

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3153

WILLIAM SEVERS,
Appellant

v.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY;
ADMINISTRATOR NEW JERSEY STATE PRISON

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-03-cr-00060-001)
District Judge: Honorable Noel L. Hillman

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

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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/ Cheryl Ann Krause
Circuit Judge

Date: April 30, 2021
Tmm/cc: William Severs
Stephen C. Sayer, I, Esq.

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DLD-111

March 4, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 20-3153

WILLIAM SEVERS, Appellant

v.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, ET AL.

(D.N.J. Civ. No. 1-15-cv-06421)

Present: JORDAN, KRAUSE and PHIPPS, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied. In order to obtain a certificate of appealability, Severs must show that "jurists of reason would find it debatable whether the District Court was correct in its procedural ruling" by making a "credible showing that the District Court's denial of his Rule 60(b) motion was erroneous." Bracey v. Superintendent Rockview SCI, 986 F.3d 274, 283 (3d Cir. 2021) (citations omitted). Reasonable jurists would not debate that the District Court properly dismissed his motion as untimely. See Moolenaar v. Gov't of the Virgin Islands, 822 F.2d 1342, 1348 (3d Cir. 1987) (holding that a Rule 60(b)(6) motion filed two years after the judgment was not filed within a reasonable time).

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: March 9, 2021



A True Copy:

Patricia S. Dodszeuweit

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

Appx B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM SEVERS,

Petitioner,

v.

THE ATTORNEY GENERAL OF THE
STATE OF NEW JERSEY, et al.,

Respondents.

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Civ. No. 15-6421 (NLH)

OPINION

APPEARANCES:

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Petitioner Pro se

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Counsel for Respondents

HILLMAN, District Judge

Petitioner William Severs has filed a motion for relief from this Court's dismissal of his habeas corpus petition as untimely. ECF No. 23. For the reasons that follow, the Court denies the motion.

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I. BACKGROUND

In 2005, Petitioner was convicted in New Jersey state court of the offenses of murder, unlawful possession of a firearm, unlawful possession of a weapon requiring an ID, and obstructing the administration of the law. See ECF No. 1 at 2. Petitioner filed a timely direct appeal, which became final on December 10, 2009, ninety (90) days after the New Jersey Supreme Court denied his Petition for Certification on September 11, 2009. Id. at 3-8.

Petitioner filed a state court post-conviction relief ("PCR") petition on November 5, 2009. Id. at 8. The PCR court conducted a hearing on September 22, 2011 and issued an order denying the petition on October 4, 2011. Id. Petitioner indicated he wanted to appeal at the September 22 hearing and several other times. He wrote to the Office of the Public Defender twice telling them he wished to appeal. ECF No. 11 at 6. "And on October 20, 2011, Severs again informed his counsel that he wished to appeal, and complained that as of that date, counsel had communicated nothing further to him about filing it. Severs did not file his post-conviction appeal until October 15, 2012." Severs v. Attorney Gen. of New Jersey, 793 F. App'x 72, 74 (3d Cir. 2019), cert. denied sub nom. Severs v. Grewal, 140 S. Ct. 829 (2020).

Petitioner filed his habeas corpus petition under 28 U.S.C. § 2254 on August 21, 2015. ECF No. 1. Respondents filed a motion to dismiss on the grounds that the petition was untimely under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). ECF No. 10. Petitioner argued he should be granted equitable tolling because his PCR attorney was involved in a serious car accident and was unable to timely perfect Petitioner's appeal. ECF No. 11 at 4.

The Court concluded the petition was untimely under 28 U.S.C. § 2244. ECF No. 12 at 7. It further held that Petitioner was not entitled to equitable tolling because he had not shown reasonable diligence in pursuing his PCR appeal. Id. at 10. The Court granted the motion to dismiss on March 19, 2018. ECF No. 13.

Petitioner appealed to the United States Court of Appeals for the Third Circuit. ECF No. 14. The Third Circuit affirmed this Court's decision on November 5, 2019. Severs v. Attorney Gen. of New Jersey, 793 F. App'x 72, 74 (3d Cir. 2019). The United States Supreme Court denied a writ of certiorari on January 13, 2020. Severs v. Grewal, 140 S. Ct. 829 (2020).

On February 27, 2020, Petitioner filed the instant motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6). ECF No. 23. He argues the Supreme Court's decision in Garza v. Idaho, 139 S. Ct. 738 (2019), warrants reopening of

his habeas case. ECF No. 24. Respondents did not file opposition to the motion.

II. DISCUSSION

A. Legal Standard

A Rule 60(b) motion is "addressed to the sound discretion of the trial court guided by accepted legal principles applied in light of all the relevant circumstances." Ross v. Meagan, 638 F.2d 646, 648 (3d Cir. 1981). Rule 60(b) "does not confer upon the district courts a 'standardless residual of discretionary power to set aside judgments.'" Moolenaar v. Gov. of the Virgin Islands, 822 F.2d 1342, 1346 (3d Cir. 1987).

Rule 60(b)(6) permits a court to relieve a party from a final judgment for any reason that justifies relief. "The standard for granting a Rule 60(b)(6) motion is a high one. The movant must show 'extraordinary circumstances' to justify reopening a final judgment." Michael v. Wetzel, 570 F. App'x 176, 180 (3d Cir. 2014) (quoting Gonzalez v. Crosby, 545 U.S. 524, 536 (2005)). "[E]xtraordinary circumstances involves a showing that without relief from the judgment, 'an "extreme" and "unexpected" hardship will result.'" Budget Blinds, Inc. v. White, 536 F.3d 244, 255 (3d Cir. 2008) (quoting Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977)).

B. Analysis

The Court must first consider whether this motion is properly brought under Rule 60(b) or whether it is a second or successive § 2254 petition. "AEDPA's restrictions on the filing of second or successive habeas petitions make it implausible to believe that Congress wanted Rule 60(b) to operate under full throttle in the habeas context." Rodwell v. Pepe, 324 F.3d 66, 67 (1st Cir. 2003); accord Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004). "[I]n those instances in which the factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits." Pridgen, 380 F.3d at 727. "However, when the Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as a successive habeas petition." Id.

Petitioner argues the Supreme Court's decision in Garza, holding that prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken" even if the defendant signed an appellate waiver, 139 S. Ct. at 744, warrants reopening his case. He argues that the petition should not have been dismissed as untimely because of the ineffective assistance of PCR counsel in delaying the filing of his appeal.

The Court concludes that this argument is not a second or successive § 2254 petition.

Motions under Rule 60(b)(6) must be filed "within a reasonable time" after the entry of judgment. Fed. R. Civ. P. 60(c)(1). The current motion was filed almost two years after the judgment entered on March 19, 2018 and a year after the Garza decision on February 27, 2019. The Court concludes this was not a reasonable amount of time for Petitioner to wait to file his motion.

At the time the Garza decision was issued, Petitioner's appeal was pending in the Third Circuit. The court of appeals granted a certificate of appealability on the timeliness question and appointed counsel to represent Petitioner on April 4, 2019. Severs v. Attorney Gen. of New Jersey, No. 18-1822 (3d Cir. Apr. 4, 2019). The Third Circuit issued its decision on November 5, 2019, well after Garza was decided. Petitioner could have presented his Garza argument to the Third Circuit or to the Supreme Court. Instead, it appears he waited until the Third Circuit and Supreme Court denied his appeals before filing asserting a right to relief based on Garza.

Alternatively, Petitioner has not shown the extraordinary circumstances necessary for relief under Rule 60(b)(6). The Supreme Court has noted that "our cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary

circumstances' justifying the reopening of a final judgment. Such circumstances will rarely occur in the habeas context." Gonzalez v. Crosby, 545 U.S. 524, 535 (2005).

Garza has little application to Petitioner's case. In Garza, the Supreme Court concluded that the prejudice prong of an ineffective assistance of counsel claim is presumed to have been met when an attorney failed to file a notice of appeal at the defendant's request even if the defendant signed an appellate waiver in a plea agreement. See Garza, 139 S. Ct. at 749-50. Petitioner went to trial; he did not sign a plea agreement. ECF No. 24-1 at 2. Garza was merely the extension of a rule that already existed at the time of Petitioner's PCR petition and initial habeas filing.

"The Supreme Court in Garza did not recognize a new right - the Court by its own logic was merely applying the rule announced in Roe v. Flores-Ortega, 528 U.S. 470 (2000), to those circumstances where there was an applicable appellate waiver." Thieme v. United States, No. 19-15507, 2020 WL 1441654, at *3 (D.N.J. Mar. 24, 2020) (citing Garza, 139 S. Ct. at 745-48). There is nothing about Garza that presents the extraordinary circumstances necessary to warrant relief from this Court's order dismissing the petition as untimely. See Gonzalez, 545 U.S. at 537 ("The change in the law . . . is all the less extraordinary in petitioner's case, because of his lack of

diligence in pursuing review" on the issue raised in the Rule 60(b)(6) motion).

As Petitioner has not shown the extraordinary circumstances necessary to justify relief under Rule 60(b)(6), the Court will deny the motion.

III. Conclusion

The Court will deny the motion for relief from judgment. An appropriate Order will be entered.

Dated: September 30, 2020
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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WILLIAM SEVERS,	:	
	:	
Petitioner,	:	Civ. No. 15-6421 (NLH)
	:	
v.	:	ORDER
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THE ATTORNEY GENERAL OF THE	:	
STATE OF NEW JERSEY, et al.,	:	
	:	
Respondents.	:	
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For the reasons expressed in the Opinion filed herewith,

IT IS on this 30th day of September, 2020,

ORDERED that the motion for relief from judgment, ECF No. 23, be, and the same hereby is, denied; and it is finally

ORDERED that the Clerk shall serve this Order and the accompanying Opinion on Petitioner by regular U.S. mail.

At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

Appx C-9

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1822

WILLIAM SEVERS,
Appellant

v.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY;
ADMINISTRATOR NEW JERSEY STATE PRISON

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-15-cv-06421)
District Judge: Honorable Noel L. Hillman

Submitted October 29, 2019
Before: SMITH, *Chief Judge*, HARDIMAN, and PHIPPS, *Circuit Judges*.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on October 29, 2019. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the United States District Court for the District of New Jersey entered March 19, 2018, be and the same is hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

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No costs shall be taxed.

ATTEST:

s/Patricia S. Dodszeit
Clerk

Dated: November 5, 2019

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1822

WILLIAM SEVERS,
Appellant

v.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY;
ADMINISTRATOR NEW JERSEY STATE PRISON

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1-15-cv-06421)
District Judge: Honorable Noel L. Hillman

Submitted under Third Circuit LAR 34.1(a)
October 29, 2019

Before: SMITH, *Chief Judge*, HARDIMAN, and PHIPPS, *Circuit Judges*

(Filed: November 5, 2019)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7
does not constitute binding precedent.

HARDIMAN, *Circuit Judge*.

William Severs appeals an order of the District Court dismissing his untimely petition for writ of habeas corpus under 28 U.S.C. § 2254. We agree with the District Court that Severs had no right to equitable tolling, so we will affirm.

I¹

On September 2, 2005, a New Jersey state court jury convicted Severs of murder and other serious crimes and he was sentenced to 60 years in state prison. After exhausting his direct appeal rights, Severs petitioned for post-conviction relief. The court denied his petition at a post-conviction hearing on September 22, 2011. About two weeks later, on October 4, 2011, the court filed a written opinion explaining the reasons for the denial.

Severs stated his desire to appeal at the September 22 hearing and several other times. He informed the Office of the Public Defender of his desire to appeal by letters dated September 26 and October 3, 2011. And on October 20, 2011, Severs again informed his counsel that he wished to appeal, and complained that as of that date, counsel had communicated nothing further to him about filing it. Severs did not file his post-conviction appeal until October 15, 2012.

¹ The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and we review de novo the District Court's determination that equitable tolling did not apply. *See Munchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012).

Severs blames his former counsel and the Office of Public Defender for the one-year delay in filing the appeal from the denial of his petition for post-conviction relief. In support, Severs filed a document entitled "Certification," a letter by his post-conviction counsel stating that Severs asked counsel to appeal the denial of his petition. The letter states that because counsel was in a severe car accident, he could not timely file Severs's post-conviction appeal. Yet the letter provides no specific facts about counsel's inability to file an appeal. Nor is there evidence in the record to show that Severs followed up with his counsel after his October 20, 2011 letter complaining about the lack of information regarding the filing of his post-conviction appeal. Although the "Certification" letter states that counsel returned his client's files in February 2012, the record does not demonstrate that Severs contacted the Office of the Public Defender anytime afterwards before that office finally filed a notice of appeal in October 2012. And following the New Jersey Supreme Court's denial of review of his appeal, Severs again waited nearly one year before seeking federal habeas relief, and fails to explain this second delay.

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides a one-year limitations period for § 2254 claims. There is no dispute that Severs's petition was untimely as he concedes he had until October 27, 2014 to file his petition but failed to do so until August 21, 2015. The District Court accordingly dismissed Severs's § 2254 petition, finding that Severs had not shown sufficient evidence to justify equitable tolling. We agree.

II

AEDPA's one-year limitations period may be equitably tolled only in extraordinary cases. *Holland v. Florida*, 560 U.S. 631, 649-50 (2010). Here, Severs had to establish: (1) he pursued his rights diligently, and (2) extraordinary circumstances prevented a timely petition. *Id.* at 649.

First, Severs failed to show he pursued his rights with reasonable diligence. *See id.* at 653; *LaCava v. Kyler*, 398 F.3d 271, 277 (3d Cir. 2005) (diligence requirement extends to the federal habeas petition and all state court remedies). For some time, Severs acted with reasonable diligence. The District Court observed that Severs appealed his conviction, pursued post-conviction relief, and informed both his attorney and the Office of the Public Defender of his intent to appeal the denial of his petition for post-conviction relief. But he provided no evidence of any further attempt to file his appeal within the limitations period or for a substantial period thereafter even though he expressed concern that his appeal had not been filed as of October 20, 2011. When the New Jersey Appellate Division affirmed the denial of his petition for post-conviction relief, Severs still had 35 days to file a timely federal habeas petition. Yet he waited 298 days beyond the limitations period to do so. Thus, the District Court did not err when it held that Severs did not show he pursued his rights with reasonable diligence.

Second, Severs failed to establish that extraordinary circumstances prevented him from timely appealing the denial of his petition for post-conviction relief. *Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 89 (3d Cir. 2013). Equitable tolling

typically applies “when the petitioner has in some extraordinary way . . . been *prevented* from asserting his or her rights.” *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999) (emphasis added) (citation and internal quotation marks omitted). Although Severs provided the letter from his counsel about a car accident, the letter says nothing about when the car accident occurred or to what extent or for how long the accident incapacitated counsel. To the extent that the Office of the Public Defender eventually acquired responsibility for Severs’ post-conviction appeal, its contribution to the filing delay was evidently due to a backlog in its case management. App. 87. Assuming that is true, this “garden variety” delay was nothing more than “excusable neglect,” which is hardly extraordinary. *Holland*, 560 U.S. at 651-52 (citation and internal quotation marks omitted). So the District Court did not err in determining Severs failed to show he was prevented in an extraordinary way from asserting his rights.

In sum, because Severs has established neither reasonable diligence nor extraordinary circumstances sufficient to justify equitable tolling, we will affirm the District Court’s order holding his habeas petition untimely.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM SEVERS,

Petitioner,

v.

THE ATTORNEY GENERAL OF THE STATE
OF NEW JERSEY, et al.,

Respondents.

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: Civ. No. 15-6421 (NLH)
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: ORDER
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For the reasons expressed in the Opinion filed herewith,

IT IS on this 19th day of March, 2018,

ORDERED that the Motion to Dismiss, ECF No. 10, is GRANTED;

and it is further

ORDERED that the Petition for Writ of Habeas Corpus, ECF
No. 1, is DISMISSED as untimely; and it is further

ORDERED that a certificate of appealability shall not
issue; and it is further

ORDERED that the Clerk shall serve this Order and the
accompanying Opinion on Petitioner by regular U.S. mail; and it
is further

ORDERED that the Clerk shall mark this case CLOSED.

At Camden, New Jersey,

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

Appx E-1

2018 US Dist Lexis 44292 (DNJ Mar 19, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM SEVERS,

Petitioner,

v.

THE ATTORNEY GENERAL OF THE STATE
OF NEW JERSEY, et al.,

Respondents.

Civ. No. 15-6421 (NLH)

OPINION

APPEARANCES:

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Petitioner Pro Se

Jennifer Webb-McRae
Cumberland County Prosecutor
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Counsel for Respondent

HILLMAN, District Judge

Petitioner William Severs, a prisoner confined at New Jersey State Prison in Trenton, New Jersey, filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, challenging his 2005 New Jersey state court conviction. ECF No. 1. For the reasons discussed below, Respondents' Motion to Dismiss the Petition as time-barred under 28 U.S.C. § 2244(d), ECF No. 10, will be granted and the Petition dismissed.

Appx E-2

I. BACKGROUND

In 2005, Petitioner was convicted in New Jersey state court of the offenses of murder, unlawful possession of a firearm, unlawful possession of a weapon requiring an ID, and obstructing the administration of the law. See ECF No. 1, Pet. at 2.

Petitioner filed a timely direct appeal, which became final on December 10, 2009, ninety (90) days after the New Jersey Supreme Court denied his Petition for Certification on September 11, 2009. See id. at 3-8.

On November 5, 2009, Petitioner filed a state court PCR petition. Id. at 8. The PCR petition was denied on October 4, 2011. Id. Petitioner notified the Office of the Public Defender by letter dated October 3, 2011 of his intent to appeal his PCR petition denial and requested the copies of the briefing from his direct appeal process so that he might use them in his PCR petition appeal. ECF No. 11, at 6. Petitioner wrote to his PCR attorney by letter dated October 20, 2011, stating as follows:

As you well know, we were denied an evidentiary hearing, on the date, September 22, 2011, and prior to leaving the courtroom, you made Judge Fineman aware of the fact, that your client, William Severs would need a copy of the Judge's decision, also you informed the Judge that we would be appealing the decision of the court. Mr. Paul, you explained to me that you were going to handle the filing of the appeal. As of this date (10-20-11), I have not heard anything from you. In the meantime, I have written to Ms. Jodi Ferguson (on 9-26-11), and to Mr. Raymond Black, (on 10-03-11);

I made them aware that I am filing for an appeal, on my Post Conviction Relief petition, in which I was denied the right to an evidentiary hearing.

ECF No. 11, at 8. Petitioner's time for filing a timely appeal to the Appellate Division of the New Jersey Superior Court expired on November 18, 2011, forty-five days after the entry of the order denying the PRC Petition on October 4, 2011.¹ Over a year later, Petitioner filed the appeal of his PCR denial on October 15, 2012. ECF No. 1, at 12. The Appellate Division affirmed the denial of the PCR petition on March 14, 2014. Petitioner next filed a petition for certification with the Supreme Court of New Jersey on March 19, 2014, which was denied on September 22, 2014. Id., at 15.

Petitioner effectively filed this Petition on August 21, 2015, the date on which he placed the Petition into the prison's mailing system, although it was not docketed by the clerk until August 26, 2015. See id. at 28. Respondents filed a Motion to Dismiss on August 10, 2017, in which they assert the Petition should be dismissed as untimely under § 2244(d). ECF No. 10, at 1. Petitioner filed a response on the issue of timeliness raised in the motion to dismiss. ECF No. 11. Relevant to the instant Motion, Petitioner includes a "certification" from his PCR attorney, in which the attorney states that he was involved

¹ N.J. Ct. R. 2:4(a) (providing forty-five days in which to file a notice of appeal to the Appellate Division).

in a serious car accident and was unable to timely perfect Petitioner's appeal. See id. at 4. This certification appears to have been executed for the purposes of Petitioner's untimely PCR appeal to the Appellate Division. See id. (dated February 29, 2012).

II. DISCUSSION

The governing statute of limitations under the Antiterrorism and Effective Death Penalty Act ("AEDPA") is found at 28 U.S.C. § 2244(d), which states in relevant part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a 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;

...

(2) 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.

28 U.S.C. § 2244(d). See also, Jones v. Morton, 195 F.3d 153, 157 (3d Cir. 1999).

Pursuant to § 2244(d), evaluation of the timeliness of a § 2254 petition requires a determination of, first, when the

pertinent judgment became "final," and, second, the period of time during which an application for state post-conviction relief was "properly filed" and "pending." The judgment is determined to be final by the conclusion of direct review, or the expiration of time for seeking such review, including the ninety-day period for filing a petition for writ of certiorari in the United States Supreme Court. See Gonzalez v. Thaler, 132 S. Ct. 641, 653-54 (2012).

Here, the New Jersey Supreme Court denied Petitioner's petition for certification on direct appeal on September 11, 2009. He did not file a petition for writ of certiorari in the Supreme Court of the United States, so his conviction became final ninety days later, i.e. on December 10, 2009. Petitioner, however, filed his PCR petition on November 5, 2009, prior to his conviction becoming final, so federal habeas statute of limitations did not begin to run on December 10, 2009. See 28 U.S.C. § 2244(d)(2). Instead, the limitations period initially ~~was~~ began to run November 19, 2011, which is the day after his time for filing an appeal of his denied PCR petition expired. N.J. Ct. R. 2:4-1(a) (providing for 45 days for appeal). See Douglas v. Horn, 359 F.3d 257, 263 (3d Cir. 2004) (rejecting notion that by "filing a nunc pro tunc petition for leave to appeal a petitioner could obtain further tolling after the time for even discretionary review of a judgment has expired"); Swartz v.

Meyers, 204 F.3d 417, 424, n.6 (3d Cir. 2000) ("We . . . agree that the time during which Swartz's nunc pro tunc request for allowance of appeal was pending does not toll the statute of limitation."); see also Alvarenga v. Lagana, No. 13-4604, 2016 WL 3610156, at *1 (D.N.J. July 1, 2016) ("When an out-of-time appeal is filed, even if the appeal is accepted as properly filed by the state appeals court, statutory tolling does not include the period between the expiration of time to appeal and when the appeal was actually filed."), aff'd sub nom Alvarenga v. Admin N. State Prison, No. 16-3538 (3d Cir. Dec. 14, 2016) (denying certificate of appealability); Smith v. Holmes, No. 13-1876, 2016 WL 1464649, at *1 (D.N.J. Apr. 14, 2016) ("when an untimely appeal is filed—even if the appeal is accepted as properly filed by the state appeals court—statutory tolling does not include the period between expiration of the time to appeal and when the appeal was actually filed"); Martin v. D'Ilio, No. 15-7158, 2017 WL 1003246, at *2 (D.N.J. Mar. 15, 2017) (same).

Here, Petitioner's federal habeas statute of limitations began to run on November 19, 2011, and continued to run until he filed his appeal of the denied PCR petition on October 15, 2012— for a total of 330 days. Then, the statute of limitations was tolled during the pendency of the PCR appeal and the timely filed petition for certification to the New Jersey Supreme

Court, but started to run again once the New Jersey Supreme Court denied review on September 22, 2014. At this point, 35 days remained on the federal habeas statute of limitations, which expired on October 27, 2014. Thus, Petitioner had until October 27, 2014 to file the instant petition but did not do so until August of 2015. Accordingly, the Petition is time-barred unless Petitioner can demonstrate extraordinary circumstances to justify equitable tolling of the limitations period.

In Holland v. Florida, the Supreme Court held that AEDPA's one-year limitations period is subject to equitable tolling in appropriate cases, on a case-by-case basis. 560 U.S. 631, 649-50 (2010). See Ross v. Varano, 712 F.3d 784, 798 (3d Cir. 2013). A litigant seeking equitable tolling bears the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Holland, 560 U.S. at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). See also Jenkins v. Superintendent of Laurel Highlands, 705 F.3d 80, 89 (3d Cir. 2013).

The diligence required for equitable tolling is reasonable diligence, not maximum, extreme, or exceptional diligence. Holland, 560 U.S. at 653. "This obligation does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period appellant is

exhausting state court remedies as well." LaCava v. Kyler, 398 F.3d 271, 277 (3d Cir. 2005) (citation omitted). See also Alicia v. Karestes, 389 F. App'x 118, 122 (3d Cir. 2010) (holding that the "obligation to act diligently pertains to both the federal habeas claim and the period in which the petitioner exhausts state court remedies"). Reasonable diligence is examined under a subjective test, and it must be considered in light of the particular circumstances of the case. See Ross, 712 F.3d at 799; Schlueter v. Varner, 384 F.3d 69, 74 (3d Cir. 2004) ("Due diligence does not require the maximum feasible diligence, but it does require diligence in the circumstances.").

The court also must determine whether extraordinary circumstances exist to warrant equitable tolling. "[G]arden variety claim[s] of excusable neglect" by a petitioner's attorney do not generally present an extraordinary circumstance meriting equitable tolling. Holland, 560 U.S. at 651 (citations omitted). See also Merritt v. Blaine, 326 F.3d 157, 168 (3d Cir. 2003). Rather, equitable tolling can be triggered only when "the principles of equity would make the rigid application of a limitation period unfair, such as when a state prisoner faces extraordinary circumstances that prevent him from filing a timely habeas petition and the prisoner has exercised reasonable diligence in attempting to investigate and bring his claims."

LaCava, 398 F.3d at 275-276. See also Holland, 560 U.S. at 648-49 (relying on Pace, 544 U.S. at 418); Jenkins, 705 F.3d at 89 (holding that equitable tolling should be applied sparingly, and only when the "principles of equity would make the rigid application of a limitation period unfair").

Indeed, extraordinary circumstances have been found only where (a) the respondent has actively misled the plaintiff, (b) the petitioner has in some extraordinary way been prevented from asserting his rights, (c) the petitioner has timely asserted his rights mistakenly in the wrong forum, or (d) the court itself has misled a party regarding the steps that the party needs to take to preserve a claim. See Brinson v. Vaughn, 398 F.3d 225, 230 (3d Cir. 2005). Nevertheless, it must be restated that, even where extraordinary circumstances do exist, "if the person seeking equitable tolling has not exercised reasonable diligence in attempting to file after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken, and the extraordinary circumstances therefore did not prevent timely filing." Brown v. Shannon, 322 F.3d 768, 773 (3d Cir. 2003) (quoting Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000)).

In his response to the Motion to Dismiss, Petitioner gives little explanation for his delay filing an appeal of his PCR petition. He cites and includes as an exhibit the

aforementioned attorney certification. Although an attorney who was prevented from filing an appeal on behalf of a petitioner because he was involved in a serious car accident may, under other circumstances, provide cause for equitable tolling, it does not in this matter. First, Petitioner fails to provide specific facts regarding when his attorney was in a car accident, for how long his attorney was incapacitated, and when his attorney's capacity was regained. The Court is thus unable to assess Petitioner's diligence and whether the circumstances were truly extraordinary.

Second, Petitioner fails to explain the nearly year-long delay for filing the PCR appeal. Once again, the Court is unable to assess Petitioner's diligence after he discovered that his appeal was not filed. Finally, the letters submitted by Petitioner demonstrate that (1) Petitioner intended to file the appeal, and (2) Petitioner was aware that, as of October 20, 2011, no PCR appeal had been taken by his attorney and that his attorney had not been in communication with him for almost a month. These letters tend to undercut any argument in favor of equitable tolling. Petitioner has thus failed to meet his burden to demonstrate the factors necessary to invoke equitable tolling.

Petitioner also cites 28 U.S.C. § 2244(d)(1)(B) in support of the timeliness of his Petition. That subsection provides, in pertinent part:

A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

...
(B) the date on which the impediment to file an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action."

28 U.S.C. § 2244(d)(1)(B). Here, however, Petitioner does not allege or provide any facts that support that he was prevented from filing any such State action. Accordingly, the Petition will be dismissed as untimely.

III. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability ("COA") may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed

further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)
(citation omitted), cited in United States v. Williams, 536 F.
App'x 169, 171 (3d Cir. 2013).

"When the district court denies a habeas petition on
procedural grounds without reaching the prisoner's underlying
constitutional claim, a COA should issue when the prisoner
shows, at least, that jurists of reason would find it debatable
whether the petition states a valid claim of the denial of a
constitutional right and that jurists of reason would find it
debatable whether the district court was correct in its
procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484
(2000), cited in Kaplan v. United States, No. 13-2554, 2013 WL
3863923, *3 (D.N.J. July 24, 2013).

Here, jurists of reason would not find it debatable whether
this Court is correct in its procedural ruling. No certificate
of appealability shall issue.

IV. Conclusion

For the reasons set forth above, this Court finds that the
§ 2254 habeas petition should be dismissed as untimely filed
under 28 U.S.C. § 2244(d), and a certificate of appealability
will not issue accordingly.

An appropriate Order follows.

Dated: March 19, 2018
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN
United States District Judge