ALD-127 February 27, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-2800**

STEPHEN FREDERICK BAKER, JR., Appellant

VS.

SUPERINTENDENT FAYETTE SCI, ET AL.

(M.D. Pa. Civ. No. 1-16-CV-02478)

Present: MCKEE, SHWARTZ and PHIPPS, Circuit Judges

Submitted are:

(1) 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); and

(2) Appellees' response

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. The District Court denied Baker's petition as untimely. To be entitled to a certificate of appealability, Baker must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and debatable whether the District Court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Baker has not shown that jurists of reason would debate that his petition was untimely and he was not entitled to equitable tolling. See McQuiggin v. Perkins, 569 U.S. 383, 399 (2013); Holland v. Florida, 560 U.S. 631, 649 (2010). Nor has he made a debatable showing of a valid claim of the denial of a constitutional right with respect to the merits of his claims. See Strickland v. Washington, 466 U.S. 668, 687-96 (1984).

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: April 2, 2020
PDB/cc: Stephen Frederick Baker, Jr.
Christopher J. Schmidt, Esq.

A True Copy:

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

PATRICIA S. DODSZUWEIT

CLERK

OFFICE OF THE CLERK

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RE: Stephen Baker, Jr. v. Superintendent Fayette SCI, et al
Case Number: 19-2800
District Court Case Number: 1-16-cv-02478

ENTRY OF JUDGMENT

Today, **April 02, 2020** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

For the Court,

s/ Patricia S. Dodszuweit,
Clerk

s/ pdb Case Manager

cc:
Mr. Peter J. Welsh

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STEPHEN BAKER,	:	**Civil No. 1:16-CV-2478**
	:	
Petitioner	:	
	:	**(Judge Kane)**
v.	:	
	:	**(Magistrate Judge Carlson)**
JAY LANE, et al.,	:	
	:	
Respondents	:	

REPORT AND RECOMMENDATION

I. Statement of Facts and of The Case

Thirteen years ago, in 2006, Stephen Baker pleaded guilty to two counts of second-degree murder and one count of possession of firearms by a prohibited person. Today, thirteen years later, courts are still wrestling with the consequences of this guilty plea and the timeliness of Baker's efforts to set aside his murder convictions.

As we turn to these issues of timeliness, we most assuredly do not write upon a blank slate in this case. Quite the contrary, over the past thirteen years, this case has been the subject of fitful litigation by Baker in the Court of Common Pleas, before Pennsylvania's Superior Court, in this Court, and in the United States Court of Appeals for the Third Circuit. The protracted history of Baker's state post-

conviction litigation was aptly summarized by this Court in its initial ruling addressing the application of the statute of limitations to this case. At that time the Court explained that:

> In the petition Baker alleges that on September 11, 2006, he pled guilty to two counts of second degree murder and one count of possession of a firearm by a prohibited person and was sentenced by the Court of Common Pleas of Huntingdon County, Pennsylvania, to two terms of life imprisonment to be served concurrently plus a consecutive term of imprisonment of 5 to 10 years. (Doc. 1, at 1-2.) Baker contends he filed appeals and post-conviction proceedings in state court but his allegations regarding the timing of those proceedings are somewhat vague. (Id. at 3-9.) However a review of the dockets of the Huntingdon County Court of Common Pleas, the Pennsylvania Superior Court and the Pennsylvania Supreme Court reveals that on September 20, 2006, Baker filed in the Court of Common Pleas a post-sentence motion, Commonwealth of Pennsylvania v. Stephen Frederick Baker, Jr., CP-31-CR-0000013-2005, apparently challenging the voluntariness of his guilty pleas and claiming that his counsel was ineffective. (See Doc. 1, at 2.) On April 4, 2007, the Court of Common Pleas denied the post-sentence motion and on April 25, 2007, Baker filed a notice of appeal. On February 12, 2008, the Superior Court affirmed the decision of the Court of Common Pleas. Commonwealth of Pennsylvania v. Stephen Frederick Baker, Jr., 738 MDA 2007.Baker did not seek review in the Pennsylvania Supreme Court and, consequently, Baker's judgment of conviction and sentence became final on March 13, 2008, 30 days after the Superior Court issued its decision. After 309 days elapsed with no proceedings pending in state court, Baker on January 16, 2009, filed in the Court of Common Pleas of Huntingdon County a petition under Pennsylvania's Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541, et seq. ("PCRA"). Commonwealth of Pennsylvania v. Stephen Frederick Baker, Jr., CP-31-CR-0000013-2005. On November 19, 2009, the Court of Common Pleas denied the PCRA petition and that decision became final and the PCRA proceedings terminated on December 21, 2009, when Baker did not file an appeal to the Superior Court. After an additional 43 days elapsed with no proceedings pending in state court,

> Baker on February 2, 2010, filed a second PCRA petition. On February 26, 2015, the Court of Common Pleas granted the second PCRA to the extent that Baker's appeal rights were reinstated and Baker filed an appeal to the Superior Court challenging the denial of his first PCRA petition. However, on November 30, 2015, the Superior Court affirmed the decision of the Court of Common Pleas. Commonwealth of Pennsylvania v. Stephen Frederick Baker, Jr., 476 MDA 2015. Subsequently, on April 6, 2016, the Supreme Court of Pennsylvania denied Baker's petition for allowance of appeal. Commonwealth of Pennsylvania, Respondent v. Stephen Frederick Baker, Jr., Petitioner, 984 MAL 2015. After that denial there were no further proceedings pending in state court and a period of 253 days elapsed before Baker filed on December 15, 2016, the present habeas petition in this court.

Baker v. Lane, No. 1:16-CV-02478, 2017 WL 386617, at *1 (M.D. Pa. Jan. 27, 2017). Examining this chronology and noting that more than 560 days had elapsed during these proceedings, which was not apparently tolled under the statute of limitations for federal habeas corpus petitions filed by state prisoner, 28 U.S.C. § 2244(d), in January of 2017 the district court found that Baker's petition was time-barred and dismissed this petition. Id.

Baker appealed this decision. (Doc. 10.) On September 29, 2017, the Court of Appeals remanded this case to the district court for further consideration of whether Baker was entitled to any form of equitable tolling of the limitations period prescribed by law, and specifically ordered as follows:

> The request for a certificate [of appealability] is granted, the District Court's order is summarily vacated, and the matter is remanded for further proceedings. On remand, the District Court should give Baker an opportunity to respond to the possible dismissal of his 28 U.S.C. §

> 2254 petition as untimely. Day v. McDonough, 547 U.S. 198, 210 (2006) (District Court must provide notice and opportunity to respond before sua sponte dismissing habeas petition as untimely). It should also address (1) his arguments for equitable tolling of the statute of limitations; see Mem. of Law at 7-8 (docket #2); see also id. at 9 (alleging diminished capacity, cognitive impairments, and illiteracy); Mot. for the App't of Counsel (same) (docket #3); Appl. for Certificate of Appealability (same) (docket #10-1); and (2) his arguments for application of the equitable exception to the statute of limitations set forth in McQuiggin v. Perkins, 133 S. Ct. 1924, 1935 (2013); see Appl. for Certificate of Appealability at 9-11.

(Doc. 12.)

Following the issuance of the Court of Appeals' mandate, this court directed the parties to thoroughly address any available grounds for equitable tolling of the statute of limitations in this case. (Docs. 13, 15.) Baker and Respondents have filed supplemental pleadings addressing these equitable tolling questions. (Docs. 14, 20, and 22.) In January and March of 2019, this case was referred to the undersigned for our consideration. Accordingly, this matter is now ripe for resolution.

Upon careful review of the parties' submissions, and evaluation of all potential grounds for equitable tolling cited by Baker, for the reasons set forth below we conclude that the petitioner has not made a sufficient showing to warrant this extraordinary form of relief. Therefore, we recommend that the petition be dismissed.

II. Discussion

A. State Prisoner Habeas Relief–The Legal Standard.

(1) Substantive Standards

In order to obtain federal habeas corpus relief, a state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy the standards prescribed by 28 U.S.C. § 2254, which provides in part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
>
> .....
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(a) and (b).

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. At the outset, a petition must satisfy exacting substantive standards to warrant relief. Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in

custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the Constitution or laws or treaties of the United States," § 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. See e.g., Reed v. Farley, 512 U.S. 339, 354 (1994). Thus, claimed violations of state law, standing alone, will not entitle a petitioner to § 2254 relief, absent a showing that those violations are so great as to be of a constitutional dimension. See Priester v. Vaughan, 382 F.3d 394, 401–02 (3d Cir. 2004).

(2) Deference Owed to State Courts

These same principles which inform the standard of review in habeas petitions and limit habeas relief to errors of a constitutional dimension also call upon federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254.

First, with respect to legal rulings by state courts, under § 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law; see 28 U.S.C. § 2254(d)(l); or (2) was "based upon an unreasonable determination of the facts," see 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. See Rice v. Collins, 546 U.S. 333, 338–39 (2006); see also Warren v. Kyler, 422 F.3d 132, 139–40 (3d Cir. 2006); Gattis v. Snyder, 278 F.3d 222, 228 (3d Cir. 2002).

In addition, § 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. See 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made in the course of criminal proceedings. See, e.g., Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam); Demosthenes v. Baal, 495 U.S. 731, 734–35 (1990). This principle applies to state court factual findings made both by the trial court and state appellate courts.

Rolan v. Vaughn, 445 F.3d 671 (3d Cir.2006). Thus, we may not re-assess credibility determinations made by the state courts, and we must give equal deference to both the explicit and implicit factual findings made by the state courts. Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000). Accordingly, in a case such as this, where a state court judgment rests upon factual findings, it is well-settled that:

> A state court decision based on a factual determination, ..., will not be overturned on factual grounds unless it was objectively unreasonable in light of the evidence presented in the state proceeding. Miller–El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003). We must presume that the state court's determination of factual issues was correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Campbell v. Vaughn, 209 F.3d 280, 285 (3d Cir.2000).

Rico v. Leftridge–Byrd, 340 F.3d 178, 181 (3d Cir. 2003). Applying this standard of review, federal courts may only grant habeas relief whenever "[o]ur reading of the PCRA court records convinces us that the Superior Court made an unreasonable finding of fact." Rolan, 445 F.3d at 681.

(3) Procedural Benchmarks – Statute of Limitations

State prisoners seeking relief under section 2254 must also satisfy specific procedural standards. Principal among these procedural benchmarks is the statute of limitations which applies to habeas corpus petitions filed by state prisoners. State prisoners seeking relief under § 2254 must timely file motions seeking habeas corpus relief. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28

U.S.C. § 2244, established a one-year statute of limitations on the filing of habeas petitions by state prisoners. In pertinent part, § 2244(d)(1) provides as follows:

> 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 plication 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.

See Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 617 (3d Cir. 1998).

The calculation of this limitations period is governed by a series of well-defined rules. At the outset, these rules are prescribed by statute, specifically 28 U.S.C. § 2244(d), prescribes several forms of statutory tolling. First, with respect to tolling based upon a petitioner's direct appeal of his conviction, "[t]he 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." § 2244(d)(1)(A). The courts have construed this tolling provision in a forgiving fashion, and in a manner that enables petitioners to toll their filing deadlines for the time periods in which they could have sought further direct appellate review of their cases, even if they did not, in fact, elect to seek such review. Thus, with respect to direct appeals, the statute of limitations is tolled during the period in which a petitioner could have sought United States Supreme Court review through a petition for writ of certiorari, even if no such petition is filed. Jimenez v. Quarterman, 555 U.S. 113, 119, 129 S. Ct. 681, 685, 172 L. Ed. 2d 475 (2009).

Section 2244(d)(2), in turn, prescribes a second period of statutory tolling requirements while state prisoners seek collateral review of these convictions in state court, and provides that:

> The 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.

See Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000).

In assessing § 2244(d)(2)'s tolling provision, for purposes of tolling the federal habeas statute of limitations, a "properly filed application for State post-conviction or other collateral review" only includes applications which are filed in a timely fashion under state law. Therefore, if the petitioner is delinquent in seeking state collateral review of his conviction, that tardy state pleading will not be

considered a "properly filed application for State post-conviction or other collateral review" and will not toll the limitations period. Pace v. DiGuglielmo, 544 U.S. 408, 412-14 (2005); Long v. Wilson, 393 F.3d 390, 394-95 (3d. Cir. 2004). Moreover, in contrast to the direct appeal tolling provisions, this post-conviction petition tolling provision does not allow for an additional 90 day period of tolling for the petitioner who does not seek United States Supreme Court certiorari review of his conviction. Miller v. Dragovich, 311 F.3d 574, 578 (3d Cir. 2002).

Further, it is important to note that § 2244(d)(2)'s tolling provision only applies to properly filed applications for *state* post-conviction or other collateral review. Therefore, it is well settled that this provision does not allow for tolling of the statute of limitations while some prior *federal* post-conviction petition is pending. As the Supreme Court has explained:

> Section 2244(d)(2), . . . , employs the word "State," but not the word "Federal," as a modifier for "review." It is well settled that " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " Bates v. United States, 522 U.S. 23, 29–30, 118 S. Ct. 285, 139 L.Ed.2d 215 (1997) (quoting Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983)). We find no likely explanation for Congress' omission of the word "Federal" in § 2244(d)(2) other than that Congress did not intend properly filed applications for federal review to toll the limitation period. It would be anomalous, to say the least, for Congress to usher in federal review under the generic rubric of "other collateral review" in a statutory provision that refers expressly to "State" review, while denominating

> expressly both "State" and "Federal" proceedings in other parts of the same statute

Duncan v. Walker, 533 U.S. 167, 173, 121 S. Ct. 2120, 2125, 150 L. Ed. 2d 251 (2001).

Beyond this tolling period mandated by statute, it has also been held that AEDPA's one-year limitations period is not a jurisdictional bar to the filing of habeas petitions, Miller, 145 F.3d at 617-18, and, therefore, is subject to equitable tolling. Id. at 618-19.Yet, while equitable tolling is permitted in state habeas petitions under AEDPA, it is not favored. As the Court of Appeals has observed:

> [E]quitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Generally, this will occur when the petitioner has "in some extraordinary way ... been prevented from asserting his or her rights." The 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 (citations omitted). Indeed, it has been held that only:

> [T]hree circumstances permit[] 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.
> Jones v. Morton, 195 F.3d 153, 159 (3d Cir.1999) (citations omitted).

Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001).

Applying this exacting standard, courts have held that, "[i]n 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." Id. (citing Freeman v. Page, 208 F.3d 572 (7th Cir. 2000) (finding no basis for equitable tolling where the statute of limitations was changed to shorten the time for filing a PCRA only four months prior to the filing of the petition) and Taliani v. Chrans, 189 F.3d 597 (9th Cir. 1999) (finding lawyer's inadequate research, which led to miscalculating the deadline, did not warrant equitable tolling)). Courts have also repeatedly rejected claims by *pro se* litigants that the burdens of proceeding *pro se* should somehow exempt them from strict compliance with the statute of limitations. See, e.g., Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2001); United States v. Cicero, 214 F.3d 199, 203 (D.C. Cir. 2000); Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000). Thus, while tardy habeas petitioners often invite courts to find extraordinary circumstances warranting equitable tolling, those invitations are rarely embraced by the courts. See, e.g., Merritt v. Blaine, 326 F.3d 157 (3d.Cir. 2003) (denying equitable tolling request); Robinson v. Johnson, 313 F.3d 128 (3d. Cir. 2002) (same).

Judged by these guideposts, Baker's petition is untimely and is barred by the statute of limitations.

B. This Petition is Untimely and Not Subject to Equitable Tolling.

A review of the chronology of this litigation indicates that Baker's instant habeas corpus petition is time-barred. As we have noted, § 2244 established a one-year statute of limitations on the filing of habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). While this limitations period is tolled during timely and proper state post-conviction litigation, there is no form of statutory tolling that would apply in the instant case to toll time which preceded or followed state post-conviction litigation.[1]

Applying these statutory tolling principles in the most generous fashion, it appears that some 309 days elapsed between the time when Baker's judgment of conviction and sentence became final on March 13, 2008—30 days after the Superior Court issued its decision—and January 16, 2009, when Baker filed a petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541 *et seq.*, in the Court of Common Pleas of Huntingdon County. While that pending state post-conviction litigation tolled the limitations period, even the most expansive reading of this tolled time period would have drawn to a close on April 6, 2016, when the Supreme Court of Pennsylvania denied Baker's petition for

[1] We note that some 43 days passed between the resolution of Baker's first PCRA petition and the filing of his second petition. Baker has argued that this time should be tolled, and we are, for purposes of this Report and Recommendation, acceding to this request.

allowance of appeal after Baker pursued his appeal of the denial of his second post-conviction petition. Commonwealth of Pennsylvania, Respondent v. Stephen Frederick Baker, Jr., Petitioner, 984 MAL 2015. After that denial, there were no further proceedings pending in state court, and an additional 253 days elapsed before Baker filed this federal habeas corpus petition on December 15, 2016. Thus, in the course of these fitful post-conviction proceedings, at a minimum, 562 days passed that were not the subject of any form of statutory tolling under § 2244(d).

Accordingly, Baker can only pursue these belated claims if he can demonstrate an entitlement to some form of equitable tolling. Baker faces an exacting burden of proof in making any equitable tolling claim. To succeed, Baker must show that: "the petitioner has '*in some extraordinary way* ... been prevented from asserting his or her rights.'" Miller, 145 F.3d at 618-19 (citations omitted) (emphasis added).

Here, Baker's equitable tolling argument fails because we find that Baker has not satisfied a basic prerequisite for equitable tolling. He has failed to show that he "exercised reasonable diligence in investigating and bringing [the] claims." Miller, 145 F.3d at 618-19 (citations and quotations omitted). Instead, the record shows that Baker pursued post-conviction relief in a fitful fashion, allowing 309 days to elapse between the culmination of his direct appeals and the commencement of his state

PCRA litigation. Once that PCRA litigation drew to a close, Baker then permitted an additional 253 days to pass before coming to federal court seeking habeas corpus relief. These 562 days of delay are unexplained and unaccounted for by Baker, and simply do not illustrate the reasonable diligence demanded of inmates seeking this extraordinary relief. In fact, the delay in pursuing these matters is particularly inexplicable since the claims Baker indicated that he wished to pursue in this federal habeas corpus petition, relating to his competence to plead guilty and the ineffectiveness of his counsel, are all matters that were plainly known to Baker more than a decade ago when he pursued the first of his halting state post-conviction filings. Given the fact that Baker has known of these claims for more than a decade, his unexplained failure to diligently pursue these matters is all the more glaring and inexcusable.

We have been enjoined on remand to consider whether Baker's claims of mental incompetence, abandonment by counsel, or actual innocence provide any grounds for equitable tolling in this case. (Doc. 12.) While we have carefully examined these claimed grounds for equitable tolling, weighing Baker's claims against the exacting standards prescribed by the law, we find these assertions to be unavailing and to provide no grounds for tolling the limitations period in this case.

Turning first to Baker's assertions that his mental state provided grounds for equitable tolling of the statute of limitations, in the past petitioners like Baker have attempted to cite to claims of mental incompetence as grounds for equitable tolling of this statute of limitations. Yet these claims, while frequently made, have rarely been embraced by the courts.

To be sure, a finding of incompetence may provide grounds for equitable tolling of this limitations period, see e.g., Nara v. Frank, 488 F.3d 187 (3d Cir. 2007); Holt v. Bowersox, 191 F.3d 970 (8th Cir. 1999), but such claims are subject to careful scrutiny by the courts. Thus, it is clear that a claim of some mental impairment, standing alone, will not excuse a procedural default by a federal habeas petitioner. Quite the contrary:

> In the "context of procedural bars arising from failure to pursue state postconviction remedies, '[a] defendant is competent ... if he is not suffering from a mental disease, disorder, or defect that may substantially affect his capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.' "*Mental illness and legal incompetence are not identical, nor are all mentally ill people legally incompetent.*" Id. (emphasis added).

Sims v. Dwyer, No. 05–727, 2006 WL 2385262, at *8 (E.D. Mo. Aug.17, 2006) (citations omitted). "Likewise, mental disabilities or disorders that do not substantially affect a petitioner's capacity to appreciate his or her position and make rational choices with respect to continuing or abandoning further litigation are not

sufficient 'cause' [justifying untimely habeas filings]." Teall v. Vail, No. 09–565, 2010 WL 2079855, *1 (W.D. Wash. May 21, 2010) (citations omitted). Instead:

> [I]n order for mental illness to constitute cause and prejudice to excuse procedural default, *there must be a conclusive showing* that mental illness interfered with a petitioner's ability to appreciate his or her position and make rational decisions regarding his or her case at the time during which he or she should have pursued post-conviction relief. See Garrett v. Groose, 99 F.3d 283, 285 (8th Cir.1996); Nachtigall v. Class, 48 F.3d 1076, 1080–81 (8th Cir.1995); Stanley v. Lockhart, 941 F.2d at 708–10.

Holt v. Bowersox 191 F.3d 970, 974 (8th Cir. 1999) (emphasis added).

Furthermore, when considering equitable tolling claims grounded on assertions of mental incompetence, we must remain mindful of the deference this Court owes to prior state court findings relating to a petitioner's competence. Thus, we are not free to substitute our views for the findings on state judges on issues of competence to stand trial, Maggio v. Fulford, 462 U.S. 111, 117, 103 S. Ct. 2261, 76 L.Ed.2d 794 (1983); competence to waive rights, Demosthenes v. Baal, 495 U.S. 731, 734–35, 110 S. Ct. 2223, 109 L.Ed.2d 762 (1990); or whether the defendant's mental competence affected his ability to comply with post-conviction petition filing deadlines. Nara v. Frank, 488 F.3d 187, 200, 201 (3d Cir. 2007). Rather, these factual findings are presumed to be correct unless the petitioner can show by clear and convincing evidence that these factual findings were erroneous. See 28 U.S.C. § 2254(e)(1). Applying these legal benchmarks, federal courts have frequently

declined invitations to excuse tardy petitions or other procedural defaults by federal habeas corpus petitioners on the grounds of mental incompetence where the evidence shows, and state courts have found, that the petitioner has not made a conclusive showing that mental illness interfered with his ability to appreciate his position and make rational decisions regarding his case at the time during which he should have pursued post-conviction relief. See e .g., Cadmus v. Warden SCI Coal Twp., No. 4:08-CV-473, 2010 WL 3081262, at *11–12 (M.D. Pa. June 28, 2010), report and recommendation adopted, No. 4:08-CV-473, 2010 WL 3081253 (M.D. Pa. Aug. 5, 2010); Teall v. Vail, No. 09–565, 2010 WL 2079855, *1 (W.D. Wash. May 21, 2010); Sims v. Dwyer, No. 05–727, 2006 WL 2385262, 8 (E.D. Mo. Aug.17, 2006); Jasa v. Mathes, No. 03–4095, 2004 WL 2039854 (N.D. Iowa Sept. 13, 2004); Ryan v. Clarke, 281 F.Supp.2d. 1008 (D. Neb. 2003).

In the instant case, the state courts have already thoroughly considered Baker's claims that he lacked mental competence, and rejected those claims. As the Superior Court observed when it affirmed the denial of Baker's state PCRA petition:

> [Baker] argues that he was of "limited mental capacity" and therefore unable to understand the crimes to which he was pleading guilty. [Baker] Brief at 14. [Baker] further attributes his alleged inability to understand the charges against him to trial counsel's failure to provide copies of discovery to [Baker] or to discuss discovery with him prior to his guilty plea. *The record flatly contradicts these claims.*

> [Baker] completed a written Guilty Plea Colloquy on September 11, 2006, wherein he affirmed that he understood the factual nature of the offenses to which he was pleading guilty and that his lawyer had explained the elements of the criminal offenses to him. See Guilty Plea Colloquy, 9/11/06 at ¶¶ 14-15. During the oral guilty plea colloquy, the trial court clearly explained to [Baker] the elements of the crimes of second degree murder and the firearms offense to which [Baker] was pleading guilty, and the Commonwealth recited the factual basis for the plea. See N.T., Plea Hearing and Sentencing, 9/11/06 at 3-9. Thereafter, [Baker] acknowledged his understanding of the information relayed to him and indicated his wish to proceed with the guilty plea. See id. at 11. [Baker] further admitted that he was entering his plea voluntarily and without coercion and that he had all of the information needed in order to make the decision to enter a guilty plea. See id. at 17-18. Based upon these statements, the trial court accepted [Baker]'s guilty plea. At no time – either in the written or oral colloquy – did [Baker] allege that he was of "limited mental capacity" or that he was without the necessary information needed to enter a knowing plea. [Baker] expressly indicated his understanding of the crimes to which he was pleading guilty and the factual basis for his plea. [Baker] cannot now baldly recant his representations made under oath to the court.
>
> ...
>
> In light of the comprehensive written and oral plea colloquy, which [Baker] fully and willingly completed, we find no factual basis to support [Baker]'s claim that his plea was in any manner unknowingly, involuntarily, or unintelligently given, or that the ineffective assistance of trial counsel rendered his plea as such.

Commonwealth v. Baker, 476 MDA 2015, at 5-7 (Pa. Super. Nov. 30, 2015) (emphasis added) (Doc. 22, Exhibit A). Moreover, these findings by the state courts were consistent with the determination of Dr. Michelle Arbitell, a licensed clinical psychologist with 17 years' experience, who conducted tests and examinations of Baker and opined at the time of Baker's state prosecution that, while he had some

verbal learning disabilities, he was competent to stand trial. (Doc. 22, Exhibit B, ¶ 87.)

In the face of this evidence and these state court rulings, Baker confronts two challenges in sustaining this equitable tolling argument. First, Baker must address the stubborn fact that the state trial and appellate courts have consistently found that he has not shown that he was incompetent at the time of this guilty plea. Second, Baker faces the stark legal reality that we are not free to substitute our views for the findings of state judges on issues of competence to stand trial, Maggio, 462 U.S. at 117; competence to waive rights, Demosthenes, 495 U.S. at 734–35; or whether the defendant's mental competence affected his ability to comply with post-conviction petition filing deadlines. Nara, 488 F.3d at 200–01. Rather, these factual findings are presumed to be correct unless the petitioner can show by clear and convincing evidence that these factual findings were erroneous. See 28 U.S.C. § 2254(e)(1).

Simply put, Baker cannot save this untimely petition by asserting that he is entitled to equitable tolling of § 2244's statute of limitations due to his claimed mental impairments. Indeed, this claim has been rebutted by the Pennsylvania courts, which have found that Baker has not shown that he was mentally incompetent, a factual finding which is fully supported by the great weight of the evidence. This factual finding is presumed to be correct unless the petitioner can show by clear and

convincing evidence that it was erroneous. See 28 U.S.C. § 2254(e)(1). In this case, Baker has made no such showing, nor can he. Rather, the evidence shows that Baker was competent, both at the time of his guilty plea, and in the ensuing months when he actively litigated *pro se* claims on his own behalf. Since Baker has not made a conclusive showing that his mental impairments prevented him from taking appropriate legal steps to protect his rights, and cannot make such a showing here, this equitable tolling claim must fail. Cadmus v. Warden SCI Coal Twp., No. 4:08-CV-473, 2010 WL 3081262, at *15 (M.D. Pa. June 28, 2010), report and recommendation adopted, No. 4:08-CV-473, 2010 WL 3081253 (M.D. Pa. Aug. 5, 2010).

Baker's claim of entitlement to equitable tolling based upon abandonment by counsel also warrants only brief consideration. While attorney abandonment may in extraordinary circumstances constitute grounds for equitable tolling, Ross v. Varano, 712 F.3d 784 (3d Cir. 2013), in order to justify equitable tolling on these grounds, the petitioner must show: "extreme neglect, including but not limited to [counsel's] refusal to accept [petitioner's] calls, overall failure to communicate with [petitioner], inaccurate assurances regarding the status of [petitioner's] appeal on those very limited occasions when [counsel] did communicate with [petitioner], and misstatements of the law." Ross v. Varano, 712 F.3d 784, 803 (3d Cir. 2013).

Nothing in Baker's petition suggests that he has meet this very high threshold for finding equitable tolling based upon abandonment of counsel. Quite the contrary, it appears that Baker has received the assistance of counsel at various stages of these state proceedings. While Baker has been disappointed by the outcome of these proceedings, that disappointment does not equate with abandonment by counsel. Therefore, this equitable tolling claim also fails.

Finally, relying upon the Supreme Court's decision in McQuiggin v. Perkins, 569 U.S. 383 (2013), Baker asserts that he is entitled to equitable tolling of the statute of limitations because he is actually innocent of the two felony murders to which he pleaded guilty in 2006. Thus, Baker's actual innocence equitable tolling claim comes before us in a novel context, where Baker insists that he is actually innocent of the crimes that he admitted under oath he committed at the time of his guilty plea.

Baker must meet exacting legal thresholds to sustain this "actual innocence" claim. As we have noted with respect to this form of equitable tolling:

> "Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or expiration of the statute of limitations." McQuiggin, 133 S. Ct. at 1928. However, this exception is also quite narrow. Id. ("We caution, however, that tenable actual-innocence gateway pleas are rare[.]"). In McQuiggin the Supreme Court relied on its prior decision in Schlup v. Delo, 513 U.S. 298 (1995), where the Court held that "a petitioner does not meet the threshold requirement [of showing actual innocence] unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond

a reasonable doubt." Schlup, 513 U.S. at 329; *see also* McQuiggin, 133 S. Ct. at 1928; *House v. Bell*, 547 U.S. 518, 538 (2006) (emphasizing that the Schlup standard is "demanding" and rarely satisfied). The timing of the petition is also a relevant factor that bears on the reliability of the evidence that a petitioner offers to demonstrate actual innocence. McQuiggin, 133 S. Ct. at 1928.

"To be credible, [an actual innocence] claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324. Stated somewhat differently, the petitioner must "present[ ] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial." Id. at 316. But where the new evidence raises "sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that trial was untainted by constitutional error," then the new evidence meets the "threshold showing of innocence [to] justify a review of the merits of the constitutional claims." Id. at 317.

In analyzing a petitioner's actual-innocence claim based on new evidence, "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.' " House, 547 U.S. at 537-38. Accordingly, "[t]he court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *Id.* At the same time, "it bears repeating that the Schlup standard is demanding and permits review only in the 'extraordinary' case." Id. at 538. A court is not compelled to hold an evidentiary hearing where, after "assess[ing] the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial," the court finds that no reasonable juror would have acquitted the petitioner in the light of the new evidence presented. Schlup, 513 U.S. at 331-32; Houck, 625 F.3d at 95.

Love v. Lamas, No. 1:13-CV-456, 2016 WL 6694498, at *5 (M.D. Pa. Sept. 20, 2016), report and recommendation adopted, No. 1:13-CV-456, 2016 WL 6582055 (M.D. Pa. Nov. 7, 2016), opinion after grant of reconsideration, No. 1:13-CV-456, 2017 WL 679828 (M.D. Pa. Feb. 21, 2017), and report and recommendation adopted, No. 1:13-CV-456, 2017 WL 679828 (M.D. Pa. Feb. 21, 2017).

In assessing this tardy claim of actual innocence, which Baker advances in order to support some form of equitable tolling, we are constrained to observe that at the time of his 2006 guilty plea, Baker acknowledged orally and in writing under oath that he had, in fact, committed this double homicide. (Dc. 22, Exhibit A, at 5-7, Doc. 22, Exhibit E.) Moreover, Baker entered these guilty pleas after earlier confessing to police that he had shot and killed his victims. In the face of these repeated admissions, Baker's current claim of actual innocence rests upon a single, thin reed. According to Baker, he cannot be guilty of second-degree murder because "[n]othing was taken, so the Commonwealth was not in a position to demonstrate that there exists a robbery in this case." (Doc. 10-1, at 11.) Thus, Baker now seeks the benefit of equitable tolling and urges us to allow him to belatedly challenge this conviction based upon a claim that, while he may be guilty of two killings, he was actually innocent of a murder during a robbery because nothing was taken after he killed his victims.

Beyond the risible notion that someone can be actually innocent of killings they admit to having committed, this "actual innocence" claim fails because it rests upon a basic misunderstanding regarding what constitutes a second-degree murder in Pennsylvania. Pennsylvania law provides that: "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa. Cons. Stat. § 2502(b). Robbery is a felony under Pennsylvania law, 18 Pa. Cons. Stat. § 3701, but what Baker fails to consider is that Pennsylvania law also recognizes the crime of attempted robbery. See 18 Pa. Cons. Stat. §§ 906, 3701. Like robbery, attempted robbery is a felony. Id. Moreover, the robbery statute defines the offense of robbery in terms that include an attempt to take money from another. As the Pennsylvania Superior Court has observed: "A conviction for robbery does not require proof of a completed theft, it requires only that the requisite force was used 'in the course of committing a theft,' which is statutorily defined as 'an attempt to commit theft or in flight after the attempt or commission.'" Commonwealth v. Robinson, 936 A.2d 107, 110 (2007) (quoting § 3701(a)(2)). Accordingly, it has been held that:

> A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa. C.S.A. § 2502(b). "Perpetration of a felony" is defined as: "The act of the defendant in engaging in or being an accomplice in the commission of, *or an attempt*

> *to commit*, or flight after committing, or *attempting to commit robbery*,
> . . . .

Commonwealth v. Knox, 2012 PA Super 148, 50 A.3d 749, 754–55 (2012) (emphasis added).

Simply put, under Pennsylvania law, Baker did not actually have to take property from his victims after he shot them to death to be guilty of second-degree murder. It was sufficient under Pennsylvania law that his victims died in the course of an attempted robbery. Nothing more was required to establish his guilt, and Baker's claim of actual innocence based upon the alleged failure to prove that he committed thefts after he engaged in this double homicide fails as a matter of law.

In sum, given this inaction by the petitioner, no form of equitable tolling analysis can save this petition from the fate which AEDPA's one-year statute of limitations dictates in this case. Thus, on its face, this petition is untimely and falls outside § 2244(d)'s one-year limitation period, and we cannot find any extraordinary circumstances of the type that would justify equitable tolling of this limitations period.

Furthermore, while Baker has not made a showing of extraordinary circumstances on his part that would justify tolling this limitations period, there are substantial interests that weigh in favor of holding the petitioner strictly to the limitations period prescribed by law. These countervailing interests include the

strong societal interests favoring finality in litigation, as well as the institutional interests of the criminal justice system, which favor prompt presentation and resolution of disputes. However, when considering a statute of limitations question which arises in the context of a belated collateral attack upon criminal convictions involving a double homicide, there is also an important human dimension to the statute of limitations. To ignore the limitations period prescribed by law, and permit Baker to belatedly re-open this case, would compel his victims to, once again, experience the trauma of these events.

Since Baker has not fulfilled his responsibility to bring this petition in a timely manner and has not carried his burden of showing extraordinary circumstances justifying a tolling of the statute of limitations, he should not be entitled to compel the government to require the families of his victims to revisit these events. Thus, this petition should be dismissed as time-barred.

III. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the petition for a writ of habeas corpus in this case be DISMISSED as time-barred, and that a certificate of appealability should not issue.

The petitioner is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in

28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 22d day of May 2019.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

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

STEPHEN FREDERICK BAKER, JR.,	:	
Petitioner	:	**No. 1:16-cv-2478**
	:	
v.	:	**(Judge Kane)**
	:	**(Magistrate Judge Carlson)**
JAY LANE, et al.,	:	
Respondents	:	

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Before the Court is the May 22, 2019 Report and Recommendation of Magistrate Judge Carlson (Doc. No. 25), recommending that the Court dismiss the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by pro se Petitioner Stephen Frederick Baker, Jr. ("Petitioner") as untimely. (Doc. No. 1.) Petitioner has filed a motion for an extension of time to file objections (Doc. No. 26), and subsequently filed his objections on June 19, 2019 (Doc. No. 27). The Court will grant his motion for an extension of time (Doc. No. 26) and deem his objections timely.

In 2006, Petitioner pled guilty to two (2) counts of second-degree murder and one (1) count of possession of a firearm by a prohibited person and was sentenced by the Court of Common Pleas for Huntingdon County to serve life in prison. See Commonwealth v. Baker, Docket No. CP-31-CR-0000013-2005 (C.C.P. Huntingdon Cty.).[1] After pursuing an unsuccessful post-trial motion, see id., Petitioner appealed, and on February 12, 2008, the Superior Court of Pennsylvania affirmed his judgment of conviction. See Commonwealth v. Baker, 738 MDA 2007 (Pa. Super. Ct.).

[1] The Court may take judicial notice of state and federal court records. See Montanez v. Walsh, Civ. A. No. 3:CV-13-2687, 2014 WL 47729, at *4 n.1 (M.D. Pa. Jan. 7, 2014).

On January 16, 2009, Petitioner filed a Post-Conviction Relief Act ("PCRA") petition. See Baker, Docket No. CP-31-CR-0000013-2005. On November 19, 2009, the PCRA court denied his petition. See id. On February 2, 2010, Petitioner filed a second PCRA petition. See id. On February 26, 2015, the PCRA court granted the second PCRA petition to the extent that Petitioner's appellate rights were reinstated, and Petitioner appealed the denial of his first PCRA petition to the Superior Court. See id. On November 30, 2015, the Superior Court affirmed the denial of Petitioner's first PCRA petition. See Commonwealth v. Baker, 476 MDA 2015 (Pa. Super. Ct.). On April 6, 2016, the Supreme Court of Pennsylvania denied Petitioner's petition for allowance of appeal. See Baker v. Commonwealth, 984 MAL 2015 (Pa.).

Petitioner filed his § 2254 petition on December 15, 2016. (Doc. No. 1.) In a Memorandum and Order dated January 27, 2017, the Court dismissed the petition as time-barred. (Doc. Nos. 7, 8.) Petitioner filed a timely notice of appeal. (Doc. No. 10.) On September 8, 2017, the United States Court of Appeals for the Third Circuit remanded the matter to this Court with directions that the Court consider whether Petitioner was entitled to any form of equitable tolling given his allegations of mental incapacity, abandonment of counsel, and actual innocence. (Doc. No. 12.) In his Report and Recommendation, Magistrate Judge Carlson concludes that Petitioner is not entitled to equitable tolling of the statute of limitations. (Doc. No. 25 at 14-28.) Specifically, Magistrate Judge Carlson rejected Petitioner's arguments that he was entitled to equitable tolling based upon mental incapacity, abandonment by counsel during PCRA proceedings, and allegations of actual innocence. (Id.)

Petitioner now objects to Magistrate Judge Carlson's Report and Recommendation, again asserting that he is entitled to equitable tolling of the statute of limitations because he was abandoned by counsel during PCRA proceedings, suffers from mental incompetency, and is

actually innocent of the crimes to which he pled guilty. (Doc. No. 27.) Having considered Petitioner's challenges, the Court concludes that Magistrate Judge Carlson correctly and comprehensively addressed them in his Report and Recommendations. Accordingly, Petitioner's objections will be overruled.

AND SO, on this 17th day of July 2019, upon independent review of the record and applicable law, **IT IS ORDERED THAT**:

1. Petitioner's motion for an extension of time (Doc. No. 26) is **GRANTED**, and his objections (Doc. No. 27) are deemed timely filed;

2. The May 22, 2019 Report and Recommendation (Doc. No. 25) of Magistrate Judge Carlson is **ADOPTED**;

3. Petitioner's objections to the Report and Recommendation (Doc. No. 27) are **OVERRULED**;

4. The petition for a writ of habeas corpus (Doc. No. 1) is **DENIED**;

5. A certificate of appealability **SHALL NOT ISSUE**; and

6. The Clerk of Court is directed to **CLOSE** this case.

s/ Yvette Kane
Yvette Kane, District Judge
United States District Court
Middle District of Pennsylvania

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2800

STEPHEN FREDERICK BAKER, JR.,
Appellant

v.

SUPERINTENDENT FAYETTE SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY HUNTINGDON COUNTY

(M.D. Pa. No. 1-16-cv-02478)

SUR PETITION FOR REHEARING

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

Date: July 23, 2020
Lmr/cc: Stephen Frederick Baker, Jr.
Christopher J. Schmidt
Ronald Eisenberg

Appendix C

actually innocent of the crimes to which he pled guilty. (Doc. No. 27.) Having considered Petitioner's challenges, the Court concludes that Magistrate Judge Carlson correctly and comprehensively addressed them in his Report and Recommendations. Accordingly, Petitioner's objections will be overruled.

AND SO, on this 17th day of July 2019, upon independent review of the record and applicable law, **IT IS ORDERED THAT**:

1. Petitioner's motion for an extension of time (Doc. No. 26) is **GRANTED**, and his objections (Doc. No. 27) are deemed timely filed;

2. The May 22, 2019 Report and Recommendation (Doc. No. 25) of Magistrate Judge Carlson is **ADOPTED**;

3. Petitioner's objections to the Report and Recommendation (Doc. No. 27) are **OVERRULED**;

4. The petition for a writ of habeas corpus (Doc. No. 1) is **DENIED**;

5. A certificate of appealability **SHALL NOT ISSUE**; and

6. The Clerk of Court is directed to **CLOSE** this case.

s/ Yvette Kane
Yvette Kane, District Judge
United States District Court
Middle District of Pennsylvania

Appendix A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 984 MAL 2015
Respondent	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
STEPHEN FREDERICK BAKER, JR.,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 6th day of April, 2016, the Petition for Allowance of Appeal is **DENIED**.

Justice Wecht did not participate in the consideration or decision of this matter.

A True Copy Amy Dreibelbis, Esquire
As Of 4/6/2016

Attest: Amy L. Dreibelbis
Deputy Prothonotary
Supreme Court of Pennsylvania

Appendix B part 1

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. STEPHEN FREDERICK BAKER, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 476 MDA 2015

Appeal from the PCRA Order November 19, 2009
In the Court of Common Pleas of Huntingdon County
Criminal Division at No(s): CP-31-CR-0000013-2005

BEFORE: PANELLA, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J. **FILED NOVEMBER 30, 2015**

Appellant, Stephen Frederick Baker, Jr., appeals from the PCRA[1] order entered on November 19, 2009, in the Court of Common Pleas of Huntingdon County. We affirm.

On September 11, 2006, Appellant entered a guilty plea to two counts of murder of the second degree and one count of persons not to possess firearms[2] and was sentenced to life imprisonment. On September 20, 2006, Appellant filed a post-sentence motion to withdraw his guilty plea, which the trial court denied. On appeal, this Court affirmed Appellant's judgment of sentence, and ordered that Appellant's remaining claims of ineffective

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* Retired Senior Judge assigned to the Superior Court.
[1] Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.
[2] 18 Pa.C.S.A. §§ 2502(b) and 6105(a)(1), respectively.

guilty plea by simply retracting or contradicting his statements made during the colloquy. ***See Pollard, supra***.

In light of the comprehensive written and oral plea colloquy, which Appellant fully and willingly completed, we find no factual basis to support Appellant's claim that his plea was in any manner unknowingly, involuntarily, or unintelligently given, or that the ineffective assistance of trial counsel rendered his plea as such. Accordingly, we affirm the order of the PCRA court.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/30/2015

Exhibit "A"

strong societal interests favoring finality in litigation, as well as the institutional interests of the criminal justice system, which favor prompt presentation and resolution of disputes. However, when considering a statute of limitations question which arises in the context of a belated collateral attack upon criminal convictions involving a double homicide, there is also an important human dimension to the statute of limitations. To ignore the limitations period prescribed by law, and permit Baker to belatedly re-open this case, would compel his victims to, once again, experience the trauma of these events.

Since Baker has not fulfilled his responsibility to bring this petition in a timely manner and has not carried his burden of showing extraordinary circumstances justifying a tolling of the statute of limitations, he should not be entitled to compel the government to require the families of his victims to revisit these events. Thus, this petition should be dismissed as time-barred.

III. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the petition for a writ of habeas corpus in this case be DISMISSED as time-barred, and that a certificate of appealability should not issue.

The petitioner is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in

Exhibit "A"

THE COURT: All right, we're here on the Baker Post-Conviction Petition. I assume I'm going to hear, Mr. Kling, from Mr. Baker, is that correct?

MR. KLING: Yes, Your Honor. I believe we were going to start with Attorney Hooper first.

THE COURT: All right, Mr. Hooper.

MR. KLING: And Attorney Jackson's --

THOMAS K. HOOPER WAS CALLED AND SWORN.

MR. KLING: Judge, initially at this time I'd like to make an oral motion to amend the PCRA to add -- I just recently learned that in situations where there is a charge involving a felon not to possess a firearm that that charge is to be severed or motion to sever is to be made. Otherwise it's, per se, ineffectiveness due to the requirement that the Commonwealth must prove that a felony was committed by the Defendant. And actually my understanding of the case law is that has to be tried separately.

THE COURT: And so you're asking to do what?

MR. KLING: To amend to include an allegation that counsel was ineffective for failing to sever the charge of felon not to possess a firearm.

THE COURT: In light of the facts in the plea, what's the relevance?

MR. KLING: It --

Exhibit "C"

THE COURT: He didn't plead to that, right?

MR. KLING: Yes, he did, Your Honor.

THE COURT: He did?

MR. JACKSON: Yeah.

THE COURT: You're saying it has to be severed for purposes of trial. He had no trial.

MR. KLING: That's correct, Your Honor, but --

THE COURT: All right. Well, you put it on the record. That's fine.

MR. KLING: It would be ineffective because the motion was never filed.

THE COURT: We never got to the point to give Mr. Hooper to make such a motion because we didn't go to trial but, all right. Mr. Hooper, recognizing your professional obligations, I am not going to direct you to answer the questions of counsel.

MR. HOOPER: Thank you, Your Honor.

THOMAS K. HOOPER WAS CALLED AND SWORN.

DIRECT EXAMINATION

BY MR. JACKSON:

Q. Good afternoon, Mr. Hooper.

A. Good afternoon.

Q. Would you give just for the record your name and address?

A. Thomas Hooper, 1316 Third Avenue, Duncansville,

Exhibit "D"

A. Yes.

Q. Her purpose was to do what?

A. We had retained her for the purpose of conducting testimony providing expert opinion on -- to his intellectual functioning, specifically to his reading and writing. I believe that on three separate occasions -- perhaps we squeezed it into two -- we had Stephen transported down to Dr. Arbitell's office in State College. She conducted IQ testing. I believe a limited amount of psychological testing, some personality testing, and then offered opinions that he was reading at a level far below the level he would have had to read at to sufficiently understand the Miranda warnings as written in the standard PSP Miranda warning waiver form.

Q. In your experience is it typical for the defense to supply an expert for suppression?

A. I have in the past with equal success I might add.

Q. In this case you petitioned the Court and had appointed two private investigators, is that correct?

A. One firm but two investigators worked on it, yes.

Q. You also successfully petitioned for a mitigation expert?

A. Yes.

Exhibit "C"

the pretrial suppression phase, I did not want the Commonwealth to have access to all the additional opinions that we would ultimately have an expert render in the penalty phase. And by rule they're not entitled to that until there is a first degree finding. So the methodology was to have two separate experts so we could keep some of that out of the hands of the Commonwealth.

And Dr. Tabikman would have offered expert opinions as to, you know, what we had talked about was and what's really tragic about it was Stephen had a really, really horrible fall several years prior to his arrest on these charges. He had fallen off a roof and suffered just debilitating injuries from it. These injuries not only potentially could impact him cognitively but also were debilitating physically, led to drug addiction. So that we thought that the combination of that, the family history, the lack of schooling, dysfunctional relationships, not only family but extra, all of it would serve well in offering mitigation.

Q. And you had someone hired to flesh all of that out, is that correct?

A. We had all the materials we needed to present that, yes.

Q. Now, I'm going to direct your attention I believe it was Defendant's Exhibit 2. Do you still have

INDEX TO WITNESSES

FOR THE COMMONWEALTH:	DIRECT	CROSS	REDIRECT	RECROSS
Thomas K. Hooper	2	24	39	--

FOR THE DEFENDANT:	DIRECT	CROSS	REDIRECT	RECROSS
Stephen F. Baker, Jr.	44	63	77	--

Exhibit C

A. Yes.
Q. The day of the --
A. I should say this was sent to me -- Stephen and I discussed this. This was sent to me to aid in any efforts we would need to impeach Crystal Frederick which wasn't the greatest challenge in the world. She reeks of impeachment.
Q. Isn't it fair also to deduce from that that may have been a way of him suggesting to you, hey, here's one of the defenses we discussed?
A. Like I said, I know what it was. He was providing me evidence she had gotten in trouble again which, like I said, was no surprise. Leave Crystal out, she's going to get in trouble again.
Q. Isn't it correct in here he refers to Crystal as a murderer?
A. As a murderer, yes.
Q. And that was a strategy that he had discussed with you which was how do we deflect this murder onto Crystal and not me?
A. Yes.
Q. The day of the guilty plea, September 11th of 2006, that was the date that had been scheduled for jury trial, correct?
A. To commence jury selection, yes.

Exhibit H

preliminary hearing transcript page 3). The preliminary hearing was held on January 7, 2005 before District Judge Colyer. After testimony, all of the charges were bound to Court with the exception of two counts of robbery, District Judge Colyer finding that the Commonwealth failed to prove a Prima Facie case thereon. Thereafter the appellant was served notice of the Commonwealths' intention to seek the death penalty.

Thereafter an omnibus pre-trial motion was filed seeking inter alia, the suppression of the appellants' confession, and the suppression of the statement of the eye witness, one Crystal Frederick. The basis of the suppression of Baker's statement was the level of his cognitive function. A hearing was held where Dr. Michelle Arbitell, a Clinical Psychologist was qualified as an expert in the field of forensic Neuropsychology. (transcript dated February 21, 2006 of pre-trial hearing page 3). Dr Arbitell testified that she performed a clinical interview of Mr. Baker, and performed the following tests: Wechsler Adult Intelligence Scale Third Revision; Wechsler Memory Scale Third Revision; Wide Range Achievement Test, reading, spelling, and arithmetic Subtests, the blue version; Assessment of Understanding and Appreciation of the Miranda Rights; MacArthur competency Assessment Tool for Criminal Adjudication; and the Flesch Test of Readability (transcript Page 6-8).

As a result of her testing Dr. Arbitell diagnosed the Appellant as suffering from a Verbal Learning Disability (transcript page 12). She found Mr. Baker to have a full scale range of intelligence of 87, meaning low average; a Verbal IQ of 78, meaning borderline mentally retarded; and a Performance IQ of 99. (transcript pages 9-12).

The trial Judge dismissed the pre-trial motions and the case was set for trial. Jury selection was scheduled to begin on Monday, September 11, 2006. At that time, the defendant indicated that his Trial Counsel, Thomas K. Hooper and Penalty Phase counsel, David G. Smith, told him they did not wish to try this case and began discussing a plea with the appellant. Appellant believes and therefore avers that he was coerced, pressured and forced to enter the subject plea. The appellant believes and therefore avers that he is suffering prejudice that rises to the level of manifest injustice, because he was denied his day in court before a jury of his peers. The appellant asserts that his counsel failed to provide him with copies of the discovery that they had received in his case. He avers that counsel failed to review discovery with him and explain the significance of the evidence to his case. He avers that counsel was ineffective in presenting

Exhibit "D"

you clear on this?" And you responded yes. Is that what that says?

A. Yeah.

Q. And and it's your testimony today that, I guess, your responses there were not truthful?

A. I told you I didn't understand none of that process.

Q. Did you indicate to the Court at that point that you didn't understand?

A. I was told to just go through it.

Q. So, in other words, when you responded that you understood, then you were not telling the truth?

A. I was just going along with what Tom Hooper told told me to do.

Q. Either you understood or you didn't understand and it's your testimony today you didn't understand?

A. I didn't understand what was going on.

Q. Did you ever tell the Court that you felt you were being forced or coerced by your attorneys into pleading guilty?

A. That's in my PCRA.

Q. Did you ever tell the Court at the time of the guilty plea?

A. No.

Q. In fact, the Judge asked you on numerous

Exhibit 5

occasions if you were forced or threatened to plead guilty and you responded that you were not, is that correct?

A. If I would have said I was, then I would have had to go to trial with those two lawyers and I didn't want them lawyers.

Q. Let me direct your attention to page No. 17 beginning with line No. 6. The Court asks you "You're entering this plea voluntarily?" You respond yes. Question by the Court: "Has anyone forced you to enter this plea?" Response by you no. Question by the Court: "Have any threats been made against you?" Response, no. Question: "Have you had sufficient time to talk with Mr. Hooper and Mr. Smith?" Your response, yes.

At that point in time when the Court asked you repeatedly if you jadbeen forced or any threats had been made and you responded there had not, is that correct?

A. Yes.

Q. And you're testifying differently now?

A. I told you I didn't understand none of that guilty plea colloquy.

Q. Do you understand what the Court meant when he asked you if you were being forced to plead guilty?

A. Yeah.

Q. And you responded no?

A. If I would have said I was, I would have had to

Exhibit "E"

> demonstration that the plea was a voluntary and intelligent action entered with full awareness of its ramifications.*566 Commonwealth v. Iseley, 419 Pa.Super. 364, 377, 615 A.2d 408, 415 (1992) (citing Commonwealth v. Ingram, 455 Pa. 198, 200, 316 A.2d 77, 78 (1974)). While the Rule 319 checklist is a necessary part of the determination of the validity of a guilty plea, a full analysis must be based on the totality of the circumstances surrounding the plea. Commonwealth v. Iseley, supra 419 Pa.Super. at 377, 615 A.2d at 415 (citing Commonwealth v. Owens, 321 Pa.Super. 122, 131, 467 A.2d 1159, 1163 (1983)). Commonwealth v. Flood, 426 Pa.Super. 555, 567, 627 A.2d 1193, 1199 (1993)

Petitioner believes that his plea was involuntary, unintelligent and unknowing based upon the totality of the circumstances surrounding this case. Trial Counsel filed pre-trial suppression motions and expert testimony regarding the petitioners' clear and obvious learning disabilities, including but not limited to his inability to read, comprehend and process information. These impairments stem from numerous sources including drug use The Court in Commonwealth v. Flanagan, 578 Pa. 587, 854 A.2d 489 (2004) has said:

> This Court has maintained that the entry of a plea that is unknowing, in the sense that the defendant lacks a basic understanding of the legal principles giving rise to the criminal responsibility that he is accepting, is a manifest injustice and grounds for post-conviction relief. *See, e.g., Commonwealth v. Gunter,* 565 Pa. 79, 84, 771 A.2d 767, 771 (2001) (plurality, but with all Justices agreeing that a manifest injustice is established in circumstances in which a plea is unknowing).[FN12] The standard for post-sentence withdrawal of guilty pleas dovetails with the arguable merit/prejudice requirements for relief based on a claim of ineffective assistance of plea counsel, *see generally Commonwealth v. Kimball,* 555 Pa. 299, 312, 724 A.2d 326, 333 (1999), under which the defendant must show that counsel's deficient stewardship resulted in a manifest injustice, for example, by facilitating entry of an unknowing, involuntary, or unintelligent plea. *See, e.g., Allen,* 557 Pa. at 144, 732 A.2d at 587 (" Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea."); *Commonwealth v. Frometa,* 520 Pa. 552, 555, 555 A.2d 92, 93 (1989); *see also Commonwealth v. Flood,* 426 Pa.Super. 555, 567, 627 A.2d 1193, 1199 (1993).

In as much as the Court has recognized that Counsel's stewardship of a case can be implicated as resulting in an unknowing, involuntary, or unintelligent plea, it is clear that in the case at bar, there is sufficient evidence to substantiate your petitioners claim of ineffective assistance of counsel, where as in the case at bar counsel did not provide your petitioner with copies of discovery with sufficient time to allow your petitioner to review same and digest its meaning. Additionally, given the claimants learning disabilities, counsel failed to adequately review and explain the import of the materials obtained in discovery and the impact of the

Exhibit M

IN THE COURT OF COMMON PLEAS OF HUNTINGDON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
Vs.	:	CR -13-2005
STEPHEN BAKER, JR.	:	
Defendant	:	

STATEMENT OF THE CASE

On December 29, 2004, the bodies of Jessica Wills and Tyrell Dixon were found in Shirleysburg, Huntingdon County Pennsylvania. An investigation ensued and on December 30, 2004 petitioner was summoned to the Huntingdon County State Police Barracks where after several separate interrogations a confession was obtained wherein petitioner implicated himself in the deaths. Contemporaneous with Mr. Baker's presence at the State Police barracks, Crystal Frederick was present and being interrogated by separate officers in a separate area of the barracks. Baker and Frederick had arrived at the barracks via Brandon Whisonant in Brandon's vehicle.

Crystal Frederick gave a Statement that she and Baker went to Altoona Pennsylvania to obtain drugs at the time of the deaths. Thereafter Crystal Frederick asked to go to the car and obtain medication, she was followed by a Trooper who witnessed her attempt at suicide by taking a bottle of pills. The pills were forcibly removed from her mouth with the exception of three pills, (which were reportedly soma), and she was taken back into the barracks where she gave a second statement implicating Baker (and herself to a lesser extent) in the deaths. She was then taken to J. C. Blair Memorial Hospital and committed on a 302.

Baker was charged with two counts of criminal homicide; (first, second, and third degree; and voluntary manslaughter); robbery; possession of instruments of a crime; crimes committed with a firearm; and firearm not to be carried without a license. (criminal complaint and "constructive possession"

EXHIBIT N"

motion which we note was skillfully presented and argued to the Court.

Next, it is alleged that trial counsel was ineffective in the "investigation and attacking the credibility of an eye witness . . .". The subject matter of this asseveration is Crystal Frederick who was undeniably present with Petitioner at the scene of the crimes. At hearing Mr. Baker gave brief testimony about Ms. Frederick and the fact that he told his attorneys to obtain her mental health records since he understood she had been committed on a 302 after giving the police a statement. The importance, he said, was that the records would reflect what drugs were in her system at the point of commitment since, he said, it was his experience that the hospital always draws blood. (N.T., April 14, 2009, at p. 58.) Attorney Hooper testified that the defense team in fact obtained by court order the records of Ms. Frederick's commitment on December 30, 2004.

Next, Petitioner sets forth in his petition that he was coerced into pleading guilty by trial and mitigation counsel. However, the record of the pleas reflect the following:

"Let's talk about this, Stephen. You