

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WAYNE KELLER,	:	
Petitioner	:	
	:	
v.	:	No. 06-2359
	:	
JAMES T. WYNDER, et al.,	:	
Respondents	:	

**MEMORANDUM**

**Green, S.J.**

**December 28, 2006**

Presently pending is the petition for writ of habeas corpus, the Report and Recommendation (the "Report") of United States Magistrate Judge Peter B. Scuderi, and Petitioner's Objections thereto. Petitioner objects to the Magistrate's conclusion that the petition for writ of habeas corpus relief was untimely filed and must be dismissed. Petitioner argues that the statute of limitations should be equitably tolled on the basis of "extraordinary circumstances." Petitioner's Objections will be overruled and the Report will be approved and adopted.

**FACTUAL AND PROCEDURAL BACKGROUND**

There is no dispute concerning the factual background of this matter. Therefore the Court will incorporate by reference the Procedural History portion of the Report and will only restate the facts necessary for this Court's determination. Petitioner pled guilty to robbery, unlawful possession of a firearm, and resisting arrest on November 12, 1992. On January 28, 1993, Petitioner was sentenced to eleven (11) to twenty-two years. Petitioner did not appeal the sentence, but on January 6, 1997, he filed a collateral appeal pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42. Pa. Con. Stat. § 9541, et seq. The petition was denied on June 18, 1997. Petitioner failed to perfect a timely appeal of the denial of his PCRA petition. Subsequently, Petitioner's collateral appellate rights were reinstated by the Court of Common Pleas, nunc pro tunc, on August 7, 2000, July 26, 2001, and December 31, 2003. The first two appeals were dismissed by the Pennsylvania Superior Court for failure to file a brief. The third

appeal was quashed by the Superior Court, which held that the Court of Common Pleas never had jurisdiction to reinstate Petitioner's collateral appellate rights to begin with. See Commonwealth v. Keller, No. 249 EDA 2004 (Pa. Super. Aug. 19, 2005). Petitioner appealed this decision to the Pennsylvania Supreme Court, which denied his petition for allowance of appeal on May 16, 2006. On May 31, 2006 Petitioner filed the instant petition.

## **DISCUSSION**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), became effective on April 26, 1996. It provides applicants with a one-year period of limitation from its effective date, or the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of time to seek such review, within which to file a petition for writ of habeas corpus. Accordingly, applicants convicted prior to April 26, 1996 had until April 26, 1997 to timely file a petition for writ of habeas corpus. See, Miller v. New Jersey State Dep't of Corrections, 145 F.3d 615, 617-18 (3d Cir. 1998). Petitioner's conviction became final in 1993, prior to the enactment of the AEDPA, therefore he had until April 26, 1997 to timely file a habeas petition. The one year limitations period, however, must be tolled for the time during which any properly filed PCRA petitions were pending.

Petitioner filed his first PCRA petition on January 6, 1997; at that time 258 days of his one year statute of limitations had already passed. The statute of limitations can only be tolled during the pendency of his first PCRA petition, not during the pendency of any of his subsequent PCRA petitions, as the Superior Court determined that Petitioner's appellate rights had been improperly restored, and consequently none of those petitions were "properly filed."<sup>1</sup> Review of his first PCRA petition concluded on July 18, 1997, when Petitioner failed to file a

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<sup>1</sup>The court cannot consider whether the Superior Court erred in its determination regarding Petitioner's appellate rights, because state court determinations of state procedural law are not cognizable in a federal habeas petition. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)

timely appeal to the Superior Court from the denial of his initial PCRA petition. Petitioner had 107 days, until November 2, 1997, to timely file a federal petition for habeas corpus relief.

Petitioner's sole objection is to the conclusion of the Magistrate Judge that the doctrine of equitable tolling does not apply. The Third Circuit has set forth three circumstances in which equitable tolling should be applied: 1) if 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, but has mistakenly done so in the wrong forum. See Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1988). Petitioner claims that he was prevented from asserting his rights due to alleged failures by his prior counsel in filing certain petitions on time, and as a result of the Court of Common Pleas improperly reinstating his appellate rights nunc pro tunc. Nothing, however, prevented petitioner from filing a petition for federal habeas corpus relief from the time that his first PCRA petition was denied, July 18, 1997, until the expiry of his AEDPA limitations period, November 2, 1997. Petitioner waited nearly three years from that date, until August of 2000, before he attempted to have his state collateral rights reinstated. That failure is not a ground for applying the doctrine of equitable tolling. For the aforementioned reasons Petitioner's Objections to the Report will be overruled and the Report will be approved and adopted.

And appropriate Order follows.

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**ORDER**

**AND NOW**, this 28th Day of December, 2006 after careful and independent consideration of the petition for a writ of habeas corpus and Petitioner's Objections thereto, **IT IS HEREBY ORDERED** that::

1. Petitioner's Objections are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. The petition for a writ of habeas corpus is **DISMISSED** as time barred; and
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

s/Clifford Scott Green

Clifford Scott Green, S.J.