the head like they said I did, but I then drank her blood because, you know, I have to because that's what vampires do." Id. Then, after an interval, he said "I didn't want it to happen, and I kept telling the voice all day that I couldn't do it." Id.

Following his indictment, a Superior Court judge found Riva incompetent to stand trial. Id. at 716 n.6. However, the trial judge subsequently found Riva competent to stand trial. See id. At trial, Riva was represented by John Spinale, Esq., who had never tried a first-degree murder case. See Spinale Aff., October 9, 1988. Throughout trial, Riva was forcibly medicated with anti-psychotic drugs. Id.; Riva Aff., July 12, 1990. He was also confined to a prisoner's dock from which he could not communicate with his attorney. See Spinale Aff., October 9, 1988; Riva Aff., July 12, 1990.

The central issue at trial was whether Riva was, despite his

mental illness, legally responsible for his actions.² Riva presented the testimony of four experts, while the state presented the testimony of one expert. See Riva, 18 Mass. App. Ct. at 716-17. The Massachusetts Appeals Court summarized the defense experts' testimony as follows:

Four psychiatrists of substantial experience, called as expert witnesses by Riva, testified that Riva suffered from serious mental illness. These psychiatrists (as well as some staff psychiatrists who examined Riva at Bridgewater State Hospital and elsewhere, but who did not testify at trial) concluded . . . that Riva, on April 10, 1980, lacked criminal responsibility . . . Not one of them was shaken in his conclusions by cross-examination.

Id. at 716-17. Three of the four psychiatrists testified that Mr. Riva suffered from schizophrenia. Id. at 717 n.8.

The Commonwealth's expert, Dr. Martin Kelly, testified that Riva was criminally responsible on April 10, 1980. Id. at 718, n.9. His opinion was based on an examination of Riva, as well as police reports, the probable cause hearing transcript, reports of

²The relevant test for criminal responsibility in Massachusetts is set forth in Commonwealth v. McHoul, 352 Mass. 544, 546-47 (1967), which adopts language from the American Law Institute's Model Penal Code, Proposed Official Draft (1962):

Section 4.01 Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

discussions with witnesses, the autopsy report, and records from Bridgewater State Hospital, some records from Taunton State Hospital, and Mayflower Counseling Service. Id. at 718 n.9. Other reports from McLean Hospital, Boston University Hospital, and Taunton State Hospital were not examined by Dr. Kelly until after he had written his report. Id. According to Dr. Kelly, Riva did not suffer from schizophrenia, but from borderline personality disorder, a condition that did not eliminate criminal capacity. Id. at 719. The Appeals Court noted that in Dr. Kelly's opinion, "a tape recording of the police conference with Riva on the afternoon of April 11, 1980 [the day after the killing] was of special importance in establishing Riva's mental state at that time" Id. at 718. None of the defense experts had access to this tape. See April, 1980 Trial Tr. at 635-65, 667, 765, 828. The Commonwealth emphasized the importance of the tape and the fact the Dr. Kelly was the only one to hear it. Id. at 997. Riva's insanity defense failed. See Riva, 18 Mass. App. Ct. at 713. The Court of Appeals denied Riva's appeal on October 31, 1984. Id.

The Massachusetts Supreme Judicial Court denied Riva's petition for further appellate review on January 4, 1985. See Commonwealth v. Riva, 393 Mass. 1105 (1985).

Through March 12, 1996, Riva filed in state court three motions for a new trial, each of which was denied. See Massachusetts Superior Court, Docket No. 74024. Riva then filed a fourth motion for a new trial on March 17, 1999, which the trial

court denied on December 13, 1999. Id. The Appeals Court affirmed the denial March 20, 2001, in an unpublished opinion. Commonwealth v. Riva, No. 00-P-169, 2001 WL 275365, *1 (App. Ct. March 20, 2001). Riva's petition for leave to obtain further appellate review was denied on June 7, 2001. See Commonwealth v. Riva, 434 Mass. 1105 (2001).

In addition to his motions for post-conviction relief in state court, Riva has filed previously three separate petitions for habeas relief in this court. Each was dismissed without prejudice for procedural reasons.³ Riva filed his fourth, instant habeas petition on October 15, 2001.

According to Riva's psychiatric expert, Dr. Montgomery Brower, Riva continues to suffer from paranoid schizophrenia that has only recently been substantially controlled with medication. See Brower Aff., Nov. 12, 2006. Moreover, Riva's mental illness required his long-term imprisonment in a psychiatric facility. Riva states that in 1990, an attempt to relocate him to a general prison environment proved disastrous, as he assaulted a corrections officer while purportedly experiencing a psychotic delusion. Riva admits that from 1996 to 1999 some of his symptoms were controlled with medication. However, he claims to have continued experiencing "obsessional preoccupation with the delusion that he needed to

³ See Riva v. Getchell, 873 F.2d 1424 (1st Cir. 1989); Civil Docket for Riva v. Dubois, C.A. No. 96-10273-MLW (D. Mass 1996); Civil Docket for Riva v. Nelson, First Circuit No. 99-1071.

obtain and consume human flesh." Riva Aff., Nov. 12, 2006. Riva also admits to experiencing greater periods of lucidity, although he maintains that such periods were nevertheless disrupted by his obsession with human flesh. Id. Dr. Brower states that "this residual psychosis interfered with Mr. Riva's ability to sustain the attention and effort necessary for him consistently and effectively to pursue legal review on his own behalf." Brower Aff., Nov. 12, 2006. However, Riva's medical records reveal that his "overall cognitive abilities fall in the upper end of the average range," and that "there is evidence, based on his many superior scores, of considerably higher levels of intellectual potential." See Bridgewater State Hospital Discharge Summary for James Riva, at 4.

III. DISCUSSION

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2254, became effective. AEDPA provides that habeas petitions must generally be filed within one-year of a final state decision on direct appeal. See 28 U.S.C. §2244(d). Where a petitioner's conviction became final before AEDPA's April 24, 1996 effective date, AEDPA grants a petitioner a one-year grace period starting on AEDPA's effective date, running through April 24, 1997, in which to file a habeas petition. See Gaskins v. Duval, 183 F.3d 8, 9 (1st Cir. 1999); Rogers v. United Stated, 180 F.3d 349, 351-52 (1st Cir. 1999). Here, the one-year grace-period applies to Riva because his direct appeal was rejected

in 1985, well before April 24, 1996. See Commonwealth v. Riva, 393 Mass. 1105 (1985). Thus, Riva had until April 24, 1997 to file a habeas petition.

This period was not extended by Riva's motions for collateral review of his conviction in state court. 28 U.S.C. §2244(d)(2) states that the "[t]ime 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 count towards the statutory limitations period. However, Riva's appeal from his third motion for a new trial was dismissed in March, 1996. Riva did not file his fourth motion for new trial until March 17, 1999. Thus, at the time that AEDPA's one-year grace-period began to run, April 24, 1996, Riva was not involved in any "application for State post-conviction or other collateral review" within the meaning of §2244(d)(2). Therefore, the AEDPA statute of limitations was not tolled on the basis of action in state court.

Riva's third habeas petition was filed in January 6, 1998, after the one-year grace period expired on April 24, 1997. Similarly, his fourth motion for a new trial was filed in March 1999, also after the one-year grace period had run. Accordingly, Riva's instant habeas petition is timely only if his mental condition tolled AEDPA's statute of limitations between April 24, 1997 and March 1999 and also between December, 1999, when his final motion for collateral review in state court was denied, and the October 15, 2001 filing of the instant petition.

The one-year limitations period can be tolled only where circumstances beyond the litigant's control prevented him from promptly filing. See Cordle v. Guarino, 428 F.2d 466, 48 (1st Cir. 2005); Neversen v. Farquharson, 366 F.3d 32, 41 (1st Cir. 2004). The First Circuit has not expressly addressed when mental illness or incompetency satisfies this standard.⁴ Other circuits, however. See Calderon v. United States Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998), abrogated on other grounds by Woodford v. Garceau, 538 U.S. 202 (2003) (commenting that "putative habeas petitioner's mental incompetency [is] a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control" justifying equitable tolling of AEDPA); Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998) (same); Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999) (same).

Those courts have permitted equitable tolling where the petitioner establishes that his mental illness was severe enough to preclude self-representation or effective communication with his counsel. See Calderon, 163 F.3d at 541 (holding that mental incompetence rendering the petitioner unable to assist his attorney

⁴The First Circuit has recognized the availability of equitable tolling on the grounds of mental illness in other statutory contexts. See Nunnally v. MacCausland, 996 F.2d 1, 4 (1st Cir. 1993) (considering whether Civil Service Reform Act limitation period was equitably tolled by plaintiff's mental illness); Lopez v. Citibank, N.A., 808 F.2d 905, 906 (1st Cir. 1987) (considering whether Title VII limitation period was equitably tolled by plaintiff's mental illness).

in preparation of a habeas petition tolls AEDPA's time-bar); Benn v. Greiner, 275 F. Supp. 2d 731, 373-74 (E.D.N.Y. 2003) (Weinstein, J.), rev. on other grounds, 402 F.3d 100 (2d Cir. 2005) (holding that petitioner's depression and schizophrenia made it impossible to file a timely petition); Aiello v. Warden, SCI Graterford, C.A. No. 03-CV-1655, 2006 U.S. Dist. LEXIS 21380, at *1-11 (E.D. Pa., April 20, 2006) (holding that petitioner's mental illness justified equitable tolling where evidence demonstrated petitioner's inability to access information and make use of it).

Conversely, courts deny tolling based on mental capacity, both in the habeas context and generally, where the record indicates that an individual was able to file legal motions and papers on his own behalf or to aid others in doing so. See Lopez v. Citibank, N.A., 808 F.2d 905, 906 (1st Cir. 1987) (tolling the statute of limitations on the basis of mental illness in the context of Title VII); Price v. Lewis, 119 Fed. Appx. 725, 726 (6th Cir. 2005) ("The exceptional circumstances that would justify equitable tolling on the basis of mental incapacity are not present when the party who seeks the tolling has been able to pursue his or her legal claims during the period of his or her alleged mental incapacity.") (quoting Brown v. McGee, 232 F. Supp. 2d 761, 768 (E.D. Mich. 2002); Bilbrey v. Douglas, 124 Fed. Appx. 971, 973 (6th Cir. 2005) (holding that schizophrenic petitioner evincing periods of lucidity sufficient to make court filings during period sought to be tolled could not toll statute of limitations on mental

incapacity grounds); see also Herbst v. Cook, 260 F.3d 1039, 1044 (9th Cir. 2001)("We will permit equitable tolling of AEDPA's limitations period only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time.") (citation and internal quotation marks omitted); Biester v. Midwest Health Servs., 77 F.3d 1264, 1268 (10th Cir. 1996) (finding equitable tolling inappropriate where the evidence demonstrated the plaintiff's ability to file his claim, in spite of his mental condition).

As the petitioner, Riva has the burden of, at a minimum, providing "'a particularized description of how [his] condition adversely affected [his] capacity to function generally or in relationship to the pursuit of [his] rights[.]'" Rios v. Mazzuca, 78 Fed. Appx. 742, 744 (2d Cir. 2005) (quoting Boos v. Runyon, 201 F.3d 178, 185 (2d Cir. 2000)). Riva fails to satisfy this burden. His court filings show from 1996 to 1999 Riva was capable of complying with habeas requirements, including the statute of limitations. Between 1985 and 1999, Riva, in cooperation with counsel, filed a direct appeal, as well as four motions for a new trial in state court, and four pro se habeas petitions. Moreover, between 1996 and 1999, Riva made three filings, on his own volition, pro se: (1) his 1996 motion for a new trial; (2) his 1998 petition for habeas corpus; (3) his 1999 petition for habeas corpus. The fact of these filings indicates that Riva possessed sufficient lucidity during the period 1996 to 1999 to make

submissions to the courts. Similarly, Riva's filings from 1985 to 1999 indicate that throughout this period he possessed sufficient lucidity to formulate legal arguments, prepare legal documents, and appear in court on his behalf, without the aid of counsel. Thus, Riva has not shown that his mental illness has been so serious as to render him incapable of facilitating his own defense or aiding counsel in preparing his case.

Petitioner's reliance on Calderon, 163 F.3d at 541, Benn, 275 F. Supp. 2d at 373-74, and Graham v. Kyler, C.A. No. 01-1997 2002 U.S. Dist. LEXIS 26639 (E.D. Pa. 2002), in support of his contention that his mental illness supports a finding of equitable tolling is misplaced. Calderon involved a district court staying all proceedings other than a competency determination, preventing the filing of a habeas petition by petitioner and thus warranting tolling the limitations period. 163 F.3d at 541. No such events exist here. Therefore, Calderon is not an analogous case. Benn involved an inmate who suffered schizophrenia and lacked sufficient control of his mental faculties to file his habeas petition without the aid and encouragement of his fellow inmates. 275 F. Supp. 2d at 373-74. This fact was a key consideration in the courts "extraordinary circumstances" analysis. No showing of a similar condition has been made here. Finally, Graham involved a mentally ill patient who lacked the ability to engage in the abstract reasoning necessary to understand basic legal concepts, suffered several psychiatric disorders, and was functionally illiterate.

2002 U.S. Dist. LEXIS 26639 at *10-31. In contrast, Riva has been shown to have above average intelligence, to be literate, and to be capable of making numerous submissions to the courts. In fact, his medical records indicate that his "overall cognitive abilities fall in the upper end of the average range," and that "there is evidence, based on his many superior scores, of considerably higher levels of intellectual potential." See Bridgewater State Hospital Discharge Summary for James Riva. In other words, Riva, unlike the petitioner in Graham, is neither illiterate or unintelligent, and has demonstrated the ability to represent himself in the past.

Riva's circumstances are more similar to the petitioners in Bilbrey v. Douglas, 124 Fed. Appx. 971, 973 (6th Cir.2005), Price v. Lewis, 119 Fed. Appx. 725, 726 (6th Cir. 2005), and Biester v. Midwest Health Servs., 77 F.3d 1264, 1268 (10th Cir. 1996). Like those petitioners, Riva, between 1985 and 1999, possessed sufficient periods of lucidity to facilitate his continued filing of both state and federal motions. While Riva's expert opines that Riva was incapable of filing the instant petition from 1996 to 1999, that view is refuted by the repeated submissions to courts that Riva made in that period.

Therefore, the court finds that Riva has not proven that the period in which this petition was required to be filed should be equitably tolled. Thus, the petition is time-barred.

IV. ORDER

Accordingly, petitioner's petition for habeas corpus (Docket No. 3) is hereby DISMISSED.

/s/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE