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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1442

DAVID RAPOPORT,
Appellant

v.

SUPERINTENDENT GREENE SCI, ET AL,

(E.D. Pa. Civ. No. 5-18-cv-02971)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER and MATEY, Circuit Judges

The petition for rehearing filed by appellant 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/ David S. Porter
Circuit Judge

Dated: July 16, 2019
Lmr/cc: David Adam Rapoport
Heather F. Gallagher

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

DAVID RAPORT
Petitioner-pro se

v.

ROBERT GILMORE, et al.
Respondents

CIVIL ACTION

NO. 18-2971

FILED

JAN 30 2019

KATHLEEN M. DOWD
CLERK OF COURT
ORDER

AND NOW, this 30th day of January 2019, upon consideration of the petition for writ of *habeas corpus*, ("Petition"), filed by *pro se* Petitioner David Rapoport ("Petitioner"), [ECF 1], the Commonwealth's Response in opposition thereto, [ECF 9], the *Report and Recommendation* (the "R&R") issued on November 27, 2018, by the Honorable Carol Sandra Moore Wells, United States Magistrate Judge (the "Magistrate Judge"), which recommended that the Petition be denied, [ECF 10], Petitioner's objections to the R&R, [ECF 15], the pleadings and the available state court record and, after conducting an independent *de novo* review of Petitioner's objections, it is hereby ORDERED that:

1. The *Report and Recommendation* is APPROVED AND ADOPTED;
2. The objections filed are without merit and are OVERRULED;¹

¹ On December 8, 2011, Petitioner pled guilty in the Court of Common Pleas of Lehigh County, Pennsylvania, to the first-degree murders of a woman and her fetus, and was sentenced to two consecutive life sentences. On July 16, 2018, he filed the instant Petition and raised claims of ineffective assistance of counsel. [ECF 1]. The Petition begins with the first three "Instructions" pages of the model court *habeas* form for a 28 U.S.C. § 2254 petition (PAE AO 241). Notably, instruction number three states:

Your habeas corpus petition must be filed within the 1-year statute of limitations time limit set forth in 28 U.S.C. § 2244(d)(1). (There are limited circumstances in which the petition may be amended, within the one-year time period, to add additional claims or facts, see Federal Rules of Civil Procedure 15; or amended after the one-year period expires, in order to clarify or amplify claims which were timely presented, see United States v. Thomas, 221 F. 3d 430 (3d Cir. 2000)).

ENT'D JAN 31 2019

After reproducing the "Instructions" pages of the model court form, Petitioner typed out the remainder of Petition independently, rather than complete the form itself. In doing so, he tracked the format of the model court form. However, the Petition did not include the final paragraph (No. 17) of the model court form, which reads as follows:

"**TIMELINESS OF PETITION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition."

On August 3, 2018, the matter was referred to the Magistrate Judge. The referral Order provided that "Pursuant to Local Civil Rule 72.1.IV(c), all issues and evidence shall be presented to the United States Magistrate Judge, and that new issues and evidence shall not be raised after the filing of the Report and Recommendation if they could have been presented to the United States Magistrate Judge." [ECF 3]. On October 23, 2018, the Commonwealth filed its response in opposition to the Petition and argued that the Petition was untimely. [ECF 9]. Petitioner did not file a response to the Commonwealth's timeliness argument. On November 27, 2018, the Magistrate Judge issued the R&R and recommended that the Petition be dismissed, as untimely. Specifically, the R&R highlighted the following relevant dates:

On December 8, 2011, Petitioner was sentenced. He did not file a direct appeal. Instead, on December 6, 2012, he filed a PCRA petition and an amended PCRA petition which was ultimately dismissed, and the dismissal was affirmed by the Superior Court of Pennsylvania. On September 10, 2014, the Pennsylvania Supreme Court denied Petitioner's *allocatur* petition.

Title 28 U.S.C. § 2244(d)(1) provides that a 1-year period of limitations 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 period of time commences on the date the judgment becomes final, by either the conclusion of any direct appeal or the expiration of the time seeking such review. *Id* at § 2244(d)(1)(A). When calculating the time to file the instant Petition, the Magistrate Judge made the following determinations:

Petitioner's conviction became final when the time to file a direct appeal expired on January 7, 2012. Thus, the year to file his § 2254 Petition began to run on that date. On December 6, 2012, when he filed his PCRA petition, 333 days had already run. The running of the time period was tolled until September 10, 2014, when the Pennsylvania Supreme Court denied *allocatur*. Petitioner's year then continued to run and expired 32 days later, on October 13, 2014. When the Petition was filed on July 16, 2018, it was over 1,370 days late. [ECF 10].

Petitioner does not dispute the accuracy of the calculations. Instead, Petitioner objects to the one-year requirement as "absurd," given the realities of daily prison life, and argues that his time to file the Petition should be equitably tolled because of extraordinary circumstances and his reasonable diligence; *to wit*:

- Petitioner was incorrectly advised by jailhouse lawyers to file his petition in the Western District of Pennsylvania, where he was incarcerated, rather than in this District where he was sentenced;
- After waiting "indefinitely" for a response to the petition filed in the Western District of Pennsylvania, he refiled his petition in this District. Notably, the Petition in this Court neither includes a copy of the allegedly misfiled petition nor indicates when it was filed in the Western District;

- He has been reasonably diligent in his attempt despite difficulties with the prison law library in terms of its hours, cost, and the quantity/quality of computers;
- Legal research is difficult for a layman; and
- His busy work schedule as the full-time head baker for the prison kitchen and a part-time certified peer support specialist made it difficult to meet deadlines. [ECF 15].

Generally, issues raised for the first time as objections to a report and recommendation may not be considered. *See Bukovinsky v. Pennsylvania*, 455 F. App'x 163, 165-66 (3d Cir. 2011) (*per curiam*) (citing *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived."). Further, Local Rule of Civil Procedure 72.1(IV)(c) provides that "[a]ll issues and evidence shall be presented to the magistrate judges, and unless the interest of justice requires it, new issues and evidence shall not be raised after the filing of the Magistrate Judge's Report and Recommendation if they could have been presented to the magistrate judge." This is particularly pertinent since Petitioner was prompted on the model court form to address the timeliness of his Petition, he received notice that the Commonwealth was challenging the Petition's timeliness, and he was advised in the referral Order that all issues needed to be presented to the Magistrate Judge, yet he did not address the issue before the Magistrate Judge. Thus, this Court finds that Petitioner has waived this argument, and his objection is overruled.

Nevertheless, even if the Court were to consider Petitioner's tolling arguments, the Petition would still be untimely. Courts use equitable tolling sparingly, *see United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998), and apply it "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice," *LaCava v. Kyler*, 398 F.3d 271, 275 (3d Cir. 2005). Although the United States Court of Appeals for the Third Circuit ("Third Circuit") has held that "[e]quitable tolling may be had if," *inter alia*, the petitioner "has timely asserted his rights mistakenly in the wrong forum," the Third Circuit has noted that "the 'wrong forum' element . . . usually refers to a peremptory filing in federal court prior to the exhaustion of state-law claims." *Satterfield v. Johnson*, 434 F.3d 185, 195-96 (3d Cir. 2006) (citations omitted). In any event, Petitioner's argument regarding the filing of his Petition in the wrong forum lacks merit. In this case, the Western District of Pennsylvania (the district in which Petitioner is incarcerated) is not an incorrect forum in which to file a *habeas corpus* petition. *Cf. 2241(d)* ("Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application."). Thus, the Western District is an appropriate forum. As a final note on this issue, this Court performed a search for any case initiated by Petitioner in the Western District of Pennsylvania, and did not find a petition. Out of an abundance of caution, this Court also performed a search in the Eastern District of Pennsylvania for any previous petitions filed by Petitioner (in case one had been transferred here from the Western District), and did not find a petition.

Lastly, as calculated, the Petition was filed over 1,370 days late. Petitioner's stated reasons of extraordinary circumstances and reasonable diligence are insufficient to ignore the almost 4 years of delay in filing the Petition so as to excuse that degree of tardiness of the Petition. *See Robinson v. Johnson*, 313 F.3d 128, 143 (3d Cir. 2002) (holding that a "deprivation of legal material for a relatively brief time period is not sufficient to warrant tolling"); *cf. Pabon v. Mahanoy*, 654 F.3d 385, 399-400 (3d Cir. 2011) (holding that "equitable tolling might be warranted when a non-English speaking petitioner could not comply with AEDPA's statute of limitations because the prison did not provide access to AEDPA-related materials,

3. Petitioner's petition for a writ of *habeas corpus*, [ECF 1], is **DENIED**; and
4. No probable cause exists to issue a certificate of appealability.²

The Clerk of Court is directed to mark this matter **CLOSED**.

BY THE COURT:

/s/ Nitzia I. Quiñones Alejandro
NITZIA I. QUIÑONES ALEJANDRO
Judge, United States District Court

translation, or legal assistance in his or her language.”). Accordingly, the R&R is adopted and approved in its entirety, and Petitioner’s objections are overruled.

² A district court may issue a certificate of appealability only upon “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). A petitioner must “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). For the reasons set forth, this Court concludes that no probable cause exists to issue such a certificate in this action because Petitioner has not made a substantial showing of the denial of any constitutional right. Petitioner has not demonstrated that reasonable jurists would find this Court’s assessment “debatable or wrong.” *Slack*, 529 U.S. at 484. Accordingly, there is no basis for the issuance of a certificate of appealability.

APPENDIX B

DAVID RAPOPORT v. ROBERT GILMORE, et al.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2018 U.S. Dist. LEXIS 201418
CIVIL ACTION NO. 18-2971
November 27, 2018, Decided
November 27, 2018, Filed

Editorial Information: Prior History

Commonwealth v. Rapoport, 627 Pa. 757, 99 A.3d 925, 2014 Pa. LEXIS 2331 (Sept. 10, 2014)

Counsel {2018 U.S. Dist. LEXIS 1}DAVID ADAM RAPOPORT, Petitioner, Pro se,
WAYNESBURG, PA.

For JAMES MARTIN, ESQ., DISTRICT ATTORNEY OF LEHIGH
COUNTY, Respondent: HEATHER F. GALLAGHER, LEHIGH COUNTY DISTRICT ATTY'S
OFFICE, ALLENTOWN, PA.

Judges: CAROL SANDRA MOORE WELLS, United States Magistrate Judge.

Opinion

Opinion by: CAROL SANDRA MOORE WELLS

Opinion

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE

Presently before the court is a Petition for a Writ of Habeas Corpus filed by David Rapoport ("Petitioner"), pro se, pursuant to 28 U.S.C. § 2254. Petitioner, a state prisoner, is currently serving consecutive life sentences at the State Correctional Institution-Greene. He seeks habeas relief based on a claim of ineffective assistance of counsel. The Honorable Nitzia I. Quinones Alejandro referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that the habeas petition be DISMISSED, without an evidentiary hearing.

I. PROCEDURAL HISTORY

The relevant procedural history as set forth by the state intermediate court follows:

On December 8, 2011, [Petitioner] pled guilty to first degree murder of Jennifer Snyder and to the first degree murder of the fetus which {2018 U.S. Dist. LEXIS 2} she was carrying. In exchange for the Commonwealth's agreement . . . to fore[go] the possibility of the death penalty, [Petitioner] agreed to waive all direct and collateral appeal rights. The sentencing court conducted an

extensive oral colloquy to confirm that [Petitioner's] decision to plead guilty was knowing and voluntary, and also incorporated into the record two written colloquies signed by [Petitioner]: one as to the guilty plea generally, and one specific to waiver of his rights to direct and collateral review. Thereafter, [Petitioner] was given consecutive life sentences without possibility of parole.

On December 6, 2012, [Petitioner] filed a *pro se* PCRA petition. Counsel was appointed and, on March 13, 2012, filed an amended petition. On July 30, 2013, the PCRA court held a hearing to determine whether [Petitioner] knowingly and voluntarily waived his collateral review rights. At the conclusion of the hearing, the PCRA court denied [Petitioner's] request for relief and dismissed his petition. [Petitioner] timely filed a notice of appeal. *Rapoport v. Gilmore*, No. 2487 EDA 2013, slip op. at 1-2 (Pa. Super. Ct. March 6, 2014) ("2014 Op."). On March 6, 2014, the Superior Court affirmed the PCRA court. *Id.* at 10. Next, on March 21, {2018 U.S. Dist. LEXIS 3} 2014, Petitioner sought allowance of appeal (*allocatur*) in the Supreme Court of Pennsylvania. *Rapoport v. Gilmore*, CP-39-CR-0001953-2011, at 14.

(<https://ujsportal.pacourts.us/DocketSheetIssue.aspx?docketNumber=CP-39-CR-0001953-2011>)(last accessed 11/08/18) ("docket"). The Supreme Court of Pennsylvania denied Petitioner's *allocatur* petition, on September 10, 2014. *Id.*

On July 16, 20182 Petitioner filed the instant habeas petition, claiming that his Sixth Amendment right to the effective assistance of counsel was violated. Petition at 7. The Commonwealth responds that this habeas petition is time-barred. Resp. at 3-8. This court agrees.

II. DISCUSSION

A. The AEDPA Statute of Limitations

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted on April 24, 1996, imposes a one-year period of limitations ("AEDPA year") for habeas corpus petitions. The time period begins to run from the latest of the following:

- (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 {2018 U.S. Dist. LEXIS 4} 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 could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). The Third Circuit has held that the starting date for the habeas period of limitations must be determined separately for each cognizable claim contained in the petition. See *Fielder v. Varner*, 379 F.3d 113, 117-18 (3d Cir. 2004).

Since Petitioner did not pursue a direct appeal, his conviction became final upon the expiration of the time to do so. See *Swartz v. Meyers*, 204 F.3d 417, 419 (3d Cir. 2000). That date was January 7, 2012, thirty days after the petitioner failed to file a direct appeal of his conviction. Pa. R. App. P. 903(a). Unless grounds for statutory or equitable tolling can be demonstrated, all of Petitioner's claims must be dismissed.

2. Statutory and Equitable Tolling

a. Statutory Tolling

Statutory tolling provisions provide that, "[t]he time that a properly filed application for state post-conviction or other collateral relief with respect to the{2018 U.S. Dist. LEXIS 5} pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section." 28 U.S.C. § 2244(d)(2). A properly filed application for state collateral relief is one submitted in compliance with the applicable rules governing filings such as the form of the document, the time limits on filing, the court and office in which it must be filed, and the requisite filing fees.³ *Artuz v. Bennett*, 531 U.S. 4, 8, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000). Answering a question left open in *Artuz*, the U.S. Supreme Court later explained that, despite exceptions to the timely filing requirement, an untimely PCRA petition is not "properly filed" and cannot statutorily toll the federal habeas period of limitations. *Pace v. DiGuglielmo*, 544 U.S. 408, 413-17, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

Petitioner's PCRA petition that was filed on December 6, 2012, tolled the habeas statute. 2014 Op. at 2. Upon filing, 333 days of his AEDPA year had already expired, leaving Petitioner 32 days to file a timely federal habeas petition. The PCRA appeal ended on September 10, 2014, when the Pennsylvania Supreme Court denied *allocatur*. See *Lawrence v. Florida*, 549 U.S. 327, 327, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007). Petitioner's AEDPA year began running again and expired 32 days later, on October 13, 2014. Petitioner did not present his habeas petition until July 16, 2018, over 1370 days late; therefore statutory tolling does{2018 U.S. Dist. LEXIS 6} not preserve his claim. Nevertheless, Petitioner may be eligible for equitable tolling.

b. Equitable Tolling

Equitable tolling is available "only when the principle of equity would make the rigid application of a limitation period unfair." *Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003) (internal quotations omitted). Courts should apply this doctrine sparingly. *LaCava v. Kyler*, 398 F.3d 271, 275 (3d Cir. 2005). The general requirements for equitable tolling are: (1) the petitioner exercised diligence in pursuing his rights, and (2) extraordinary circumstances prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). The petitioner bears the burden of proving both requirements. *Pace*, 544 U.S. at 418; *Urcinoli v. Cathel*, 546 F.3d 269, 273 (3d Cir. 2008).

Petitioner has neither identified nor demonstrated any extraordinary circumstance(s) that prevented timely filing of his habeas petition nor demonstrated diligence in pursuing his cognizable claim. It is Petitioner's burden to establish entitlement to equitable tolling, hence, this court cannot equitably toll his AEDPA year. *Pace*, 544 U.S. at 418; *Urcinoli*, 546 F.3d at 273.

III. CONCLUSION

Petitioner's claim is time-barred. Reasonable jurists would not debate this court's procedural disposition of his claims; therefore a certificate of appealability should not issue. See *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 27th day of November, 2018, for the reasons contained{2018 U.S. Dist. LEXIS 7} in the preceding Report, it is hereby **RECOMMENDED** that Petitioner's sole claim be **DISMISSED**, without an evidentiary hearing. Petitioner has neither demonstrated that any reasonable jurist could find this court's procedural rulings debatable, nor shown denial of any federal constitutional right; hence, there is no probable cause to issue a certificate of appealability.

Petitioner may file objections to this Report and Recommendation within fourteen (14) days of being

served with a copy of it. See Local R. Civ. P. 72.1(IV). Failure to file timely objections may constitute a waiver of any appellate rights.

It be so ORDERED.

/s/ Carol Sandra Moore Wells

CAROL SANDRA MOORE WELLS

United States Magistrate Judge

Footnotes

1

The information set forth in this procedural history was gleaned from Petitioner's case file, Petitioner's Habeas Corpus Petition, inclusive of all exhibits attached thereto, and the Commonwealth's Response, inclusive of all exhibits attached thereto.

2

The Clerk of Court docketed the habeas petition on July 16, 2018. Since Petitioner is a *pro se* inmate, his petition is deemed filed on the date he gave it to prison officials for mailing. See *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). However, Petitioner signed the habeas petition but does not specify the date he placed it in the prison mailing system. Petition at 13. Hence, this court must use July 16, 2018 as the filing date.

3

The Supreme Court initially declined to decide whether the existence of exceptions to a timely filing requirement can prevent a late application from being considered improperly filed. *Artuz*, 531 U.S. at 8 n.2.

lyccases

4

APPENDIX C

BLD-208

June 6, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 19-1442

DAVID ADAM RAPOPORT, Appellant

VS.

SUPERINTENDENT GREENE SCI; ET AL.

(E.D. Pa. Civ. No. 5-18-cv-02971)

Present: AMBRO, KRAUSE and PORTER, Circuit Judges

Submitted are:

- (1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and
- (2) Appellees' response in opposition thereto

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied because jurists of reason would not debate the District Court's denial of his habeas petition as untimely. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000). We make that determination largely for the reasons explained by the District Court and, in particular, we conclude that jurists of reason would not debate whether appellant was entitled to equitable tolling.

By the Court,

s/ David J. Porter

Circuit Judge

Dated: June 7, 2019
Lmr/cc: David Adam Rapoport
Heather F. Gallagher



A True Copy:

Patricia S. Dodzuweit

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