CLD-096 January 11, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-3243**

RICKY B. CHHEA, Appellant

VS.

SUPERINTENDENT MAHANOY SCI, ET AL.

(E.D. Pa. Civ. No. 2-16-cv-02692)

Present: CHAGARES, GREENAWAY, JR., and GREENBERG, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,
Clerk

ORDER

Appellant's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would not debate that Appellant's habeas petition was properly dismissed by the District Court as time-barred, for essentially the reasons set forth in the District Court's opinion. See generally Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: February 13, 2018
tmm/cc: Ricky B. Chhea
John W. Goldsborough, Esq.

A True Copy:

Patricia A. Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3243

RICKY B. CHHEA,
Appellant

v.

SUPERINTENDENT MAHANOY SCI;
PHILADELPHIA D.A. OFFICE;
THE ATTORNEY GENERAL OF
THE STATE OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and GREENBERG, *Circuit Judges*[*]

The petition for rehearing filed by Appellant Ricky Chhea in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: April 20, 2018
sb/cc: Ricky B. Chhea
John W. Goldsborough, Esq.

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[*] Judge Greenberg's vote is limited to panel rehearing only.

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

RICKY B. CHHEA	:	
	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	
	:	**NO. 16-2692**
JOHN KERESTES	:	
	:	
Respondent.	:	

FILED
SEP 18 2017
KATE BARKMAN, Clerk
By Dep. Clerk

ORDER

AND NOW, this 18th day of September, 2017, upon consideration of the Petition for Writ of Habeas Corpus (Doc. No. 1), the Revised Habeas Corpus Petition Forms (Doc. No. 2), Petitioner's Memorandum of Law in Support of Federal Habeas Petition (Doc. No. 12), Respondents' Response in Opposition (Doc. No. 25), Petitioner's Response to Respondent's Answer (Doc. No. 26), the August 15, 2017 Report and Recommendation of Chief United States Magistrate Judge Linda K. Caracappa, Plaintiff's Objections thereto (Doc. No. 30),[1] and after a thorough and independent review of the record, it is hereby **ORDERED** that:

ENTERED
SEP 19 2017
CLERK OF COURT

[1] In support of his original habeas petition, Petitioner argued that he was entitled to equitable tolling to excuse the untimeliness of his Petition because (a) the calculation of the one-year limitations does not factor in the delay of when a *pro se* litigant receives notice of a decision by the state courts; (b) the Commonwealth denied him access to the necessary discovery needed to file his state collateral appeals; and (c) prisoners face hardships such as limited access to the law library and slow distribution of prison mail. The Magistrate Judge's Report and Recommendation fully addressed these arguments in a well-reasoned and well-supported analysis.

In his Objections, Petitioner now reasserts his general claim of equitable tolling without an explanation of why the Report and Recommendation's discussion of that issue was erroneous and without any elaboration on his original argument. The United States Court of Appeals for the Third Circuit has held that providing complete *de novo* review where only a general objection is offered "would undermine the efficiency the magistrate system was meant to

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;

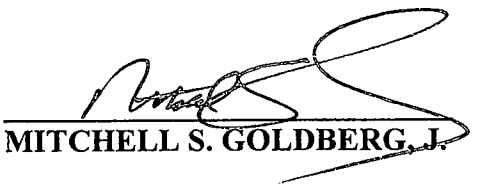
2. Petitioner's Objections are **OVERRULED**;

3. The Petition for Writ of Habeas Corpus is **DENIED** with prejudice and **DISMISSED** as untimely without an evidentiary hearing; and

4. There is no probable cause to issue a certificate of appealability.

It is **FURTHER ORDERED** that Petitioner's Motion for Discovery (Doc. No. 14) is **DENIED AS MOOT**.

BY THE COURT:



MITCHELL S. GOLDBERG, J.

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contribute to the judicial process." Goney v. Clark, 749 F.2d 5, 6 (3d Cir. 1984). Thus, if objections to a report "merely rehash an argument presented to and considered by a magistrate judge," *de novo* review is not required. Gray v. Delbiaso, No. 14-4902 , 2017 WL 2834361, at *4 (E.D. Pa. June 30, 2017); see also King v. Bickell, No. 13-2118, 2017 WL 1178068, at *5 (M.D. Pa. Mar. 30, 2017) (holding that argument that "is merely a rehashing of the arguments" already made to the Magistrate Judge are not entitled to *de novo* review); Davis v. Wetzel, No. 14-4160, 2017 WL 264061, at *4 (E.D. Pa. Jan. 20, 2017) (same)). As Petitioner's Objections in this case are nothing more than a precise "rehashing of the arguments" presented to and considered by the Magistrate Judge, I decline to give them *de novo* review.

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

RICKY B. CHHEA, Petitioner,	:	CIVIL ACTION
v.	:	
JOHN KERESTES, et al., Respondents.	:	No. 16-2692

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA
UNITED STATES CHIEF MAGISTRATE JUDGE

Now pending before this court is a petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated in the State Correctional Institution Mahanoy in Frackville, Pennsylvania. For the reasons that follow, it is recommended that the instant habeas petition be DISMISSED.

I. PROCEDURAL HISTORY

On January 14, 2010, following a jury trial in the Court of Common Pleas of Philadelphia County presided over by the Honorable Gwendolyn N. Bright, petitioner was convicted of third-degree murder, conspiracy, and possession of a firearm by a minor. See CP-51-CR-0012794-2008. On March 26, 2010, petitioner was sentenced to a term of eighteen (18) to thirty-six (36) years imprisonment for murder, a consecutive term of eight (8) to sixteen (16) years imprisonment for conspiracy, and a concurrent term of two and one-half (2 ½) to five (5) years imprisonment for possession of a firearm by a minor. See id.

On May 14, 2010, petitioner filed a timely direct appeal and the Superior Court affirmed petitioner's judgment of sentence on September 14, 2011. Commonwealth v. Chhea, 34 A.3d 226 (Pa. Super. 2011). On March 29, 2012, the Supreme Court of Pennsylvania denied

petitioner's petition for allowance of appeal. Commonwealth v. Chhea, 42 A.3d 290 (Pa. 2012).

On September 17, 2012, petitioner filed a timely pro se petition for collateral review under the Pennsylvania Post-Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541, et seq. See CP-51-CR-0012794-2008 at 14. Counsel was appointed and thereafter, counsel filed a "no merit" letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988).[1] Id. On April 29, 2014, the PCRA court notified petitioner of the court's intent to dismiss the petition pursuant to Pa.R.Crim.P. 907. Id. On May 8, 2014, petitioner filed a pro se response in opposition to the 907 notice. Id. On June 13, 2014, the PCRA court dismissed the petition. Id. at 15. On June 23, 2015, the Pennsylvania Superior Court affirmed the dismissal of petitioner's PCRA petition. Commonwealth v. Chhea, 122 A.3d 1141 (Pa. Super. 2015). Petitioner did not file an allowance of appeal with the Pennsylvania Supreme Court.

On May 23, 2016, petitioner filed the instant pro se petition for Writ of Habeas Corpus.[2]

Respondents contend the instant habeas petition is untimely, because it was not filed within the one-year habeas limitation period, and it does not meet the standard for equitable tolling. See Resp. to Habeas Pet. at 3-7. We agree and recommend the petition be dismissed as untimely.

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[1] Pursuant to Finley, appointed counsel in a post-conviction proceeding may be given leave to withdraw upon submission of a "no-merit" letter that details the nature and extent of counsel's review of the case, lists each issue the petitioner wished to have reviewed, and explains counsel's assessment that the case lacks merit. The court must conduct an independent review of the record and must agree with counsel that the petition is meritless before dismissing the petition.

[2] Although the habeas petition was not docketed by this court until May 31, 2016, (Doc. 1), the "mailbox rule" applies. Under the "mailbox rule," a pro se prisoner's habeas petition is considered filed on the date the prisoner delivers the petition to prison authorities for filing. See Houston v. Lack, 487 U.S. 266, 276 (1988). Here, petitioner verified his petition was placed in the prison mailing system on May 23, 2016.

II. TIMELINESS

Petitioner's allegations of substantive grounds for relief need not be examined as these claims are barred by the procedural obstacle of timeliness. A strict one-year time limitation on the filing of new petitions is set forth in the federal habeas statute. Under Section 2244(d), the AEDPA provides:

> 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;
>
> (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 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) (1996).

On direct appeal, the Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal on March 29, 2012. As such, petitioner's judgment of sentence became final on June 27, 2012, when the ninety day time period for filing a direct appeal to the United States Supreme Court expired. See United States Supreme Court Rule 13(1) ("A petition for writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.") As such, petitioner had until June 27,

2013 to file a timely federal habeas petition, unless the deadline was subject to statutory or equitable tolling.

A. Statutory Tolling

The AEDPA contains a statutory tolling exception. If a petitioner submits a "properly filed" petition for state collateral relief, the one-year limitations period is tolled while that petition is pending. 28 U.S.C. § 2244(d)(2). The Third Circuit defined a "properly filed application" 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). If a petition is untimely, and the state court dismisses it as time-barred, then the petition was not "properly filed" for tolling purposes. Merritt v. Blaine, 326 F.3d 157, 165-66 (3d Cir. 2003).

Here, petitioner's one-year statute of limitation was tolled on September 17, 2012 with the filing of petitioner's timely PCRA petition, after eighty-one (81) days had run since the judgement became final on June 27, 2012. See 28 U.S.C. § 2244(d)(2). The Superior Court affirmed the denial of petitioner's PCRA petition on June 23, 2015. The statute of limitations began running again on July 23, 2015, when petitioner's time for filing a petition for allowance of appeal in the Pennsylvania Supreme Court expired. See Pa. R.A.P. 1113(a) (providing thirty days from Superior Court's decision to file petition for allowance of appeal). When petitioner's one-year statute of limitation began to run again on July 23, 2015, petitioner had 284 days left to file a timely federal habeas petition, or until May 2, 2016. Petitioner did not, however, file a federal habeas petition until May 23, 2016 – twenty-one (21) days after the federal deadline. Accordingly, the petition must be dismissed as untimely, unless equitable tolling is available.

B. Equitable Tolling

Another exception to the one-year statute of limitations rule is equitable tolling. See Holland v. Florida, 560 U.S. 631, 645 (2010). A court may use its discretion "to equitably toll [the one-year limitations period] in extraordinary circumstances." Miller v. N.J. Jersey State Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998). A court should only use equitable tolling if "principles of equity would make [the] rigid application [of a limitation period] unfair." Id. (internal quotation omitted). The Third Circuit has further cautioned that equitable tolling should be invoked sparingly. See LaCava v. Kyler, 398 F.3d 271, 275 (3d Cir. 2005); United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998).

For equitable tolling to apply, a petitioner must show he has been diligently pursuing his rights and an extraordinary circumstance prevented him from filing his petition on time. See Holland, 560 U.S. at 649 (2010) (internal quotation omitted). The Third Circuit identified three circumstances in which equitable tolling is allowed: (i) when a defendant has actively mislead a petitioner, (ii) when an extraordinary circumstance has stopped a petitioner from asserting his rights, and (iii) when a petitioner has asserted his rights in a timely manner, but in the wrong forum. See Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1998) (internal quotations omitted). In non-capital cases, attorney error, inadequate research, and other mistakes are not "extraordinary" for equitable tolling purposes. See Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001).

Here, petitioner filed a reply brief on August 15, 2017, arguing that petitioner is entitled to equitable tolling. Petitioner appears to argue that he is entitled to equitable tolling because the Commonwealth denied him access to the necessary discovery petitioner needed to file petitioner's state collateral appeals. First, it is well established by Pennsylvania law that a

prisoner does not need transcripts or other court documents in order to pursue post-conviction relief. Perry v. Diguglielmo, 169 Fed. Appx. 134, 138 (3d Cir.2006) (citing Commonwealth v. Crider, 1999 PA Super 204, 735 A.2d 730 (Pa.1998); Commonwealth v. Martin, 705 A.2d 1337 (Pa.1999)). Second, a "[l]ack of understanding or knowledge of the law" does not amount to extraordinary circumstances. See Bowen v. Palakovich, No. 06–3378, 2012 U.S. Dist. LEXIS 19075 at *16, 2012 WL 383663, at *5 (E.D.Pa. Jan.26, 2012).

Petitioner claims that equitable tolling should be granted because prisoners face hardships, such as limited access to the law library and slow distribution of prison mail. While "[t]here are no bright-line rules" for determining whether equitable tolling should apply, United States v. Thomas, 713 F.3d 165, 174 (3d Cir. 2013), "deprivation of legal material for a relatively brief time period is not sufficient to warrant tolling," Robinson v. Johnson, 313 F.3d 128, 143 (3d Cir. 2002). Though limited access to legal materials may make filing a timely appeal more difficult, "increased difficulty does not, by itself, satisfy the required showing of extraordinary circumstances" for equitable tolling. Thomas, 713 F.3d at 175.

Finally, petitioner claims that petitioner would not have received the state court decisions on the exact day the decisions were filed, thus, petitioner should be given extra days in the timeliness calculation. However, petitioner acknowledges that even with the benefit of a few extra days, petitioner's petition would still be untimely. Furthermore, aside from petitioner claiming petitioner's PCRA petition was signed three days before it was docketed, petitioner does not offer alternative dates for any other filing or receipt of state court opinions. Petitioner simply alleges that he probably would have received state court decisions several days after they were filed. Petitioner has failed to prove that an extraordinary circumstance prevented petitioner

from filing a timely appeal. As such, we find petitioner is not entitled to equitable tolling, and we recommend the instant habeas petition be dismissed as time barred.

Therefore, we make the following:

RECOMMENDATION

AND NOW, this 15th day of August 2017, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DISMISSED. Further, there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/S LINDA K. CARACAPPA
LINDA K. CARACAPPA
UNITED STATES CHIEF MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.