

APPENDIX A

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

FILED SEP 29 2017

DARNELL WILKINS

: CIVIL ACTION

v.

: NO. 16-5845

JAY LANE, *et al.*

MEMORANDUM

KEARNEY, J.

September 29, 2017

Darnell Wilkins objects to United States Magistrate Judge Perkin's Report and Recommendation denying his petition for habeas corpus relief. Judge Perkin's comprehensive analysis addresses each of Mr. Wilkins' grounds for relief. To ensure we address all of his habeas petition's grounds and later objections, we fully reviewed the petition and objections to Judge Perkin's detailed analysis. Upon review, we overrule Mr. Wilkins' objections, adopt Judge Perkin's Report and Recommendation and dismiss the petition for habeas relief finding no basis to issue a certificate of appealability in the accompanying Order.

**I. Background**

On March 17, 2008, Darnell Wilkins pled guilty to seven counts of robbery, one count of aggravated assault, and eight counts of possession of an instrument of crime.<sup>1</sup> The state court accepted Mr. Wilkins's guilty plea and sentenced him to a negotiated aggregate term of fifteen to thirty years imprisonment.<sup>2</sup> Mr. Wilkins did not move to withdraw his guilty plea or file a direct appeal to the Pennsylvania Superior Court.<sup>3</sup>

Mr. Wilkins instead filed a *pro se* petition for collateral review under the Pennsylvania Post-Conviction Relief Act on July 12, 2010 alleging constitutional violations, ineffective assistance of counsel, and an unlawfully induced guilty plea.<sup>4</sup> The court appointed counsel to

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represent him, but the attorney filed a February 13, 2012 letter and moving to withdraw because the claims lacked merit.<sup>5</sup> The PCRA court dismissed Mr. Wilkins' petition as frivolous on April 16, 2012.<sup>6</sup>

Mr. Wilkins appealed the denial of his PCRA petition to the Pennsylvania Superior Court on May 15, 2012.<sup>7</sup> Before submitting his brief, Mr. Wilkins filed a *pro se* motion for discovery, which the superior court denied on August 22, 2012.<sup>8</sup> He moved for reconsideration of the discovery ruling, which the superior court denied.<sup>9</sup> Mr. Wilkins filed a *pro se* brief in the superior court claiming the PCRA court abused its discretion in failing to consider his being subject to an improper preliminary hearing and the trial court lacked jurisdiction to accept his guilty plea.<sup>10</sup> Mr. Wilkins argued his mental incompetence prevented him from validly entering a guilty plea and from timely filing a *pro se* direct appeal or PCRA petition.<sup>11</sup> The superior court affirmed the PCRA court's denial of the PCRA petition finding his issues lacked merit, were untimely, and did not meet the exceptions to the one-year statute of limitations.<sup>12</sup>

Mr. Wilkins filed a May 13, 2016 Petition for leave to file a petition for allowance of appeal *nunc pro tunc*.<sup>13</sup> The Pennsylvania Supreme Court declined to review the appeal on July 5, 2016.<sup>14</sup> He then filed a Petition for writ of habeas corpus ad subjiciendum in the Court of Common Pleas of Philadelphia County on July 11, 2016 challenging the calculation of restitution owed to the victims.<sup>15</sup> This petition is pending before the state court.<sup>16</sup>

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Mr. Wilkins filed a November 2, 2016 *pro se* Petition for writ of habeas corpus alleging 1) violation of his appellate and PCRA rights; 2) he did not voluntarily, intelligently, or knowingly enter his guilty plea because he suffers from a "mental health problem;" and 3) he could not timely pursue an appeal or collateral review.<sup>17</sup> Mr. Wilkins alleged his "mental health problem" prohibited his timely filing the habeas petition.<sup>18</sup>

We referred this case to the Honorable Henry S. Perkin for a Report and Recommendation.<sup>19</sup> Judge Perkin timely issued a July 28, 2017 Report and Recommendation finding Mr. Wilkins's federal habeas corpus petition statutorily time-barred and ineligible for either statutory or equitable tolling.<sup>20</sup> Judge Perkin recommended denial with prejudice of Mr. Wilkins's petition and dismissal without an evidentiary hearing.<sup>21</sup>

## **II. Analysis**

Mr. Wilkins now objects, moving for reconsideration and stay, to Judge Perkin's July 28, 2017 comprehensive Report and Recommendation.<sup>22</sup> Mr. Wilkins argues (1) Judge Perkin incorrectly found Mr. Wilkins did not demonstrate good cause to require the Commonwealth to provide documents and discovery<sup>23</sup> needed to show the trial court lacked jurisdiction at the time of his guilty plea because the Commonwealth did not establish a *prima facie* case against him,<sup>24</sup> (2) "he was denied due process because he never had a competency hearing or investigation into his mental health and effects of the medication (i.e. thorazine) he was taking during his guilty plea"<sup>25</sup>, and (3) "his PCRA counsel wrongly advised him that he had one (1) year to file the instant habeas petition from the date his PCRA Petition was appealed to the Pennsylvania Supreme Court and denied."<sup>26</sup>

### **A. Mr. Wilkins's federal habeas petition is statutorily time-barred.**

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations to apply for a writ of habeas corpus challenging a state court judgment.<sup>27</sup> The limitation period begins on "the date on which the judgment of sentence became final by the conclusion of direct review or the expiration of time for seeking such review."<sup>28</sup> An exception exists when direct review of a criminal conviction concluded before the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act.<sup>29</sup> Such cases are permitted one year from April 24, 1996 to file a habeas petition.<sup>30</sup> Our court of appeals considers "direct review" to

mean “review of the state’s highest court.”<sup>31</sup> Under Pa.R.A.P. 903, a party has thirty days to file an appeal after the entry of an order.<sup>32</sup>

Mr. Wilkins’s judgment of sentence became final on April 17, 2008, thirty days after his March 17, 2008 guilty plea and when his time for filing a notice of appeal with the Pennsylvania Superior Court expired.<sup>33</sup> The one-year time limit for Mr. Wilkins to file a timely federal Petition for writ of habeas corpus began on April 17, 2008 and concluded on April 17, 2009. Mr. Wilkins filed his habeas petition on November 3, 2016, over seven years after the expiration of the limitation period.<sup>34</sup>

**1. Mr. Wilkins’s federal habeas petition is ineligible for statutory tolling.**

We adopt and approve Judge Perkin’s finding Mr. Wilkins is ineligible for an extended deadline for the limitation period under 28 U.S.C. § 2244(d)(1).<sup>35</sup>

**2. Mr. Wilkins’s federal habeas petition is ineligible for equitable tolling.**

Judge Perkin found Mr. Wilkins’s untimely petition is not eligible for equitable tolling. We agree. Mr. Wilkins argues he is entitled to equitable tolling because his “mental health problems[,] he was unable to file a timely PCRA petition,” as well as a timely habeas petition.<sup>36</sup>

The Supreme Court directs equitable tolling applies to the Antiterrorism and Effective Death Penalty Act statute of limitations.<sup>37</sup> But equitable tolling is limited in its application.<sup>38</sup> “The two general requirements for equitable tolling [are]: (1) that ‘the Petitioner has in some extraordinary way been prevented from asserting his or her rights;’ and (2) that the petitioner has shown that ‘he or she exercised reasonable diligence in investigating and bringing [the] claims.’”<sup>39</sup> Our court of appeals allows three instances for equitable tolling: “if (1) 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 mistakenly in the wrong forum.”<sup>40</sup>

**a. Mr. Wilkins's alleged mental incapacity does not entitle him to equitable tolling.**

Mr. Wilkins argues "he was denied due process because he never had a competency hearing or investigation into his mental health and effects of the medication (i.e. thorazine) he was taking during his guilty plea."<sup>41</sup> Judge Perkin found Mr. Wilkins's alleged mental incapacity did not hinder his ability to timely file his habeas petition. We agree.

Our court of appeals directs mental incompetency coupled with attorney abandonment may be deemed an "extraordinary circumstance" to justify equitable tolling, but "mental incompetence is not a *per se* reason to toll a statute of limitations."<sup>42</sup> For equitable tolling to be appropriate, "'the alleged mental incompetence must somehow have affected the petitioner's ability to file' a timely action."<sup>43</sup> The burden rests on the petitioner to demonstrate a "particularized description of how [his] condition adversely affected [his] capacity to function generally or in relationship to the pursuit of [his] rights" in order for equitable tolling for mental illness to apply.<sup>44</sup> Mr. Wilkins's "alleged mental incompetence must somehow have affected [his] ability to file a timely habeas petition."<sup>45</sup> "[M]ental health problems,' an undefined and expansive category" is not a basis for equitable tolling in and of itself.<sup>46</sup> Mr. Wilkins must demonstrate his mental incompetence caused him "an inability to pursue [his] legal rights, provided there is a nexus between [his] mental condition and [his] inability to file a timely petition."<sup>47</sup>

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"[A] mental condition that burdens but does not prevent a prisoner from filing a timely petition does not constitute 'extraordinary circumstances' justifying equitable tolling."<sup>48</sup> A mental impairment "even rising to the level of insanity" may not be enough to warrant equitable tolling.<sup>49</sup> Even the combination of a *pro se* plaintiff with a mental incapacity is not enough for equitable tolling.<sup>50</sup> The mental condition must have "made it impossible to file a petition on

time.”<sup>51</sup>

Mr. Wilkins cannot conclusively claim his mental impairment prevented him from timely filing without demonstrating his mental disability hindered him from submitting his habeas petition on time.<sup>52</sup> In *Champney v. Secretary Pennsylvania Department of Corrections*, our court of appeals defined the factors we must consider in determining if an individual’s mental incapacity prevented him from filing on time: “(1) [whether] the petitioner [was] adjudicated incompetent and, if so, when did the adjudication occur in relation to the habeas statutory period; (2) [whether] the petitioner [was] institutionalized for his mental impairment; (3) [whether] the petitioner handled or assisted in other legal matters which required action during the federal limitations period; and (4) [whether] the petitioner supported his allegations of impairment with extrinsic evidence such as evaluations and/or medications.”<sup>53</sup>

Mr. Wilkins has not met the *Champney* factors. As Judge Perkin found, Mr. Wilkins has not adduced evidence of being adjudicated incompetent or institutionalized for his alleged mental impairments. He did not provide documents or medical evidence corroborating his alleged mental impairments. He still does not provide medical records or documents corroborating a specific diagnosis, his alleged thorazine prescription, or if the thorazine compromised his ability to participate in the proceedings or timely file during the appeals process. “[T]he use of psychotropic medications can weigh against equitable tolling, because frequently the treatment of mental illness with drugs will ‘restore the patient to at least a reasonable approximation of normal mentation and behavior[ ] and [w]hen ... illness is controlled [an individual] can work and attend to his affairs, including the pursuit of any legal remedies that he may have.’”<sup>54</sup>

Even if Mr. Wilkins provided medical evidence of his mental incompetence and prescriptions, we still could not *per se* find his mental incapacity caused his late filing and

equitable tolling would not apply.<sup>55</sup> Relying on the Commonwealth's Response, Judge Perkin found Mr. Wilkins's behavior throughout his appeals process indicates his alleged mental impairment did not hinder him from timely filing his habeas petition. Judge Perkin described Mr. Wilkins "as an active litigant during the entire period for which he seeks tolling. He filed numerous *pro se* petitioners, briefs, and motions at all levels of Pennsylvania's judicial system well before turning to this matter:

1. A *pro se* PCRA petition in March 2012, which invoked *Holland* for the proposition that he was entitled to equitable tolling. Habeas Petition, pg. 20; *Commonwealth v. Darnell Wilkins*, CP-51-0000782-2008, pg. 12-13.

2. A timely *pro se* appeal from the denial of PCRA relief and submitted: a) a motion for discovery; b) an appellate brief; and c) a reply brief. See Exhibit B [to Response, Dkt. No. 12].

3. A petition for allocatur *nunc pro tunc* in May 2016, still acting *pro se*. See Exhibit D [to Response, Dkt. No. 12].

4. In July 2016, a state habeas petition arguing to reduce his restitution payments. See Exhibit E [to Response, Dkt. No. 12].

In short, petitioner actively prosecuted cases at all level of the Pennsylvania Courts from July 2010 through July 2016. He nevertheless neglected to file this habeas petition until November of 2016. Such activity in state court shows that petitioner was able to file a habeas petition well before this date, but simply ignored pursuing his federal rights for over seven years. Such activity demonstrates that equitable tolling is not appropriate here."<sup>56</sup>

We accept Judge Perkin's finding Mr. Wilkins failed to demonstrate his mental incapacity prevented him from timely filing his habeas petition.



**b. Misinformation from his attorney regarding the filing deadline does not entitle Mr. Wilkins to equitable tolling.**

Mr. Wilkins argues his Post-Conviction Relief Act counsel improperly advised him he had one year to file a habeas petition from the date the Pennsylvania Supreme Court denied his Post-Conviction Relief Act Petition.<sup>57</sup>

“There is no constitutional right to an attorney in state post-conviction proceedings.”<sup>58</sup> A plaintiff cannot bring a claim for constitutional ineffective assistance of counsel when no such constitutional right exists.<sup>59</sup> “[A] petitioner ‘must “bear the risk of attorney error.”’<sup>60</sup> In *Lawrence v. Florida*, the plaintiff filed a federal habeas application over one hundred days after the expiration of the one-year limitations period.<sup>61</sup> The plaintiff argued the “his counsel’s mistake in miscalculating the limitations period” caused the untimely filing and equitable tolling should apply.<sup>62</sup> Our Supreme Court rejected this argument holding “[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel.”<sup>63</sup> The Court reasoned the plaintiff’s “argument would essentially equitably toll limitations periods for every person whose attorney missed a deadline.”<sup>64</sup>

Absent attorney error, a *pro se* petitioner’s ignorance of the law does not provide a basis for equitable tolling.<sup>65</sup> As the court in *Lawrence* rejected the petitioner’s argument his attorney’s miscalculation of the deadline caused his untimely filing, we find Mr. Wilkins is not entitled to equitable tolling because his attorney allegedly misinformed him of the deadline to file his habeas petition.

**3. Mr. Wilkins failed to demonstrate good cause to compel the Commonwealth to provide a copy of his guilty plea and preliminary hearing transcripts and the issue is time barred.**

Mr. Wilkins sought default judgment after the Commonwealth failed to provide him with a copy of the guilty plea and preliminary hearing transcripts when responding to this present petition. He objects to Judge Perkin's finding he did not demonstrate good cause to compel the Commonwealth to provide these transcripts.

Under Rule 6 of the Rules Governing § 2254 cases, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure."<sup>66</sup> The district court has discretion to permit discovery in a habeas proceeding.<sup>67</sup> "In order to establish good cause a petitioner must point to specific evidence that might be discovered that would support a constitutional claim."<sup>68</sup> "Bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery."<sup>69</sup> A petitioner's discovery demands must be "specific, not merely speculative or conclusory."<sup>70</sup> In *Taylor v. Carol*, the petitioner requested the court to order respondent to produce the grand jury minutes and *voir dire* testimony transcripts to determine if the requisite twelve or more jurors indicted him.<sup>71</sup> The court found he did not present "any specific evidence or allegations indicating there is a possibility that he was indicted by less than twelve jurors, or that unqualified jurors were on the jury" and determined "it appears that he is on a 'fishing expedition' to comb through files to determine if he has a claim."<sup>72</sup>

Mr. Wilkins argues "the trial court lacked jurisdiction to accept his guilty plea because there was no preliminary hearing or competent evidence presented by the Commonwealth to establish a *prima facie* case existed and there was no 'factual basis' placed on record for the plea,[...] and the fact that this Court did in fact order the Respondent to 'attach copies of the

pertinent records' to the Response to the Petition, the preliminary hearing record and the guilty plea record are pertinent records which Respondent failed or refused to attach to the Response to the Petition, and Petitioner showed "good cause" for discovery of same by asserting that the preliminary hearing transcript and guilty plea transcript will show that [Mr. Wilkins] is entitled to release from custody."<sup>73</sup>

Judge Perkin found "this Court did not direct Respondents to provide Petitioner with any documents or discovery"<sup>74</sup> and acknowledge the January 6, 2017 Order requesting all records, including transcripts.<sup>75</sup> But, similar to the petitioner in *Taylor*'s unsupported conclusion the government failed to properly indict him, we find Mr. Wilkins failed to raise "specific evidence or allegations" the trial court did not have jurisdiction to accept his guilty plea and the Commonwealth failed to establish a *prima facie* case existed in support of Mr. Wilkins's guilty plea. Mr. Wilkins conclusively asserts allegations without citing to specific evidence. We overrule his objection and adopt and approve Judge Perkin's finding Mr. Wilkins failed to demonstrate good cause to compel discovery.

We also adopt and approve Judge Perkin's finding Mr. Wilkins's request for discovery is time barred due to his untimely filing.<sup>76</sup>

### **III. Conclusion**

In the accompanying Order, we approve and adopt Judge Perkin's comprehensive Report and Recommendation and dismiss Mr. Wilkins' petition for habeas corpus relief. We agree with Judge Perkin the petition must be dismissed. We further find no basis for a certificate of appealability.

<sup>1</sup> ECF Doc. No. 7, State Court Dockets; Court of Common Pleas of Philadelphia County, CP-51-CR-0000782-2008, CP-51-CR-0000745-2008, CP-51-0000703-2008.

<sup>2</sup> *Id.*

<sup>3</sup> ECF Doc. No. 15 at 2.

<sup>4</sup> ECF Doc. No. 7, State Court Documents; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell, Filed July 12, 2010.

<sup>5</sup> ECF Doc. No. 7, State Court Documents; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell, PCRA – Finley Letter, Filed Feb. 13, 2012; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell Motion to Withdraw as Counsel (Filed Feb. 13, 2012).

<sup>6</sup> ECF Doc. No. 7, State Court Documents; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell, Order Denying PCRA Petition as Frivolous – Attorney Relieved - Finley, April 16 2012.

<sup>7</sup> ECF Doc. No. 7, State Court Documents; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell, Statement of Matters Complained on Appeal, Filed May 15, 2012.

<sup>8</sup> ECF Doc. No. 15 at 3.

<sup>9</sup> ECF Doc. No. 7, State Court Docket; Superior Court of Pennsylvania, 1557 EDA 2012.

<sup>10</sup> *Commonwealth v. Darnell Wilkins*, 2013 WL 11276251 (Pa.Super. 2013).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> ECF Doc. No. 7, State Court Docket; Supreme Court of Pennsylvania, 68 EM 2016.

<sup>14</sup> *Commonwealth v. Darnell Wilkins*, 2016 Pa. LEXIS 1402 (Pa. July 5, 2016)(table).

<sup>15</sup> ECF Doc. No. 1.

<sup>16</sup> *Id.*

<sup>17</sup> ECF Doc. No. 1 at 5-10.

<sup>18</sup> ECF Doc. No. 1 at 14.

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<sup>19</sup> ECF Doc. No. 15.

<sup>20</sup> *Id.* at 5-14.

<sup>21</sup> *Id.* at 15.

<sup>22</sup> ECF Doc. No. 19.

<sup>23</sup> ECF Doc. No. 19 at 2.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 4.

<sup>27</sup> 28 U.S.C. § 2244 requires:

(d)(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;

(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.

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<sup>28</sup> 28 U.S.C. § 2244(d)(1).

<sup>29</sup> *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998).

<sup>30</sup> *Id.*

<sup>31</sup> *Kapral v. United States*, 166 F.3d 565, 573 (3d Cir. 1999)(quoting *Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998)).

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<sup>32</sup> Pa.R.A.P. 903.

<sup>33</sup> Pa.R.A.P. 903; *See also* ECF Doc. No. 15 at 7.

<sup>34</sup> *See* ECF Doc. No. 1.

<sup>35</sup> ECF Doc. No. 15 at 8.

<sup>36</sup> ECF Doc. No. 1 at 14.

<sup>37</sup> *Holland v. Florida*, 560 U.S. 631, 645 (2010).

<sup>38</sup> *Sistrunk v. Rozum*, 674 F.3d 181, 190 (3d Cir. 2012).

<sup>39</sup> *Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003)(citing *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001)).

<sup>40</sup> *Fahy*, 240 F.3d at 244 (3d Cir. 2001)(citing *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999)).

<sup>41</sup> ECF Doc. No. 19 at 3.

<sup>42</sup> *Nara v. Frank*, 264 F.3d 310, 319-320 (3d Cir. 2001)(citing *Lake v. Arnold*, 232 F.3d 360, 371 (3d Cir. 2000)).

<sup>43</sup> *Champney v. Secretary Penn. Dept. of Corrections*, 469 Fed.Appx. 113, 177 (3d Cir. 2001)(quoting *Nara*, 264 F.3d at 320)).

<sup>44</sup> *Bolarinwa v. Williams*, 593 F.3d 226, 232 (2d Cir. 2010)(quoting *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000)).

<sup>45</sup> *Champney*, 469 Fed.Appx. at 177 (3d Cir. 2001)(citing *Nara*, 264 F.3d at 320).

<sup>46</sup> *United States v. Harris*, 268 F.Supp.2d 500, 506 (E.D.Pa. 2003)(quoting *Nara*, 264 F.3d at 320).

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Hedges v. United States*, 404 F.3d 744, 753 (3d Cir. 2005).

<sup>50</sup> *Id.*

<sup>51</sup> *Heath v. Commonwealth*, C.A. Nos. 06-4787, 07-1766, 07-3013, 2007 WL 2207776, at \* 3 (E.D.Pa. July 27, 2007)(quoting *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003)).

<sup>52</sup> *Ross v. Varano*, 712 F.3d 784, 803 (3d Cir. 2013).

<sup>53</sup> *Champney*, 469 Fed. Appx. at 117 (3d Cir. 2001)(citing *Passmore v. Pennsylvania*, No. 080705, 2008 WL 2518108, at \*3 (M.D.Pa. 2008).

<sup>54</sup> *Boyd v. Gills*, 2004 WL 2397296, at \*3 (E.D.Pa. Oct. 25, 2004)(citing *Miller v. Runyon*, 77 F.3d 189, 192 (7th Cir. 1996)).

<sup>55</sup> *Boyd*, 2004 WL 2397296, at \*3(court found mental incompetence did not prohibit timely filing even after review of petitioner's medical records and psychiatric evaluations); *See also Harris*, 268 F.Supp.2d at 506 (equitable tolling inapplicable even after petitioner corroborated allegations of mental incompetence with expert testimony).

<sup>56</sup> ECF Doc. No. 12 at 6-7; *See also* ECF Doc. No. 15 at 12-13.

<sup>57</sup> ECF Doc. No. 19 at 4.

<sup>58</sup> *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)(citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *See also Murray v. Giarratano*, 492 U.S. 1 (1989).

<sup>59</sup> *Coleman*, 501 U.S. at 752 (citing *Wainwright v. Torna*, 455 U.S. 586 (1982)).

<sup>60</sup> *Holland v. Florida*, 560 U.S. 631, 651 (2010) (quoting *Coleman*, 501 U.S. at 752-753).

<sup>61</sup> *Lawrence v. Florida*, 549 U.S. 327, 329 (2007)

<sup>62</sup> *Id.* at 336.

<sup>63</sup> *Id.* at 336-337.

<sup>64</sup> *Id.* at 336.

<sup>65</sup> *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004)(citing *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir.2003)); *See also United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002); *Delaney v. Matesanz*, 264 F.3d 7, 15 (1st Cir. 2001) (equitable tolling did not apply when Plaintiff failed to show attorney intentionally deceived him regarding the statute of limitations)).

<sup>66</sup> *United States ex rel. Adonai-Adoni v. Prison Health Services*, 2007 WL 2407281, at \*1 (E.D.Pa. Aug. 20, 2007).

<sup>67</sup> *Adonai-Adoni*, 2007 WL 2407281, at \*1; *See also Taylor v. Carroll*, 2003 WL 22075693, at \*1 (D.Del. Aug. 29, 2003).

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<sup>68</sup> *Taylor*, No. 03-07, 2003 WL 22075693, at \*1.

<sup>69</sup> *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 301 (3d Cir. 1991)(citing *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987)).

<sup>70</sup> *Taylor v. Carol*, No. 03-07, 2003 WL 22075693, at \*1 (citing *Murphy v. Johnson*, 205 F.3d 809 (5<sup>th</sup> Cir.2000)).

<sup>71</sup> *Id.* at \*2.

<sup>72</sup> *Id.*

<sup>73</sup> ECF Doc. No. 19 at 2-3.

<sup>74</sup> ECF Doc. No. 14.

<sup>75</sup> ECF Doc. No. 5.

<sup>76</sup> ECF Doc. No. 14.



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DARNELL WILKINS

v.

JAY LANE, *et al.*

: CIVIL ACTION

: NO. 16-5845

**ORDER**

AND NOW, this 29<sup>th</sup> day of September 2017, upon considering Darnell Wilkins's Petition for writ of *Habeas Corpus* (ECF Doc. No. 1), the July 28, 2017 Report and Recommendation of United States Magistrate Judge Henry S. Perkin (ECF Doc. No. 15), Mr. Wilkins's Objections to the Report and Recommendation (ECF Doc. No. 19), and for reasons in the accompanying Memorandum, it is **ORDERED**:

1. United States Magistrate Judge Perkin's extensive and well-reasoned July 28, 2017 Report and Recommendation of (ECF Doc. No. 15) is **APPROVED AND ADOPTED**;
2. Mr. Wilkins's Petition for Writ of *habeas corpus* (ECF Doc. No. 1) is **DISMISSED**;
3. There is no probable cause to issue a certificate of appealability; and
4. The Clerk of Court shall mark this case closed for statistical purposes.

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KEARNEY, J.

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**MEMORANDUM**

**KEARNEY, J.**

**September 29, 2017**

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**I. Background**

On March 17, 2008, Darnell Wilkins pled guilty to seven counts of robbery, one count of aggravated assault, and eight counts of possession of an instrument of crime.<sup>1</sup> The state court accepted Mr. Wilkins's guilty plea and sentenced him to a negotiated aggregate term of fifteen to thirty years imprisonment.<sup>2</sup> Mr. Wilkins did not move to withdraw his guilty plea or file a direct appeal to the Pennsylvania Superior Court.<sup>3</sup>

Mr. Wilkins instead filed a *pro se* petition for collateral review under the Pennsylvania Post-Conviction Relief Act on July 12, 2010 alleging constitutional violations, ineffective assistance of counsel, and an unlawfully induced guilty plea.<sup>4</sup> The court appointed counsel to

represent him, but the attorney filed a February 13, 2012 letter and moving to withdraw because the claims lacked merit.<sup>5</sup> The PCRA court dismissed Mr. Wilkins' petition as frivolous on April 16, 2012.<sup>6</sup>

Mr. Wilkins appealed the denial of his PCRA petition to the Pennsylvania Superior Court on May 15, 2012.<sup>7</sup> Before submitting his brief, Mr. Wilkins filed a *pro se* motion for discovery, which the superior court denied on August 22, 2012.<sup>8</sup> He moved for reconsideration of the discovery ruling, which the superior court denied.<sup>9</sup> Mr. Wilkins filed a *pro se* brief in the superior court claiming the PCRA court abused its discretion in failing to consider his being subject to an improper preliminary hearing and the trial court lacked jurisdiction to accept his guilty plea.<sup>10</sup> Mr. Wilkins argued his mental incompetence prevented him from validly entering a guilty plea and from timely filing a *pro se* direct appeal or PCRA petition.<sup>11</sup> The superior court affirmed the PCRA court's denial of the PCRA petition finding his issues lacked merit, were untimely, and did not meet the exceptions to the one-year statute of limitations.<sup>12</sup>

Mr. Wilkins filed a May 13, 2016 Petition for leave to file a petition for allowance of appeal *nunc pro tunc*.<sup>13</sup> The Pennsylvania Supreme Court declined to review the appeal on July 5, 2016.<sup>14</sup> He then filed a Petition for writ of habeas corpus ad subjiciendum in the Court of Common Pleas of Philadelphia County on July 11, 2016 challenging the calculation of restitution owed to the victims.<sup>15</sup> This petition is pending before the state court.<sup>16</sup>

Mr. Wilkins filed a November 2, 2016 *pro se* Petition for writ of habeas corpus alleging 1) violation of his appellate and PCRA rights; 2) he did not voluntarily, intelligently, or knowingly enter his guilty plea because he suffers from a "mental health problem;" and 3) he could not timely pursue an appeal or collateral review.<sup>17</sup> Mr. Wilkins alleged his "mental health problem" prohibited his timely filing the habeas petition.<sup>18</sup>

We referred this case to the Honorable Henry S. Perkin for a Report and Recommendation.<sup>19</sup> Judge Perkin timely issued a July 28, 2017 Report and Recommendation finding Mr. Wilkins's federal habeas corpus petition statutorily time-barred and ineligible for either statutory or equitable tolling.<sup>20</sup> Judge Perkin recommended denial with prejudice of Mr. Wilkins's petition and dismissal without an evidentiary hearing.<sup>21</sup>

## **II. Analysis**

Mr. Wilkins now objects, moving for reconsideration and stay, to Judge Perkin's July 28, 2017 comprehensive Report and Recommendation.<sup>22</sup> Mr. Wilkins argues (1) Judge Perkin incorrectly found Mr. Wilkins did not demonstrate good cause to require the Commonwealth to provide documents and discovery<sup>23</sup> needed to show the trial court lacked jurisdiction at the time of his guilty plea because the Commonwealth did not establish a *prima facie* case against him,<sup>24</sup> (2) "he was denied due process because he never had a competency hearing or investigation into his mental health and effects of the medication (i.e. thorazine) he was taking during his guilty plea"<sup>25</sup>, and (3) "his PCRA counsel wrongly advised him that he had one (1) year to file the instant habeas petition from the date his PCRA Petition was appealed to the Pennsylvania Supreme Court and denied."<sup>26</sup>

### **A. Mr. Wilkins's federal habeas petition is statutorily time-barred.**

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations to apply for a writ of habeas corpus challenging a state court judgment.<sup>27</sup> The limitation period begins on "the date on which the judgment of sentence became final by the conclusion of direct review or the expiration of time for seeking such review."<sup>28</sup> An exception exists when direct review of a criminal conviction concluded before the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act.<sup>29</sup> Such cases are permitted one year from April 24, 1996 to file a habeas petition.<sup>30</sup> Our court of appeals considers "direct review" to

mean “review of the state’s highest court.”<sup>31</sup> Under Pa.R.A.P. 903, a party has thirty days to file an appeal after the entry of an order.<sup>32</sup>

Mr. Wilkins’s judgment of sentence became final on April 17, 2008, thirty days after his March 17, 2008 guilty plea and when his time for filing a notice of appeal with the Pennsylvania Superior Court expired.<sup>33</sup> The one-year time limit for Mr. Wilkins to file a timely federal Petition for writ of habeas corpus began on April 17, 2008 and concluded on April 17, 2009. Mr. Wilkins filed his habeas petition on November 3, 2016, over seven years after the expiration of the limitation period.<sup>34</sup>

**1. Mr. Wilkins’s federal habeas petition is ineligible for statutory tolling.**

We adopt and approve Judge Perkin’s finding Mr. Wilkins is ineligible for an extended deadline for the limitation period under 28 U.S.C. § 2244(d)(1).<sup>35</sup>

**2. Mr. Wilkins’s federal habeas petition is ineligible for equitable tolling.**

Judge Perkin found Mr. Wilkins’s untimely petition is not eligible for equitable tolling. We agree. Mr. Wilkins argues he is entitled to equitable tolling because his “mental health problems[,] he was unable to file a timely PCRA petition,” as well as a timely habeas petition.<sup>36</sup>

The Supreme Court directs equitable tolling applies to the Antiterrorism and Effective Death Penalty Act statute of limitations.<sup>37</sup> But equitable tolling is limited in its application.<sup>38</sup> “The two general requirements for equitable tolling [are]: (1) that ‘the Petitioner has in some extraordinary way been prevented from asserting his or her rights;’ and (2) that the petitioner has shown that ‘he or she exercised reasonable diligence in investigating and bringing [the] claims.’”<sup>39</sup> Our court of appeals allows three instances for equitable tolling: “if (1) 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 mistakenly in the wrong forum.”<sup>40</sup>

**a. Mr. Wilkins's alleged mental incapacity does not entitle him to equitable tolling.**

Mr. Wilkins argues "he was denied due process because he never had a competency hearing or investigation into his mental health and effects of the medication (i.e. thorazine) he was taking during his guilty plea."<sup>41</sup> Judge Perkin found Mr. Wilkins's alleged mental incapacity did not hinder his ability to timely file his habeas petition. We agree.

Our court of appeals directs mental incompetency coupled with attorney abandonment may be deemed an "extraordinary circumstance" to justify equitable tolling, but "mental incompetence is not a *per se* reason to toll a statute of limitations."<sup>42</sup> For equitable tolling to be appropriate, "the alleged mental incompetence must somehow have affected the petitioner's ability to file a timely action."<sup>43</sup> The burden rests on the petitioner to demonstrate a "particularized description of how [his] condition adversely affected [his] capacity to function generally or in relationship to the pursuit of [his] rights" in order for equitable tolling for mental illness to apply.<sup>44</sup> Mr. Wilkins's "alleged mental incompetence must somehow have affected [his] ability to file a timely habeas petition."<sup>45</sup> "[M]ental health problems," an undefined and expansive category is not a basis for equitable tolling in and of itself.<sup>46</sup> Mr. Wilkins must demonstrate his mental incompetence caused him "an inability to pursue [his] legal rights, provided there is a nexus between [his] mental condition and [his] inability to file a timely petition."<sup>47</sup>

"[A] mental condition that burdens but does not prevent a prisoner from filing a timely petition does not constitute 'extraordinary circumstances' justifying equitable tolling."<sup>48</sup> A mental impairment "even rising to the level of insanity" may not be enough to warrant equitable tolling.<sup>49</sup> Even the combination of a *pro se* plaintiff with a mental incapacity is not enough for equitable tolling.<sup>50</sup> The mental condition must have "made it impossible to file a petition on

time.”<sup>51</sup>

Mr. Wilkins cannot conclusively claim his mental impairment prevented him from timely filing without demonstrating his mental disability hindered him from submitting his habeas petition on time.<sup>52</sup> In *Champney v. Secretary Pennsylvania Department of Corrections*, our court of appeals defined the factors we must consider in determining if an individual’s mental incapacity prevented him from filing on time: “(1) [whether] the petitioner [was] adjudicated incompetent and, if so, when did the adjudication occur in relation to the habeas statutory period; (2) [whether] the petitioner [was] institutionalized for his mental impairment; (3) [whether] the petitioner handled or assisted in other legal matters which required action during the federal limitations period; and (4) [whether] the petitioner supported his allegations of impairment with extrinsic evidence such as evaluations and/or medications.”<sup>53</sup>

Mr. Wilkins has not met the *Champney* factors. As Judge Perkin found, Mr. Wilkins has not adduced evidence of being adjudicated incompetent or institutionalized for his alleged mental impairments. He did not provide documents or medical evidence corroborating his alleged mental impairments. He still does not provide medical records or documents corroborating a specific diagnosis, his alleged thiorazine prescription, or if the thiorazine compromised his ability to participate in the proceedings or timely file during the appeals process. “[T]he use of psychotropic medications can weigh against equitable tolling, because frequently the treatment of mental illness with drugs will ‘restore the patient to at least a reasonable approximation of normal mentation and behavior[ ] and [w]hen ... illness is controlled [an individual] can work and attend to his affairs, including the pursuit of any legal remedies that he may have.’”<sup>54</sup>

Even if Mr. Wilkins provided medical evidence of his mental incompetence and prescriptions, we still could not *per se* find his mental incapacity caused his late filing and

equitable tolling would not apply.<sup>55</sup> Relying on the Commonwealth's Response, Judge Perkin found Mr. Wilkins's behavior throughout his appeals process indicates his alleged mental impairment did not hinder him from timely filing his habeas petition. Judge Perkin described Mr. Wilkins "as an active litigant during the entire period for which he seeks tolling. He filed numerous *pro se* petitions, briefs, and motions at all levels of Pennsylvania's judicial system well before turning to this matter:

1. A *pro se* PCRA petition in March 2012, which invoked *Holland* for the proposition that he was entitled to equitable tolling. Habeas Petition, pg. 20; *Commonwealth v. Darnell Wilkins*, CP-51-0000782-2008, pg. 12-13.

2. A timely *pro se* appeal from the denial of PCRA relief and submitted: a) a motion for discovery; b) an appellate brief; and c) a reply brief. See Exhibit B [to Response, Dkt. No. 12].

3. A petition for allocatur *nunc pro tunc* in May 2016, still acting *pro se*. See Exhibit D [to Response, Dkt. No. 12].

4. In July 2016, a state habeas petition arguing to reduce his restitution payments. See Exhibit E [to Response, Dkt. No. 12].

In short, petitioner actively prosecuted cases at all level of the Pennsylvania Courts from July 2010 through July 2016. He nevertheless neglected to file this habeas petition until November of 2016. Such activity in state court shows that petitioner was able to file a habeas petition well before this date, but simply ignored pursuing his federal rights for over seven years. Such activity demonstrates that equitable tolling is not appropriate here."<sup>56</sup>

We accept Judge Perkin's finding Mr. Wilkins failed to demonstrate his mental incapacity prevented him from timely filing his habeas petition.



**b. Misinformation from his attorney regarding the filing deadline does not entitle Mr. Wilkins to equitable tolling.**

Mr. Wilkins argues his Post-Conviction Relief Act counsel improperly advised him he had one year to file a habeas petition from the date the Pennsylvania Supreme Court denied his Post-Conviction Relief Act Petition.<sup>57</sup>

“There is no constitutional right to an attorney in state post-conviction proceedings.”<sup>58</sup> A plaintiff cannot bring a claim for constitutional ineffective assistance of counsel when no such constitutional right exists.<sup>59</sup> “[A] petitioner ‘must “bear the risk of attorney error.”’<sup>60</sup> In *Lawrence v. Florida*, the plaintiff filed a federal habeas application over one hundred days after the expiration of the one-year limitations period.<sup>61</sup> The plaintiff argued the “his counsel’s mistake in miscalculating the limitations period” caused the untimely filing and equitable tolling should apply.<sup>62</sup> Our Supreme Court rejected this argument holding “[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel.”<sup>63</sup> The Court reasoned the plaintiff’s “argument would essentially equitably toll limitations periods for every person whose attorney missed a deadline.”<sup>64</sup>

Absent attorney error, a *pro se* petitioner’s ignorance of the law does not provide a basis for equitable tolling.<sup>65</sup> As the court in *Lawrence* rejected the petitioner’s argument his attorney’s miscalculation of the deadline caused his untimely filing, we find Mr. Wilkins is not entitled to equitable tolling because his attorney allegedly misinformed him of the deadline to file his habeas petition.

**3. Mr. Wilkins failed to demonstrate good cause to compel the Commonwealth to provide a copy of his guilty plea and preliminary hearing transcripts and the issue is time barred.**

Mr. Wilkins sought default judgment after the Commonwealth failed to provide him with a copy of the guilty plea and preliminary hearing transcripts when responding to this present petition. He objects to Judge Perkin's finding he did not demonstrate good cause to compel the Commonwealth to provide these transcripts.

Under Rule 6 of the Rules Governing § 2254 cases, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure."<sup>66</sup> The district court has discretion to permit discovery in a habeas proceeding.<sup>67</sup> "In order to establish good cause a petitioner must point to specific evidence that might be discovered that would support a constitutional claim."<sup>68</sup> "Bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery."<sup>69</sup> A petitioner's discovery demands must be "specific, not merely speculative or conclusory."<sup>70</sup> In *Taylor v. Carol*, the petitioner requested the court to order respondent to produce the grand jury minutes and *voir dire* testimony transcripts to determine if the requisite twelve or more jurors indicted him.<sup>71</sup> The court found he did not present "any specific evidence or allegations indicating there is a possibility that he was indicted by less than twelve jurors, or that unqualified jurors were on the jury" and determined "it appears that he is on a 'fishing expedition' to comb through files to determine if he has a claim."<sup>72</sup>

Mr. Wilkins argues "the trial court lacked jurisdiction to accept his guilty plea because there was no preliminary hearing or competent evidence presented by the Commonwealth to establish a *prima facie* case existed and there was no 'factual basis' placed on record for the plea,[...] and the fact that this Court did in fact order the Respondent to 'attach copies of the

pertinent records' to the Response to the Petition, the preliminary hearing record and the guilty plea record are pertinent records which Respondent failed or refused to attach to the Response to the Petition, and Petitioner showed "good cause" for discovery of same by asserting that the preliminary hearing transcript and guilty plea transcript will show that [Mr. Wilkins] is entitled to release from custody."<sup>73</sup>

Judge Perkin found "this Court did not direct Respondents to provide Petitioner with any documents or discovery"<sup>74</sup> and acknowledge the January 6, 2017 Order requesting all records, including transcripts.<sup>75</sup> But, similar to the petitioner in *Taylor's* unsupported conclusion the government failed to properly indict him, we find Mr. Wilkins failed to raise "specific evidence or allegations" the trial court did not have jurisdiction to accept his guilty plea and the Commonwealth failed to establish a *prima facie* case existed in support of Mr. Wilkins's guilty plea. Mr. Wilkins conclusively asserts allegations without citing to specific evidence. We overrule his objection and adopt and approve Judge Perkin's finding Mr. Wilkins failed to demonstrate good cause to compel discovery.

We also adopt and approve Judge Perkin's finding Mr. Wilkins's request for discovery is time barred due to his untimely filing.<sup>76</sup>

### **III. Conclusion**

In the accompanying Order, we approve and adopt Judge Perkin's comprehensive Report and Recommendation and dismiss Mr. Wilkins' petition for habeas corpus relief. We agree with Judge Perkin the petition must be dismissed. We further find no basis for a certificate of appealability.

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<sup>1</sup> ECF Doc. No. 7, State Court Dockets; Court of Common Pleas of Philadelphia County, CP-51-CR-0000782-2008, CP-51-CR-0000745-2008, CP-51-0000703-2008.

<sup>2</sup> *Id.*

<sup>3</sup> ECF Doc. No. 15 at 2.

<sup>4</sup> ECF Doc. No. 7, State Court Documents; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell, Filed July 12, 2010.

<sup>5</sup> ECF Doc. No. 7, State Court Documents; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell, PCRA – Finley Letter, Filed Feb. 13, 2012; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell Motion to Withdraw as Counsel (Filed Feb. 13, 2012).

<sup>6</sup> ECF Doc. No. 7, State Court Documents; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell, Order Denying PCRA Petition as Frivolous – Attorney Relieved - Finley, April 16 2012.

<sup>7</sup> ECF Doc. No. 7, State Court Documents; Court of Common Pleas of Philadelphia County, CP-51-CR-0000745-2008, Comm. v. Wilkins, Darnell, Statement of Matters Complained on Appeal, Filed May 15, 2012.

<sup>8</sup> ECF Doc. No. 15 at 3.

<sup>9</sup> ECF Doc. No. 7, State Court Docket; Superior Court of Pennsylvania, 1557 EDA 2012.

<sup>10</sup> *Commonwealth v. Darnell Wilkins*, 2013 WL 11276251 (Pa.Super. 2013).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> ECF Doc. No. 7, State Court Docket; Supreme Court of Pennsylvania, 68 EM 2016.

<sup>14</sup> *Commonwealth v. Darnell Wilkins*, 2016 Pa. LEXIS 1402 (Pa. July 5, 2016)(table).

<sup>15</sup> ECF Doc. No. 1.

<sup>16</sup> *Id.*

<sup>17</sup> ECF Doc. No. 1 at 5-10.

<sup>18</sup> ECF Doc. No. 1 at 14.

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<sup>19</sup> ECF Doc. No. 15.

<sup>20</sup> *Id.* at 5-14.

<sup>21</sup> *Id.* at 15.

<sup>22</sup> ECF Doc. No. 19.

<sup>23</sup> ECF Doc. No. 19 at 2.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 4.

<sup>27</sup> 28 U.S.C. § 2244 requires:

(d)(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;

(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.

<sup>28</sup> 28 U.S.C. § 2244(d)(1).

<sup>29</sup> *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998).

<sup>30</sup> *Id.*

<sup>31</sup> *Kapral v. United States*, 166 F.3d 565, 573 (3d Cir. 1999)(quoting *Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998)).

<sup>32</sup> Pa.R.A.P. 903.

<sup>33</sup> Pa.R.A.P. 903; *See also* ECF Doc. No. 15 at 7.

<sup>34</sup> *See* ECF Doc. No. 1.

<sup>35</sup> ECF Doc. No. 15 at 8.

<sup>36</sup> ECF Doc. No. 1 at 14.

<sup>37</sup> *Holland v. Florida*, 560 U.S. 631, 645 (2010).

<sup>38</sup> *Sistrunk v. Rozum*, 674 F.3d 181, 190 (3d Cir. 2012).

<sup>39</sup> *Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003)(citing *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001)).

<sup>40</sup> *Fahy*, 240 F.3d at 244 (3d Cir. 2001)(citing *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999)).

<sup>41</sup> ECF Doc. No. 19 at 3.

<sup>42</sup> *Nara v. Frank*, 264 F.3d 310, 319-320 (3d Cir. 2001)(citing *Lake v. Arnold*, 232 F.3d 360, 371 (3d Cir. 2000)).

<sup>43</sup> *Champney v. Secretary Penn. Dept. of Corrections*, 469 Fed.Appx. 113, 177 (3d Cir. 2001)(quoting *Nara*, 264 F.3d at 320)).

<sup>44</sup> *Bolarinwa v. Williams*, 593 F.3d 226, 232 (2d Cir. 2010)(quoting *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000)).

<sup>45</sup> *Champney*, 469 Fed.Appx. at 177 (3d Cir. 2001)(citing *Nara*, 264 F.3d at 320).

<sup>46</sup> *United States v. Harris*, 268 F.Supp.2d 500, 506 (E.D.Pa. 2003)(quoting *Nara*, 264 F.3d at 320).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Hedges v. United States*, 404 F.3d 744, 753 (3d Cir. 2005).

<sup>50</sup> *Id.*

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<sup>51</sup> *Heath v. Commonwealth*, C.A. Nos. 06-4787, 07-1766, 07-3013, 2007 WL 2207776, at \* 3 (E.D.Pa. July 27, 2007)(quoting *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003)).

<sup>52</sup> *Ross v. Varano*, 712 F.3d 784, 803 (3d Cir. 2013).

<sup>53</sup> *Champney*, 469 Fed. Appx. at 117 (3d Cir. 2001)(citing *Passmore v. Pennsylvania*, No. 080705, 2008 WL 2518108, at \*3 (M.D.Pa. 2008).

<sup>54</sup> *Boyd v. Gills*, 2004 WL 2397296, at \*3 (E.D.Pa. Oct. 25, 2004)(citing *Miller v. Runyon*, 77 F.3d 189, 192 (7th Cir. 1996)).

<sup>55</sup> *Boyd*, 2004 WL 2397296, at \*3(court found mental incompetence did not prohibit timely filing even after review of petitioner's medical records and psychiatric evaluations); *See also Harris*, 268 F.Supp.2d at 506 (equitable tolling inapplicable even after petitioner corroborated allegations of mental incompetence with expert testimony).

<sup>56</sup> ECF Doc. No. 12 at 6-7; *See also* ECF Doc. No. 15 at 12-13.

<sup>57</sup> ECF Doc. No. 19 at 4.

<sup>58</sup> *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)(citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *See also Murray v. Giarratano*, 492 U.S. 1 (1989).

<sup>59</sup> *Coleman*, 501 U.S. at 752 (citing *Wainwright v. Torna*, 455 U.S. 586 (1982)).

<sup>60</sup> *Holland v. Florida*, 560 U.S. 631, 651 (2010) (quoting *Coleman*, 501 U.S. at 752-753).

<sup>61</sup> *Lawrence v. Florida*, 549 U.S. 327, 329 (2007)

<sup>62</sup> *Id.* at 336.

<sup>63</sup> *Id.* at 336-337.

<sup>64</sup> *Id.* at 336.

<sup>65</sup> *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004)(citing *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir.2003)); *See also United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002); *Delaney v. Matesanz*, 264 F.3d 7, 15 (1st Cir. 2001) (equitable tolling did not apply when Plaintiff failed to show attorney intentionally deceived him regarding the statute of limitations)).

<sup>66</sup> *United States ex rel. Adonai-Adoni v. Prison Health Services*, 2007 WL 2407281, at \*1 (E.D.Pa. Aug. 20, 2007).

<sup>67</sup> *Adonai-Adoni*, 2007 WL 2407281, at \*1; *See also Taylor v. Carroll*, 2003 WL 22075693, at \*1 (D.Del. Aug. 29, 2003).

<sup>68</sup> *Taylor*, No. 03-07, 2003 WL 22075693, at \*1.

<sup>69</sup> *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 301 (3d Cir. 1991)(citing *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987)).

<sup>70</sup> *Taylor v. Carol*, No. 03-07, 2003 WL 22075693, at \*1 (citing *Murphy v. Johnson*, 205 F.3d 809 (5<sup>th</sup> Cir.2000)).

<sup>71</sup> *Id.* at \*2.

<sup>72</sup> *Id.*

<sup>73</sup> ECF Doc. No. 19 at 2-3.

<sup>74</sup> ECF Doc. No. 14.

<sup>75</sup> ECF Doc. No. 5.

<sup>76</sup> ECF Doc. No. 14.



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

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DARNELL WILKINS,

Petitioner

v.

JAY LANE, et. al.

Respondents

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CIVIL ACTION

NO. 16-5845

Henry S. Perkin, M.J.

July 28, 2017

**REPORT AND RECOMMENDATION**

Presently before the Court is the *pro se* Petition for Writ of Habeas Corpus (Docket No. 1) dated November 3, 2016 and filed November 10, 2016 by the Petitioner, Darnell Wilkins ("Petitioner"), pursuant to 28 U.S.C. § 2254. Respondents filed their Response to Petition for Writ of Habeas Corpus (Docket No. 12) on July 7, 2017.

Petitioner is currently incarcerated at State Correctional Institution - Fayette in LaBelle, Pennsylvania. By order dated January 3, 2017, the matter was assigned to the undersigned for preparation of a Report and Recommendation. For the reasons that follow, it is recommended that the Petition should be denied with prejudice and dismissed without an evidentiary hearing.

**I. PROCEDURAL HISTORY.<sup>1</sup>**

**State Court Proceedings**

On March 17, 2008, Petitioner appeared before the Honorable Leon W. Tucker in the Court of Common Pleas of Philadelphia County, and pled guilty to seven counts of robbery, one count of aggravated assault, and eight counts of possession of an instrument of crime. See State Court Dockets; Court of Common Pleas of Philadelphia County, CP-51-CR-0000782-2008, CP-51-CR-0000745-2008, CP-51-CR-0000703-2008. Judge Tucker accepted Petitioner's plea, and sentenced Petitioner to a negotiated aggregate term of fifteen to thirty years imprisonment. See State Court Dockets; Court of Common Pleas of Philadelphia County, CP-51-CR-0000782-2008, CP-51-CR-0000745-2008, CP-51-CR-0000703-2008. Petitioner did not file a motion to withdraw his guilty plea, nor did he file a direct appeal to the Pennsylvania Superior Court.

More than two years later, on July 12, 2010, Petitioner filed a *pro se* petition for collateral review under the Pennsylvania Post Conviction Relief Act ("PCRA") in which he alleged that he was eligible for relief due to constitutional violations, ineffective assistance of counsel, and an unlawfully induced guilty plea. Counsel was appointed to represent Petitioner, but following his review of the record, filed a letter and motion to withdraw on February 13, 2012, advising the PCRA court that he was unable to discern any issues of arguable merit to advance on Petitioner's behalf. Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). On March 16, 2012, Petitioner filed an amended PCRA petition citing Holland v. Florida, 560 U.S. 631, 649 (2010), in support of his claim that his PCRA petition was timely filed.

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<sup>1</sup> This information is taken from the Petition for Writ of Habeas Corpus, the Response to Petition for Writ of Habeas Corpus, and the attachments to those pleadings. In addition, this Court ordered and reviewed the state court record in this matter. The information contained in the state court record has been considered and incorporated into this Report and Recommendation.

On March 19, 2012, the PCRA court entered an order giving Pa.R.Crim.P. 907 notice of its intent to dismiss Petitioner's PCRA petition. Petitioner failed to respond, and by order dated April 16, 2012, the PCRA court dismissed Petitioner's PCRA petition as frivolous.

Petitioner appealed the denial of his PCRA petition to the Pennsylvania Superior Court. On May 15, 2012, Petitioner filed his statement of matters complained of on appeal. Before submitting his brief, Petitioner filed a *pro se* motion for discovery, which was denied by the Superior Court on August 22, 2012. Petitioner's motion for reconsideration as to the discovery ruling was also denied. See State Court Docket; Superior Court of Pennsylvania, 1557 EDA 2012.

On October 31, 2012, Petitioner filed his *pro se* brief in the Superior Court, alleging that the PCRA court erred and abused its discretion in failing to consider that his preliminary hearing was improper and that the trial court lacked jurisdiction to accept his guilty plea. Commonwealth v. Darnell Wilkins, 2013 WL 11276251 (Pa. Super. 2013); Response to Petition for Writ of Habeas Corpus ("Response"), Exhibit C. Petitioner further asserted that his mental incompetence impeded him from entering a valid guilty plea and from filing a *pro se* direct appeal and/or timely PCRA petition. Id. The Commonwealth filed its response on February 21, 2013, and Petitioner filed a reply brief on March 6, 2013. See State Court Docket; Superior Court of Pennsylvania, 1557 EDA 2012.

On March 21, 2013, the Superior Court issued a memorandum opinion finding that Petitioner's issues did not merit relief, and affirming the PCRA court's denial of the PCRA petition. Commonwealth v. Darnell Wilkins, 69 A.3d 1298, 2013 Pa. Super. LEXIS 1395 (Pa. Super. 2013); Response, Exhibit C. Specifically, the Superior Court held that Petitioner's PCRA

petitions were untimely, and did not meet any exceptions to the one-year statute of limitations. Id. at \*2.

Although Petitioner did not initially seek an appeal with the Pennsylvania Supreme Court, he subsequently filed a Petition for Leave to File Petition for Allowance of Appeal Nunc Pro Tunc on May 13, 2016. See State Court Docket; Supreme Court of Pennsylvania, 68 EM 2016. The Supreme Court declined review on July 5, 2016. Commonwealth v. Darnell Wilkins, 2016 Pa. LEXIS 1402 (Pa. July 5, 2016)(table).

On July 11, 2016, Petitioner filed a “Petition for Writ of Habeas Corpus Ad Subjiciendum” in the Court of Common Peas of Philadelphia County. This Petition, which challenges the calculation of restitution owed to the victims, remains pending before the state court.

#### Federal Court Proceedings

Petitioner signed the instant *pro se* Petition for Writ of Habeas Corpus on November 3, 2016, and it was docketed by the Clerk of Court on November 10, 2016. See Docket No. 1. Pursuant to the prison mailbox rule, this Court will consider the date of filing as November 3, 2016. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1997) (motion is deemed timely filed on date petitioner gave petition to prison officials to mail). Petitioner’s habeas Petition alleges, *inter alia*, that his appellate and PCRA rights were violated; his guilty plea was not voluntarily, intelligently, or knowingly made because he was suffering from a “mental health problem;” and he was unable to pursue an appeal or collateral review in a timely fashion. See Petition, Docket No. 1 at 5-10. Petitioner further avers that his “mental health problem” has prevented him from filing a timely habeas petition. Id. at 14.

The case was assigned to the Honorable Mark A. Kearney, who referred it to the undersigned for preparation of a Report and Recommendation on January 3, 2017. On January 6, 2017, the undersigned ordered the District Attorney of Philadelphia County added as a Respondent, and directed the District Attorney to file a Response and a Brief or Memorandum in support thereof. See Docket No. 6. On that same date, the undersigned also entered an Order directing that the Prothonotary of Philadelphia/Clerk of Courts for the Court of Common Pleas of Philadelphia County forward copies of all records, including transcripts of notes of testimony at arraignment, pre-trial and suppression hearings, trial, sentencing, and post-conviction hearings and appeals; all trial and appellate briefs and petitions, all pleadings, and all court opinions of proceedings in connection with this matter. See Docket No. 5. The state court record pertaining to Commonwealth v. Darnell Williams, Court of Common Pleas of Philadelphia County, was received in chambers of the undersigned on February 27, 2017. See Docket No. 7.

On July 7, 2017, Respondents filed a Response to Petition for Writ of Habeas Corpus. See Docket No. 12. Respondents contend that the Petition is time-barred, the principles of equitable tolling do not apply to excuse the untimeliness of the Petition, and the case should be dismissed with prejudice and without an evidentiary hearing. Having reviewed the documents of record in this case, we offer this Report and Recommendation.

## **II. DISCUSSION.**

### **A. The Federal Habeas Corpus Petition at Issue is Statutorily Time-Barred.**

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which was enacted on April 24, 1996, requires that federal courts give greater deference to a state court’s legal determinations. The AEDPA also amended 28 U.S.C. section 2244, to require that

a strict one-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.<sup>2</sup> However, if direct review of a criminal conviction ended prior to the AEDPA's effective date, a prisoner has one year subsequent to the April 24, 1996 effective date to properly file a habeas action. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). In this case, the applicable starting point to examine the limitation period is the latest date on which the judgment of sentence became final, either by the conclusion of direct review or the expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1).

Petitioner's judgment of sentence became final on April 17, 2008, when his time for filing a notice of appeal with the Pennsylvania Superior Court expired. See 28 U.S.C. § 2244(d)(1)(A); 42 Pa. C.S.A. § 9545(b)(3); Pa. R.A.P. 903 (allowing thirty days after the entry of

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<sup>2</sup> 28 U.S.C. section 2244 requires that:

(d)(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;

(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).

an order to file an appeal in the Pennsylvania Superior Court); Kapral v. United States, 166 F.3d 565, 570-571 (3d Cir. 1999) (judgment of sentence becomes final at conclusion of direct review or expiration of time for seeking such review). Accordingly, the one-year time limit for Petitioner to timely file a federal Petition for Writ of Habeas Corpus began on April 17, 2008. In the absence of any statutory or equitable tolling, Petitioner, therefore, would have been required to file his federal habeas petition on or before April 17, 2009. Petitioner, however, did not file his federal habeas Petition until November 3, 2016, more than seven years after the limitation period expired.

We note, however, that because the AEDPA's one-year statute of limitations is subject to both statutory and equitable tolling, we must examine whether the instant habeas Petition may be considered timely filed under either concept. 28 U.S.C. § 2244(d) (enumerating statutory tolling provisions); Merritt v. Blaine, 326 F.3d 157, 161 (3d Cir.), cert. denied, 540 U.S. 921 (2003) (holding AEDPA's time limit is subject to the doctrine of equitable tolling, a judicially crafted exception).

**B. The Federal Habeas Corpus Petition at Issue is Not Eligible for Statutory or Equitable Tolling.**

The AEDPA's one-year statute of limitations is subject to both statutory and equitable tolling. 28 U.S.C. § 2244(d) (enumerating statutory tolling provisions); Merritt v. Blaine, 326 F.3d 157, 161 (3d Cir.), cert. denied, 540 U.S. 921 (2003) (holding AEDPA's time limit is subject to the doctrine of equitable tolling, a judicially crafted exception).

**1. Statutory Tolling**

We note initially that Petitioner is not entitled to a new, extended deadline for the AEDPA's limitation period pursuant to 28 U.S.C. § 2244(d)(1). In addition, there is no evidence

to demonstrate that state action prevented the timely filing of his habeas action. 28 U.S.C. § 2244(d)(1)(B). Furthermore, the claims alleged in the Petition do not rely on a new rule of federal constitutional law of retroactive application. 28 U.S.C. § 2244(d)(1)(C). Finally, Petitioner has not made a showing that the factual predicate of his claims was not discoverable through the exercise of due diligence long ago. 28 U.S.C. § 2244(d)(1)(D).

With respect to Petitioner's PCRA filing, we note that the limitations period will be statutorily tolled for the time during which a "properly filed" application for state post-conviction or other collateral review is pending. See 28 U.S.C. § 2244(d)(2). However, if a PCRA petition is not timely filed, it is not considered properly filed in order to toll the AEDPA one-year statutory time period. Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005).

Petitioner's PCRA petitions, filed on July 12, 2010 and March 16, 2012, do not give rise to statutory tolling. These petitions have been ruled untimely by the PCRA court, and were not properly filed. See Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) ("Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2)").

## 2. Equitable Tolling

This Court must next examine whether the AEDPA statute of limitations should be equitably tolled to consider the Petition timely filed. Robinson v. Johnson, 313 F.3d 128, 134 (3d Cir. 2002), cert. denied, 540 U.S. 826 (2003)(citing Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 617-618 (3d Cir. 1998)(citation omitted). The limitation period will be equitably tolled when the principles of equity would make the rigid application of a limitation period unfair. Satterfield v. Johnson, 434 F.3d 185, 195 (3d Cir. 2006); Jones v. Morton, 195



F.3d 153, 159 (3d Cir. 1999). In this matter, Petitioner avers that because he was suffering from “mental health problems[,] he was unable to file a timely PCRA petition” and, presumably, a timely habeas petition. See Petition, Docket No. 1 at 14.

Courts must be sparing in their use of equitable tolling. Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1999). In fact, the United States Court of Appeals for the Third Circuit has held that equitable tolling is proper “only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice.” United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)(citation omitted). “The two general requirements for equitable tolling: (1) that ‘the Petitioner has in some extraordinary way been prevented from asserting his or her rights;’ and (2) that the petitioner has shown that ‘he or she exercised reasonable diligence in investigating and bringing [the] claims.’” Merritt v. Blaine, 326 F.3d 157, 168 (3d Cir. 2003), citing Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001). Mere excusable neglect is not sufficient. Miller, 145 F.3d at 618 (quoting New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1126 (3d Cir. 1997) and citing Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990)).

The Third Circuit has set forth the following three circumstances in which equitable tolling is permitted: (1) if the [Respondent] has actively misled the [Petitioner]; (2) if the [Petitioner] has in some extraordinary way been prevented from asserting his rights, or (3) if the [Petitioner] has timely asserted his rights mistakenly in the wrong forum. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001), cert. denied, 534 U.S. 944 (2001)(citing Jones, 195 F.3d at 159 (citations omitted)). “In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the ‘extraordinary’ circumstances required for

equitable tolling.” Fahy, 240 F.3d at 244. The habeas petitioner bears the burden of demonstrating both his entitlement to equitable tolling and his due diligence. Pace, 544 U.S. at 418; Cooper v. Price, 82 Fed.Appx. 258, 260 (3d Cir. 2003); Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982); United States v. Soto, 159 F.Supp.2d 39, 45 (E.D. Pa. 2001) (Van Antwerpen, J.).

The Third Circuit has held that ongoing mental incompetency, coupled with attorney abandonment, may toll the AEDPA statute of limitations in some circumstances. Nara v. Frank, 264 F.3d 310 (3d Cir. 2001), overruled in part on other grounds, Carey v. Saffold, 536 U.S. 214 (2002). In so doing, however, the Court cautioned that “mental incompetence is not a *per se* reason to toll a statute of limitations.” Champney v. Secretary Pa. Dept. Of Corrections, 469 Fed. Appx. 113, 117 (3d Cir. 2012) (citing Nara, 264 F.3d at 320). Instead, “the alleged mental incompetence must somehow have affected the petitioner’s ability to file a timely habeas petition.” Id. The Third Circuit has not “held that ‘mental health problems,’ an undefined and expansive category, constitutes a basis for equitable tolling” in and of itself. United States v. Harris, 268 F. Supp. 2d 500, 506 (E.D. Pa. 2003) (Dalzell, J.) (equitable tolling requires “an inability to pursue one’s legal rights” and “a nexus between the petitioner’s mental condition and her inability to file a timely petition”).

Applying the Third Circuit’s ruling in Nara, our colleagues in this district have determined that “a mental condition that burdens but does not prevent a prisoner from filing a timely petition does not constitute ‘extraordinary circumstances’ justifying equitable tolling.” Harris, 268 F. Supp. 2d at 506. See also Clapsadl v. Shannon, No. 02-CV-4621, 2003 U.S. Dist.

LEXIS 22252, at \*5 (E.D. Pa. 2003) (Surrick, J.) (same).<sup>3</sup> Accordingly, “[e]quitable tolling may be appropriate because of petitioner’s mental illness, but only when condition made it impossible to file a petition on time.” Heath v. Commonwealth, C.A. Nos. 06-4787, 07-1766, 07-3013, 2007 WL 2207776, at \*3 (E.D. Pa. July 27, 2007) (Sánchez, J.) (internal quotations and citation omitted).

A petitioner cannot simply allege that his mental impairment prevented him from filing on time. Rather, he must show that his disability actually hindered him from submitting a timely habeas petition. Ross v. Varano, 712 F.3d 784, 803 (3d Cir. 2013). The Third Circuit has also held that “mental incompetence, even rising to the level of insanity” may not justify tolling a statute of limitations. Hedges v. United States, 404 F.3d 744, 753 (3d Cir. 2005). This remains true even when a party is proceeding *pro se*. Id.

In Champney, the Third Circuit set forth a non-exhaustive list of factors that courts should consider when determining whether mental incompetency actually prevented a petitioner from filing on time. The factors to consider include

(1) [whether] the petitioner [was] adjudicated incompetent and, if so, when did the adjudication occur in relation to the habeas statutory period; (2) [whether] the petitioner [was] institutionalized for his mental impairment; (3) [whether] the petitioner handled or assisted in other legal matters which required action during the federal limitations period; and (4) [whether] the petitioner supported his allegations of impairment with extrinsic evidence such as evaluations and/or medications.

Champney, 469 Fed. Appx. at 117 (citations omitted). None of these factors fall in petitioner’s favor.

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<sup>3</sup> The court determined that equitable tolling did not apply because Petitioner had failed to demonstrate any relationship between his full scale IQ of 71 and his failure to timely file his petition. Clapsadl, No. 02-CV-4621, 2003 WL 22871663, at \*1 (E.D. Pa. 2003)

There is no evidence in this case that Petitioner has ever been adjudicated incompetent or institutionalized for his alleged mental impairments. In fact, Petitioner has not provided any medical evidence or documentation to support his allegations of mental impairment. Although Petitioner repeatedly refers to his “mental health problems” and various “medication” he was taking at the time of his guilty plea, he makes no effort to identify any specific diagnosis or any medication he was allegedly taking. No medical records have been provided to this Court.

In addition, and as correctly noted by Respondents in their responsive brief,

Petitioner has been an active litigant during the entire period for which he seeks tolling. He filed numerous *pro se* petitions, briefs, and motions at all levels of Pennsylvania’s judicial system well before turning to this matter:

1. He filed a *pro se* PCRA petition in July 2010 and a supplemental petition in March 2012, which invoked Holland for the proposition that he was entitled to equitable tolling. Habeas Petition, pg. 20; Commonwealth v. Darnell Wilkins, CP-51-CR-0000782-2008, pg. 12–13.
2. He filed a timely *pro se* appeal from the denial of PCRA relief and submitted: a) a motion for discovery; b) an appellate brief; and c) a reply brief. *See* Exhibit B [to Response, Dkt. No. 12].
3. He likewise sought a petition for allocator *nunc pro tunc* in May 2016, still acting *pro se*. *See* Exhibit D [to Response, Dkt. No. 12].
4. In July 2016, he submitted a state habeas petition and argued he was entitled to a reduction of his restitution payments. *See* Exhibit E [to Response, Dkt. No. 12].

In short, petitioner actively prosecuted cases at all levels of the Pennsylvania Courts from July 2010 through July 2016. He nevertheless neglected to file this habeas petition until November of 2016. Such activity in state court shows that petitioner was able

to file a habeas petition well before this date, but simply ignored pursuing his federal rights for over seven years. Such activity demonstrates that equitable tolling is not appropriate here. *See, e.g., Bilbrey v. Douglas*, 124 F. App'x 971, 973 (6th Cir. 2005) (“[E]ven during the periods when Bilbrey’s mental condition appears to have been the most impaired, she continued to file litigation in the state courts,” which precluded the application of equitable tolling).

See Response at 6-7.

We conclude that Petitioner has failed to make the threshold proffer necessary to justify this Court’s further consideration of his demand for equitable tolling,<sup>4</sup> much less to hold an evidentiary hearing. *See Zettlemyer v. Fulcomer*, 923 F.2d 284, 298 n.12 (3d Cir. 1991) (petitioner not entitled to evidentiary hearing based on “bald assertions and conclusory allegations”); *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987) (same), cert. denied, 484 U.S. 946 (1987); *Brown*, 669 F.2d at 158 (petitioner bears burden as to all factual and procedural requirements). *See generally Pace*, 544 U.S. at 418 (petitioner bears burden of demonstrating both entitlement to equitable tolling and his due diligence). *See also Wilson*, 2005 WL 1712385, at \*3 (declining to award equitable tolling based on alleged psychiatric disorder or mental retardation where petitioner cited “no evidence (e.g., expert testimony, prison medical records)”);

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<sup>4</sup> In determining whether extraordinary circumstances exist to warrant the application of equitable tolling, this Court must also examine Petitioner’s due diligence in pursuing the matter under the specific circumstances he faced. *Traub v. Folio*, No. 04-386, 2004 WL 2252115, at \*2 (E.D. Pa. Oct. 5, 2004) (citing *Schleuter v. Varner*, 384 F.3d 69 (3d Cir. 2004))(affirming dismissal of habeas petition as time barred and not entitled to equitable tolling because lengthy periods of time had elapsed following his conviction before he sought relief). It is Petitioner’s burden to show that he acted with reasonable diligence and that extraordinary circumstances caused his petition to be untimely. *Id.*

Under the circumstances of this case, Petitioner did not act in a reasonably diligent fashion because a reasonably diligent petitioner would have acted promptly to preserve his rights not only in the state court, but also in *this* Court. Petitioner fails to allege any steps that he took to timely file the instant federal habeas petition. None of the circumstances which warrant equitable tolling apply in this case to render the instant Petition timely. *Fahy*, 240 F.3d at 244.

Harris, 268 F. Supp.2d at 506 (finding claim of mental incompetence inadequately supported for equitable tolling purposes even where petitioner presented expert opinion); Boyd v. Gillis, No. 02-CV-8034, 2004 WL 2397296, at \*4-5 (E.D.Pa. Oct. 25, 2004) (Padova, J.) (mental incompetence allegation unproven for equitable tolling purposes despite, *inter alia*, “extensive psychiatric reports and evaluations”); Clapsadl, 2003 WL 22871663, at \*2 (declining to award equitable tolling where there was “simply nothing in [the] record to support a claim of mental incompetence”).

In summary, with respect to Petitioner’s alleged “mental health problems,” we conclude that Petitioner has not submitted any evidence that demonstrates he suffers from a mental illness, or that such a disorder prevented him from pursuing his claims in a timely fashion. As a result, Petitioner’s alleged condition does not constitute an extraordinary circumstance warranting equitable tolling.

### **C. Certificate of Appealability.**

When a district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, a certificate of appealability should issue only if (1) the petition states a valid claim for the denial of a constitutional right, and (2) reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). In this case, reasonable jurists could not disagree that the instant Petition is time-barred. It is statutorily barred, and neither statutory nor equitable tolling apply to this Petition.

For all of the above reasons, I make the following:

**RECOMMENDATION**

AND NOW, this 28<sup>th</sup> day of July, 2017, IT IS RESPECTFULLY  
RECOMMENDED that the instant Petition for Writ of Habeas Corpus filed pursuant to 28  
U.S.C. § 2254 should be DENIED with prejudice and DISMISSED without an evidentiary  
hearing. There is no probable cause to issue a certificate of appealability.

The Petitioner may file objections to this Report and Recommendation. See Local Civ.  
Rule 72.1. Failure to timely file objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Henry S. Perkin

HENRY S. PERKIN

UNITED STATES MAGISTRATE JUDGE

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

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DARNELL WILKINS,

Petitioner

v.

JAY LANE, et. al.

Respondents

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CIVIL ACTION

NO. 16-5845

**ORDER**

**AND NOW**, this        day of        , 2017, upon careful and independent consideration of the Petition for Writ of Habeas Corpus (Docket No. 1) filed November 10, 2016; the Response to Petition for Writ of Habeas Corpus (Docket No. 12) filed by Respondents on July 7, 2017; and after review of the Report and Recommendation ("R&R") of United States Magistrate Judge Henry S. Perkin dated July 28, 2017,

**IT IS HEREBY ORDERED** that:

1. the R&R is APPROVED and ADOPTED;
2. the Petition for Writ of Habeas Corpus is DENIED with prejudice and DISMISSED without an evidentiary hearing; and
3. there is no probable cause to issue a certificate of appealability.

BY THE COURT:

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MARK A. KEARNEY, J.



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

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DARNELL WILKINS,

Petitioner

v.

JAY LANE, et. al.

Respondents

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CIVIL ACTION

NO. 16-5845

**ORDER**

AND NOW, this 28<sup>th</sup> day of July, 2017, upon consideration of the Motion for Default Judgment or Discovery and Appointment of Counsel or Enlargement of Sixty (60) to Reply to Response to Petition for Writ of Habeas Corpus (Docket No. 13), which motion was filed by Petitioner on July 27, 2017,

**IT IS ORDERED** that the motion is **DENIED**.<sup>1</sup>

BY THE COURT:

/s/ Henry S. Perkin

HENRY S. PERKIN

UNITED STATES MAGISTRATE JUDGE

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<sup>1</sup> *Pro se* Petitioner seeks an Order from this Court granting default judgment after Respondents allegedly failed to provide him with a copy of the guilty plea and preliminary hearing transcripts when filing their response to his habeas corpus Petition. Petitioner further asserts that “counsel should be appointed to conduct discovery” with respect to this matter. Initially, we note that this Court did not direct Respondents to provide Petitioner with any documents or discovery. Further, we are mindful that a habeas petitioner seeking discovery must demonstrate “good cause.” Rule 6(a), Rules Governing § 2254 Cases in the United States District Courts (“A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery”). A petitioner establishes “‘good cause’ . . . where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.” *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997). Thus, “bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery.” *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 301 (3d Cir. 1991). Petitioner has not demonstrated good cause.

Moreover, as more specifically addressed by undersigned’s Report and Recommendation dated July 28, 2017, this matter is time-barred, and neither statutory nor equitable tolling apply to Petitioner’s habeas Petition. Appointment of counsel is only appropriate when the Court orders an evidentiary hearing or when the interests of justice so require. Because it is not evident that a hearing will be necessary, and there is no interests of justice issue, Petitioner is not entitled to the appointment of counsel.

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

7/28/17

RE: DARNELL WILKINS v. JAY LANE, et al.  
CA No. 16-5845

**NOTICE**

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge HENRY S. PERKIN, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

**KATE BARKMAN**  
Clerk of Court

By: S/Kris Yerry

KRIS YERRY, Deputy Clerk

cc: File, Deputy - U. Hevener, D. Wilkins, C. Lynett

**APPENDIX B**

CLD-106

January 25, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-3388

DARNELL WILKINS, Appellant

VS.

SUPERINTENDENT FAYETTE SCI, et al.

(E.D. Pa. Civ. No. 2-16-cv-05845)

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

Submitted is Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied because reasonable jurists would not debate the District Court's conclusion that Appellant's 28 U.S.C. § 2254 petition is barred by the one-year statute of limitations. See 28 U.S.C. § 2244(d)(1); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant has not arguably demonstrated a basis for equitable tolling. See Holland v. Florida, 560 U.S. 631, 649 (2010).

By the Court,

s/Joseph A. Greenaway, Jr.  
Circuit Judge

Dated: March 28, 2018  
tyw/cc: Darnell Wilkins  
Christopher P. Lynett, Esq.



A True Copy:

*Patricia A. Dodszeit*

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