APPENDIX-A

FILED NOV - 1 2013

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

MARK BENTON	:	CIVIL ACTION
	:	
v.	:	No. 12-1015
	:	
BRIAN COLEMAN, et al.	:	

ORDER

AND NOW, this 1st day of November, 2013, upon careful and independent consideration of Petitioner Mark Benton's pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa and Benton's objections thereto, it is ORDERED:

1. Benton's Objections to Magistrate's Report and Recommendation (Document 11) are OVERRULED;[1]

[1] In his objections to the Report and Recommendation, Benton raises no issues that would cause this Court to disturb Judge Caracappa's conclusion that the statute of limitations under 28 U.S.C. § 2244(d)(1) bars consideration of Benton's habeas petition.

In objecting to the Report and Recommendation, Benton reasserts his claim that the United States Supreme Court's decision in *Holland v. Florida*, 130 S. Ct. 2549 (2010), intended to overrule the Third Circuit's decision in *LaCava v. Kyler*, 398 F.3d 271 (3d Cir. 2005). The *LaCava* Court held that absent affirmative misrepresentation, an attorney's failure to inform a client of an unsuccessful state appeal does not qualify as the extraordinary circumstances necessary to equitably toll the statute of limitations for a habeas petition. *Id.* at 276. Benton claims the failure of his attorney to inform him about the Pennsylvania Supreme Court's denial of his petition for allowance of appeal of his PCRA petition, which caused him to file his habeas petition twenty-nine days after the statute of limitations expired, warrants applying equitable tolling, and his habeas petition should be considered timely.

Benton's efforts to distinguish his circumstances from those in *LaCava* are not persuasive, as Judge Caracappa has already addressed why Benton's attorney's actions did not warrant equitable tolling. The Supreme Court in *Holland* decided extraordinary circumstances are not limited to attorney misrepresentation, but could arise when attorney negligence amounts to more than "garden variety" negligence. *See Holland*, 130 S. Ct. at 2564. As Judge Caracappa explained, however, not only was *Holland* a capital case, but the Supreme Court reiterated "a

garden variety claim of excusable neglect," such as simple miscalculation leading a lawyer to miss a filing deadline, does not warrant equitable tolling. *Id.*

In his objections, Benton bolsters his argument by pointing to two recent Supreme Court decisions and one Third Circuit opinion he claims demonstrate the courts' desire to expand the application of equitable tolling and "ensure justice is served in a fundamentally fair manner." Objections to Magistrate's Report and Recommendation 4, ECF No. 11. Benton asserts these cases, when viewed in light of the Supreme Court's decision in *Holland*, relax the principle of *Coleman v. Thompson* (and *LaCava*), that "[a]ttorney ignorance or inadvertence" in a postconvicition proceeding does not toll a habeas petition filing deadline "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." 501 U.S. 722, 753 (1991) (citation and internal quotation marks omitted). First, in *Maples v. Thomas*, the Supreme Court held that under agency principles, "a client cannot be charged with the acts or omissions of an attorney who has abandoned him." 132 S. Ct. 912, 924 (2012). The Court differentiated between attorney error and attorney abandonment, and emphasized the case focused on the latter, justifying equitable tolling due to "extraordinary circumstances beyond [petitioner's] control." *Id.* Next, in *Martinez v. Ryan*, the Supreme Court recognized a narrow exception to the general rule of *Coleman*, finding "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S. Ct. 1309, 1320 (2012). The Court limited its decision only to the first occasion a state allows a prisoner to raise a claim of ineffective assistance, and expressly stated the holding did not extend to attorney errors in any other proceedings, including appeals from initial-review collateral proceedings or petitions for discretionary review in state appellate courts. *Id.* Benton also relies on the Third Circuit's decision in *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001). In that case, the Court of Appeals ordered an evidentiary hearing to determine if equitable tolling was warranted in a case in which the petitioner alleged that his mental incompetency prevented him from filing his habeas petition on time and that his attorney during his third PCRA proceeding effectively abandoned him when she failed to inform him that the Pennsylvania Supreme Court denied review of his motion to withdraw his guilty plea, refused to remove herself as appointed counsel, led him to believe she was going to file a habeas petition on his behalf, and told him there were no time constraints for filing a petition. *Id.* at 320.

Benton's reliance on these cases does not undermine Judge Caracappa's finding that his attorney's actions did not qualify as extraordinary circumstances justifying equitable tolling. First, the Supreme Court issued its decision in *Maples* on January 18, 2012, and its decision in *Martinez* on March 20, 2012, and the Third Circuit decided *Nara* in 2001. Judge Caracappa issued her Report and Recommendation on July 25, 2012, and presumably considered this case law when making her recommendation. Second, even if Judge Caracappa did not take these cases into account, the holdings in each do not change the outcome here because they are easily distinguishable from this case. In *Maples*, the Court dealt with attorneys who abandoned their client without leave of court, without informing him they could no longer represent him, and without securing any substitution of counsel. *Maples*, 132 S. Ct. at 927. In this case, Benton made no showing that his attorney abandoned him; he only alleges his attorney failed to inform him the state court denied review of his appeal. In *Martinez*, the Court expressly stated its

2. The Report and Recommendation (Document 10) is APPROVED and ADOPTED;

3. Benton's petition for writ of habeas corpus (Document 1) is DENIED;

4. There has been no substantial showing of the denial of a constitutional right warranting the issuance of a certificate of appealability; and

5. The Clerk of Court is DIRECTED to mark this case CLOSED.

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CLERK OF COURT

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, J.

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holding would *not* apply to what Benton alleges occurred in this case—attorney errors in "petitions for discretionary review in the State's appellate courts." *Martinez*, 132 S. Ct at 1320. Further, the petitioner in *Nara* alleged more than just attorney error; he claimed he suffered from mental incompetence and his attorney abandoned him. In addition, the Third Circuit only found an evidentiary hearing was necessary, not that equitable tolling applied.

Benton admits that "*Martinez* was not specifically answering a question about 'extraordinary circumstances,'" but asserts "that decision in conjunction with *Maples* is illustrative of the Court's intent" to relax the principle found in *Coleman*. Objections to Magistrate's Report and Recommendation 4, ECF No. 11. Even if true, a relaxation of *Coleman* is meaningless in this case because, under *Holland*, only extraordinary attorney misconduct warrants equitable tolling. Because Benton does not present any new facts in his objections regarding his attorney's performance, he still fails to demonstrate that the alleged negligence of his attorney amounts to more than "garden variety" neglect. Simply failing to notify a client of a denial of petition for review is not comparable to the extraordinary circumstances of *Maples*, *Holland*, or *Nara*. Accordingly, Benton's objections are denied.

Lastly, on August 20, 2012, almost two weeks after filing his objections, Benton filed an affidavit from his counsel for his initial PCRA petition (not the counsel against whom he is alleging misconduct). Under Local Rule of Civil Procedure 72.1, Benton had fourteen days after issuance of the Report and Recommendation to file his objections. Because Judge Caracappa filed her Report on July 25, 2012, this affidavit is not timely and need not be considered as part of Benton's objections. However, even treating it as part of his objections, the affidavit does not demonstrate equitable tolling should apply in this case. It only provides context for the failure to notify Benton of the appeal, and as explained above, this failure does not constitute extraordinary circumstances necessary to invoke equitable tolling.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JUL 25 2012

MARK BENTON, JR. Petitioner,	:	CIVIL ACTION
v.	:	
BRIAN COLEMAN, et al., Respondents.	:	NO. 12-1015

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA
UNITED STATES MAGISTRATE JUDGE

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

I. PROCEDURAL HISTORY

On January 31, 2006, following a jury trial presided over by the Honorable Alan M. Rubenstein of the Bucks County Court of Common Pleas, petitioner was found guilty of first degree murder, attempted murder, robbery of a motor vehicle, firearms not to be carried without a license, resisting arrest and fleeing and eluding a police officer. Specifically, petitioner was found guilty of the fatal shooting of Wael Rafaey and the shooting of Nancy Martinez Alvarez. Petitioner was found guilty of stealing victim Rafaey's car and fleeing from police. Petitioner was found not guilty of aggravated assault and robbery. Petitioner was sentenced to a term of life imprisonment. Petitioner was further sentenced to consecutive sentences of not less than five (5)

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to not more than ten (10) years for attempted murder, and not less than two and a half (2 ½) to not more than five (5) years for robbery of a motor vehicle.

Petitioner filed a direct appeal to the Superior Court. On January 26, 2007, the Superior Court affirmed petitioner's judgment of sentence. Petitioner's petition for allowance of appeal to the Pennsylvania Supreme Court was subsequently denied on July 24, 2007.

On September 18, 2008, petitioner filed a timely petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541, et seq. Attorney Daniel Silverman, Esquire represented petitioner. An evidentiary hearing was held on February 2, 2009. The PCRA court dismissed the petition on November 2, 2009.

Petitioner filed a notice of appeal to the Superior Court. The court appointed Keith Williams, Esquire to represent petitioner. On November 5, 2010, the Superior Court affirmed the PCRA court's decision and denied petitioner's counseled PCRA appeal. Petitioner filed a request for allowance of appeal to the Pennsylvania Supreme Court, which was denied on December 5, 2011.

On February 6, 2012, petitioner filed the instant habeas petition in the United States District Court in the Middle District of Pennsylvania, Docket No. 12-cv-299. On February 15, 2012, the instant case was transferred to this Court.

On April 26, 2012, this Court ordered petitioner to file a complete copy of the original petition that was filed in the Middle District, as the petition on record was missing relevant pages.

On May 18, 2012 petitioner filed a new petition instead of re-filing a complete copy of the original.

The instant petition seeking habeas corpus relief, claims:

1. Direct appeal counsel rendered ineffective assistance in failing to preserve the claim that the trial court erred in failing to instruct the jury completely and accurately on the charge of unreasonable belief voluntary manslaughter, omitting the elements of the offense, definitions of those elements and the applicable burden of proof, and trial counsel was ineffective for failing to register a clear objection;

2. Trial counsel rendered ineffective assistance in failing to present in the guilty phase, that the Commonwealth witness, Nancy Alvarez, previously identified the deceased, Wael Rafaey, and not petitioner, as the one who shot her. Such evidence was critical to support petitioner's claims of self defense and defense of others and undercut the conviction for attempted murder;

3. Trial counsel rendered ineffective assistance in her presentation of the defense of unreasonable belief voluntary manslaughter, by failing to introduce and argue available abundant evidence that petitioner's capacity to accurately perceive and judge the actions of others was severely compromised;

4. Trial and appellate counsel rendered ineffective assistance in failing to raise at trial or on appeal, the claim that the police erred in failing to preserve from the deceased evidence of gunshot primer residue which could have exonerated petitioner, and as such, deprived petitioner of his right to due process;

5. Trial counsel rendered ineffective assistance in failing to object to prosecution evidence that a Commonwealth witness, Angelo Lopez, was "rewired to testify truthfully" as a condition of his deal with the Commonwealth and that the Commonwealth believed that Lopez had in fact, complied with this condition;

6. Trial counsel rendered ineffective assistance in failing to impeach Commonwealth witness, Angelo Lopez with several admissible non-final criminal dispositions;

7. Trial counsel rendered ineffective assistance in failing to request, or object to the absence of a jury instruction that the jury should consider the evidence of Mr. Lopez's pending cases as relevant to his bias in favor of the Commonwealth;

8. Trial counsel's cumulative errors in connection with the Commonwealth witness, Angelo Lopez, deprived petitioner of the effective assistance of counsel;

9. Trial counsel rendered ineffective assistance in withdrawing her objection to the testimony that immediately upon his arrest petitioner said to Bensalem police officer, Todd Shapiro, "Smith you're a bitch," followed by evidence suggesting petitioner was threatening a police officer unconnected to this case, as this was completely irrelevant and prejudicial to petitioner's right to a fair trial;

10. The prosecutor's repeated references to petitioner as "that African-American male," where race was an irrelevant factor, injected into this trial improper elements of race and racial prejudice such that petitioner's rights to due process were violated. Trial counsel's failure to object denied petitioner the effective assistance of counsel;

11. Trial counsel rendered ineffective assistance in failing to object to the trial court's failure to include as re-instructions petitioner asserted, where such failure improperly tilted the court's instructions in favor of conviction;

12. Trial counsel failed to object to the trial court's erroneous instruction that if the jury found that the Commonwealth did not prove voluntary manslaughter, "then the defendant is not guilty of any crime with which he is charged," as this would lead certain jurors to convict in order to avoid a complete aquittal on all charges;

13. Trial counsel rendered ineffective assistance in giving a rambling unfocused closing argument that failed to address effectively the defense asserted;

14. Direct appeal counsel rendered ineffective assistance of counsel in failing to allege as a separate and distinct basis for relief under the United States Constitution that the evidence was insufficient as a matter of law to sustain the conviction for attempted murder of Nancy Alvarez, as there was no evidence that petitioner specifically intended to kill her;

15. Direct appeal counsel rendered ineffective assistance of counsel in failing to allege as a separate and distinct basis for relief under the United States Constitution that the trial court erred in admitting inflammatory, unnecessary and prejudicial photographs and power point slides of the deceased's gruesome injuries; and

16. The cumulative impact of all the errors committed at trial deprived petitioner of a fair trial and the effective assistance of counsel.

Respondents retort that petitioner is not entitled to federal habeas relief.

Respondents assert that petitioner's habeas petition is untimely. In the alternative, respondents contend that petitioner's claims are without merit.

The court agrees that petitioner's habeas petition is untimely. As such, petitioner is not entitled to habeas relief.

II. TIMELINESS

A strict one-year time limitation on the filing of new petitions is set forth in the federal habeas statute, 28 U.S.C. § 2241, *et seq.*, which was amended under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), enacted in April 24, 1996. Under section 2244(d), the AEDPA provides:

> A 1-year period of limitation shall apply to an application for a Writ of Habeas Corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1) (1996).

This statute also creates a tolling exception, which notes that "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). A "properly filed application" is "one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). If a petitioner files an out-of-time application and the state court dismisses it as time-barred, then it is not deemed to be a "properly filed application" for tolling purposes. Merrit v. Blaine, 326 F.3d 157, 165-66 (3d Cir. 2003).

In the case at bar, petitioner's conviction became final on October 22, 2007, ninety days after the Pennsylvania Supreme Court denied petitioner's allowance of appeal. The statute of limitations was tolled on September 18, 2008, after approximately eleven months of the statute of limitations had run, when petitioner filed an application for post-conviction relief. The statute of limitations began to run again on December 5, 2011, when the Pennsylvania Supreme Court opted not to review petitioner's PCRA appeal. See Stokes v. District Attorney of County of Phila., 247 F.3d 539, 543 (3rd Cir. 2001) (holding that the ninety day period during which a state prisoner may file a petition for a writ of certiorari in the United States Supreme Court from the denial of his state post-conviction petition does not toll the one year limitation period set forth in 28 U.S.C. § 2244(d)(2)). Petitioner then had approximately thirty-four days, or until January 8, 2012, remaining to file a timely petition for writ of habeas corpus.

The instant habeas petition was not filed until February 6, 2012, twenty-nine days after the deadline to file a timely habeas petition had run, rendering petitioner's habeas petition

untimely.

One avenue of relief remains for petitioner. The statute of limitations set forth in the AEDPA is subject to equitable tolling. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). Equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Id. (quotation omitted). In order to qualify for equitable tolling "[t]he petitioner must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims.' Mere excusable neglect is not sufficient." Id. at 618-19. Our Circuit court has identified four circumstances in which equitable tolling is justified: (1) when the defendant has actively misled the plaintiff; (2) when the plaintiff has in some extraordinary way been prevented from asserting his or her rights; (3) when the plaintiff has timely asserted rights, but has mistakenly done so in the wrong forum; or (4) when the claimant received inadequate notice of the right to file suit, a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that he or she had done everything required. Jones v. Morton, 195 F.3d 153, 159 (3d Cir.1999) (*citing* United Sates v. Midgley, 142 F.3d 174, 179 (3d Cir.1998); Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239-40 (3d Cir.1999)). The court has cautioned, however, that equitable tolling is to be invoked "only sparingly." *See* Midgley, 142 F.3d at 179. Additionally, the court has reiterated that in order to qualify for equitable tolling, the petitioner must exercise reasonable diligence throughout the period he or she seeks to toll. *See* Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 699 (petitioner must also establish diligence).

Petitioner argues that petitioner's attorney's negligence entitles petitioner to equitable tolling. On December 5, 2011, the Pennsylvania Supreme Court denied petitioner's

request for allowance of appeal. Petitioner claims that his court appointed attorney, Keith Williams, Esq., failed to inform petitioner of the Supreme Court decision. Petitioner asserts that petitioner wrote to the prothonotary of the Pennsylvania Supreme Court and on January 30, 2012, the prothonatary notified petitioner that the request for allowance of appeal was denied on December 5, 2011. Petitioner then wrote to Attorney Williams. On February 20, 2012 Attorney Williams sent petitioner a letter confirming that the request for allowance of appeal had been denied. Attorney Williams stated in the letter to petitioner that attorney Williams forwarded the denial to petitioner's prior counsel, based on the understanding that prior counsel was going to represent petitioner at the habeas level. Petitioner claims that Attorney Williams' negligence in waiting two and a half months to inform petitioner of the court's ruling amounts to egregious behavior sufficient to invoke equitable tolling.

In Seitzinger, the Third Circuit held that an attorney's affirmative misrepresentations to a client about the attorney's own actions on the client's behalf may constitute an extraordinary circumstance. Seitzinger v. Reading Hosp. & Med. Ctr., 165 f.3d 236, 238 (3d Cir.1999). In LaCava v. Kyler, the court extended a line of holdings that absent affirmative misrepresentation, an attorney's mere failure to inform a client of an unsuccessful appeal does not qualify as extraordinary: "In non-capital case, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." 398 F.3d 271, 276 (3d Cir.2005)(*quoting* Merritt v. Blaine, 326 F.3d 157, 169 (3d Cir.2003)); *see also* Schleuter v. Varner, 384 F.3d 69, 76-78 (3d Cir.2004)(attorney's misconduct did not constitute extraordinary circumstances where attorney failed to keep promise to file PCRA petition on time and failed to communicate further with

petitioner about the status of the case). The Third Circuit has drawn a distinction between an affirmative misrepresentation by counsel about what he had done on behalf of the client and an attorney's negligent failure to act. The former equitably tolls the statute, the latter does not. *See* Schleuter, 384 F.3d at 76-77.

Petitioner cites the recent Supreme Court decision of *Holland v. Florida* in support of his position that Attorney Williams' negligence constitutes extraordinary circumstances. 560 US ------, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). In *Holland* (a capital case), the Supreme Court found that the conduct of a habeas petitioner's attorney could "be an 'extraordinary' instance in which petitioner's attorney's conduct constituted far more than 'garden variety' or 'excusable neglect.' " *Id.* at 2564. The Supreme Court explained that it has been held that "a garden variety claim of excusable neglect", such as a simple "miscalculation" that leads to a lawyer to miss a filing deadline, does not warrant equitable tolling. Id. The Supreme Court explained in Holland the attorney's actions may have constituted more then a "a garden variety" or "excusable neglect". The Supreme Court found extraordinary circumstances might occur where the attorney:

> ... failed to file [the petitioner's] federal petition on time despite [the petitioner's] many letters that repeatedly emphasized the importance of his doing so. [The attorney] apparently did not do the research necessary to find out the proper filing date, despite [the petitioner's] letters that went so far as to identify the applicable legal rules. [The attorney also] failed to inform [the petitioner] in a timely manner about the crucial fact that the Florida Supreme Court had decided his case, again despite [the petitioner's] many pleas for that information. And [the attorney] failed to communicate with [the petitioner] over a period of years, despite various pleas from [the petitioner] that [the attorney] respond to his letters.
> Id. at 2564.

Petitioner contends that Attorney Williams' failure to inform petitioner of the denial of his request for allowance of appeal is an extraordinary circumstance. The Supreme

Court in *Holland* may have decided that extraordinary circumstance is not limited to attorney misrepresentation but can possibly be found when attorney negligence amounts to more than "garden variety" negligence, however, *Holland* was a capital case. The case at bar is not a capital case and it is not clear that the Supreme Court in *Holland* intended to overrule the Third Circuit holdings that "[i]n non-capital case, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." LaCava v. Kyler. 398 F.3d 271, 276 (3d Cir.2005)(*quoting* Merritt v. Blaine, 326 F.3d 157, 169 (3d Cir.2003)). Furthermore, the Supreme Court in *Holland* still noted that "a garden variety claim of excusable neglect", such as a simple "miscalculation" that leads to a lawyer to miss a filing deadline, does not warrant equitable tolling. Id. at 2564.

Petitioner has failed to prove that the alleged negligence of Attorney Williams amounted to more than "garden variety" neglect. Petitioner has shown that for two months, Attorney Williams failed to inform petitioner of the denial of the petition for allowance of appeal. Attorney negligence in failing to inform petitioner of the court's denial does not constitute extraordinary circumstances warranting equitable tolling. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)("Failing to make sure the client learned of the denial of the petition for review may have been negligent, but the attorney's ordinary negligence does not merit equitable tolling of a limitations period.").

The instant matter is not a rare situation that warrants equitable tolling. As such, it is recommended that the instant petition be dismissed as untimely.[1]

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[1]Petitioner filed two separate documents (Docket #2 and # 9) requesting a hearing to take testimony from petitioner's prior retained counsel, Attorney Silverman. Petitioner claims that Attorney Silverman would testify that Attorney Silverman was not representing petitioner and

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 25th day of July, 2012, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DISMISSED. It is also RECOMMENDED that a certificate of appealability not be granted.

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

BY THE COURT:

LINDA K. CARACAPPA
UNITED STATES MAGISTRATE JUDGE

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did not tell PCRA counsel, Attorney Williams, that he was going to represent petitioner at the federal habeas level. Petitioner argues this will prove that Attorney Williams should not have sent the denial notice to Attorney Silverman. This court recommends that petitioner's request for a hearing be denied. The alleged testimony from Attorney Silverman would not make a difference in the court recommendation. Attorney Williams' decision to forward the denial to Attorney Silverman was not extraordinary circumstance requiring equitable tolling.

APPENDIX-B

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

MARK BENTON	:	CIVIL ACTION
v.	:	No. 12-1015
BRIAN COLEMAN, et al.	:	

ORDER

AND NOW, this 19th day of September, 2019, upon consideration of Petitioner Mark Benton's pro se motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), and the Respondent's response thereto, it is ORDERED the motion (Document 19) is DENIED.[1]

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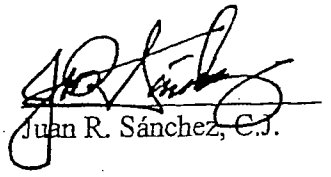
[1] Petitioner Mark Benton is a Pennsylvania state prisoner seeking relief from this Court's November 1, 2013, Order adopting the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa, overruling his objections thereto, and dismissing his 29 U.S.C. § 2254 habeas corpus petition as untimely. On January 31, 2006, Benton was convicted, in the Bucks County Court of Common Pleas, of first-degree murder, attempted murder, robbery of a motor vehicle, firearms not to be carried without a license, resisting arrest, and fleeing and eluding a police officer.

Following his convictions and appeals, Benton sought relief in Pennsylvania state court pursuant to Pennsylvania's Post Conviction Relief Act. On February 6, 2012, after failing to receive relief in state court, Benton filed the instant habeas petition in the United States District Court for the Middle District of Pennsylvania. The petition was then transferred to this Court on February 15, 2012. On November 1, 2013, this Court dismissed his petition as untimely. Benton sought a certificate of appealability from the United States Court of Appeals for the Third Circuit. Benton's application was then denied on March 14, 2014.

On June 26, 2019, Benton filed this pro se motion pursuant to Federal Rule of Civil Procedure 60(b)(6) seeking relief from the Court's November 1, 2013, Order, asserting the Court was mistaken in determining equitable tolling was unwarranted and the Ninth Circuit Court of Appeals' decision in *Gibbs v. LeGrand*, 767 F.3d 879 (9th Cir. 2014), constituted a new intervening law and "extraordinary circumstance" warranting relief. Rule 60(b)(6) permits the court to relieve a party from a "final judgment, order, or proceeding" for "any . . . reason that justifies relief." Pursuant to Rule 60(c), a motion under Rule 60(b)(6) must be brought "within a reasonable time." "What constitutes [a] reasonable time depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon; and [the consideration of] prejudice [if any] to other parties." *See Devon v. Vaughn*, No. 94-2534, 1995 WL 295431, at *2 (E.D. Pa. Apr. 27, 1995) (citing *Kagan v. Caterpillar Tractor*, 795 F.2d 601, 610 (7th Cir. 1986)).

BY THE COURT:



Juan R. Sánchez, C.J.

When a motion under Rule 60(b)(6) is filed more than one year after judgment is final, generally, it is untimely absent a showing of "exceptional circumstances." *See O'Neill v. Close*, No. 10-4210, 2015 WL 4578824, at *2 (E.D. Pa. July 29, 2015). "Therefore, when the petitioner files a Rule 60(b)(6) motion more than one year after the judgment was entered, he bears the 'heavy burden' of demonstrating exceptional circumstances excusing his delay and establishing his entitlement to relief." *See id.* (citing *Gordon v. Monoson*, 239 F. App'x 710, 713 (3d Cir. 2007)).

Because Benton filed this motion five and a half years after the Court's November 1, 2013, Order, it is untimely absent a showing of extraordinary circumstances. First, Benton has made no showing of extraordinary circumstances excusing his delay. Although Benton asserts grounds for relief under a new case *Gibbs v. Legrand*, 767 F.3d 879 (9th Cir. 2014), he fails to explain why he did not file the instant motion until June 2019—nearly five years after that case was decided in 2014. *See Moolenaar v. Gov't. of the Virgin Islands*, 822 F.2d 1342, 1348 (3d Cir. 1987) (finding Rule 60(b)(6) motion to be untimely where party waited two years after judgment to file motion); *Franks v. Gloucester Cty. Prosecutors Office*, 738 F. App'x 79, 81 (3d Cir. 2018) (affirming the denial of a Rule 60(b)(6) motion where petitioner had provided no reasonable explanation as to the delay).

Second, Benton has failed to show any extraordinary circumstances entitling him to relief. Specifically, with the basis of this motion on equitable tolling, Benton advances the same arguments as he did in his objections to Judge Caracappa's Report and Recommendation. This Court has already addressed Benton's arguments on this point, and nothing in Benton's motion persuades the Court to reach a different conclusion. The Court addressed Benton's arguments at some length in its Order overruling his objections, ultimately holding equitable tolling was unwarranted. Further, the "new intervening law" presented in *Gibbs* does not provide a basis for relief. In *Gibbs*, the attorney misconduct was egregious where the petitioner had repeatedly requested communication from the attorney, the attorney promised to notify the petitioner of the results of his post conviction petition, and based on the petitioner's own research, he discovered the state supreme court dismissed his petition. Benton, however, has asserted no such circumstances that rise to the same level of attorney misconduct or exercise of reasonable diligence on his own behalf. *But see Gibbs*, 767 F.3d at 886 ("[E]xtraordinary circumstances existed where counsel failed to timely file his client's habeas petition despite having promised to do so, even though the petitioner hired him over a year before the AEDPA deadline, paid him $20,000, gave him files and repeatedly inquired about his case." (citing *Doe v. Busby*, 661 F.3d 1001, 1012 (9th Cir. 2011)). Thus, to the extent *Gibbs* has persuasive value on this Court, it does not provide Benton with grounds for relief.

Because Benton fails to show extraordinary circumstances excusing his delay in filing this motion or entitling him to relief, Benton's Rule 60(b)(6) motion is denied.

ALD-110 February 6, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-3271**

MARK BENTON, Appellant

VS.

SUPERINTENDENT FAYETTE SCI, et al.

(E.D. Pa. Civ. No. 2:12-cv-01015)

Present: MCKEE, SHWARTZ and PHIPPS, Circuit Judges

Submitted are:

1) Appellant's application for a certificate of appealability; and

2) Appellees' Response in Opposition to Issuance of a Certificate of Appealability

in the above-captioned case.

Respectfully,
Clerk

ORDER

Appellant's application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason could not debate that the District Court correctly denied his motion brought under Federal Rule of Civil Procedure 60(b)(6). See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: April 6, 2020
JK/cc: Mark Benton
Karen A. Diaz, Esq.
Ronald Eisenberg, Esq.

A True Copy:

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