BLD-287 September 26, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-2141**

RICHARD C. CURRAN, Appellant

VS.

COMMONWEALTH OF PENNSYLVANIA; ET AL.

(M.D. Pa. Civ. No. 1:18-cv-00679)

Present: AMBRO, KRAUSE, and PORTER, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied, for reasonable jurists would not debate the District Court's denial of Appellant's habeas petition as time-barred. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). More specifically, reasonable jurists would not debate the following conclusions: that 28 U.S.C. § 2244(d)(1)(B) does not apply in this case, that Appellant did not file his habeas petition within the one-year limitations period, see 28 U.S.C. § 2244(d)(1)(A), and that he failed to establish a basis for either equitably tolling the limitations period, see Brinson v. Vaughn, 398 F.3d 225, 230 (3d Cir. 2005); Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999), or applying the equitable exception to the limitations period set forth in McQuiggin v. Perkins, 569 U.S. 383, 392, 398 (2013).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2141

RICHARD C. CURRAN,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA; ET AL.

(M.D. Pa. Civ. No. 1:18-cv-00679)

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 en banc is denied.

BY THE COURT,

s/ David J. Porter
Circuit Judge

Date: December 20, 2019
Lmr/cc: Richard C. Curran

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

RICHARD CURRAN,	:	**CIVIL NO. 1:18-CV-679**
	:	
Petitioner,	:	**(Judge Kane)**
v.	:	
	:	**(Magistrate Judge Carlson)**
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Respondent.	:	

REPORT AND RECOMMENDATION

I. Statement of Facts and of the Case

In August of 2005, Richard Curran, executed his estranged wife and the mother of his two children, shooting her seven times. Curran then fled the scene and was apprehended attempting to cross the Canadian border with the murder weapons still in his possession. Curran was convicted of this killing in 2008, and after a halting, feckless series of state post-conviction proceedings, exhausted all of his state criminal remedies by January of 2015.

More than 1,100 days then passed before Curran filed the instant federal habeas corpus petition. (Doc. 1.) In this tardy petition, Curran blames a host of others for his current legal dilemma, identifying what he alleges are 25 errors committed by others which now warrant setting aside this conviction and sentence. Moreover, Curran's

petition trivializes the death of his ex-wife and the mother of his children, stating that: "The only crime I committed was a summary disorderly conduct."(Doc. 1.)

While Curran's petition focuses blame upon others, and trivializes his own criminal conduct, he neglects to address an issue of cardinal importance in this case; namely, his own dilatory conduct in failing to timely file this petition for writ of habeas corpus for more than three years. This failing by Curran now has consequences for the petition and compels the dismissal of this petition as time-barred under the one-year statute of limitations which applies to federal habeas corpus proceedings.

The factual background of this execution-style slaying has been aptly described by the state courts in the decisions denying Curran's various requests for post-conviction relief in the following terms:

> On the morning of August 25, 2005, the Defendant, Richard Curran, arrived at the home of the victim, Tina Curran, his ex-wife and the mother of their two young children. The two argued about issues regarding child support, and police were called to the residence. After Tina asked, in the presence of law enforcement, the Defendant to leave, he reluctantly did so. When the police officer indicated that he might contact Defendant's employer in regard to the incident, Defendant made remarks about hoping that Tina was happy, since that would cause him to lose his job and make it even more difficult for her to get child support.
>
> Approximately half an hour later, while walking toward an employee entrance at her place of work, Shamokin Area Community Hospital, Tina Curran was shot seven times. Despite prodigious efforts at resuscitation, by medical staff at Shamokin Area Community Hospital,

> Life Flight medical personnel, and medical staff at Geisinger Medical Center, the Victim was pronounced dead at 12:06 p.m. Witnesses reported seeing a car that matched the description of the vehicle driven by the Defendant on the grounds of the Shamokin Area Community Hospital at the time of the incident. Several witnesses heard multiple gunshots, and one witness observed a white male walk away from the scene with a gun in his hand, turn back to fire additional shots, then enter . . . a vehicle matching the description of the Defendant's vehicle.
>
> Law enforcement personnel from several agencies began to search for the Defendant, however he was not located until several hours later when he was detained at the United States/Canada vehicle border crossing at Niagara Falls. He was eventually turned over to Niagara Falls, NY police, waived extradition, and was returned to Northumberland County. The handgun found in Richard Curran's possession when he was detained was later determined by the state police crime laboratory as having fired the casings found at the scene of the shooting.
>
> Following a five-day jury trial, Defendant was found guilty of first degree murder, aggravated assault. and recklessly endangering another person. During the penalty phase, the Commonwealth, in respect of the wishes of the victim's family, withdrew the aggravating circumstances and requested that the Court instead impose the mandatory sentence of life imprisonment on the first degree murder charge. Defendant waived a presentence investigation and was sentenced on June 20, 2008, to a mandatory sentence of life imprisonment.
>
> (Doc. 22-2, pp. 11 and 12.)

Following this 2008 conviction for the murder of his estranged wife, Curran launched upon a halting, but ultimately feckless seven-year course of state post-conviction litigation. Thus, Curran unsuccessfully pursued post-trial motions but when these motions were denied neglected to file a timely direct appeal from his conviction and sentence. (Doc. 22, Exhibits C and D.) Instead, on March 12, 2009,

Curran filed a Motion for Post-Conviction Collateral Relief (PCRA) in state court. (Doc. 22, Exhibit E.) This motion was granted, in part, in that on May 5, 2009, the PCRA Court reinstated Mr. Curran's direct appeal rights *nunc pro tunc.* (Doc. 22, Exhibit F.)

Curran then pursued a direct appeal of this conviction and sentence on May 28, 2009, by filing a Notice of Appeal to the Pennsylvania Superior Court. Commonwealth v. Richard Curran, 934 MDA 2009 (Pa. Super 2009). This direct appeal was unsuccessful. On September 8, 2010, the Pennsylvania Superior Court, in a *per curiam* decision, affirmed Curran's judgment of conviction and sentence. (Doc. 22, Exhibit I.) On October 7, 2010, Curran filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, but the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal on March 7, 2011. (Doc. 22, Exhibits J and K.)

With his direct appeals exhausted, Curran then filed a second, *pro se* PCRA petition in state court which leveled multiple allegations of ineffectiveness against Curran's original trial counsel. (Doc. 22, Exhibit L.) The PCRA court subsequently appointed new counsel to represent Curran in these post-conviction proceedings. (Doc. 22, Exhibit B, specifically Northumberland County Docket Sheet p. 21.) On November 26, 2012, an amended, counseled PCRA Petition was filed on behalf of Curran. (Doc. 22, See Exhibit M.) The Commonwealth filed its answer to the Amended PCRA Petition on December 3, 2012, (Doc. 22, Exhibit N), and on June

19, 2013, the PCRA Court conducted an evidentiary hearing on Curran's PCRA claims, at which hearing Curran and his trial counsel appeared and testified.

On July 10, 2013, the PCRA trial court denied Curran's Amended PCRA Petition, concluding, *inter alia*, that defense counsel had a reasonable trial strategy in electing not to raise mental illness as a diminished capacity defense. (Doc. 22, Exhibit O.) On August 2, 2013, Curran appealed this ruling to the Pennsylvania Superior Court. Following full briefing of these post-conviction claims, on May 14, 2014, the Superior Court affirmed the PCRA court's decision denying post-conviction relief to Curran. (Doc. 22, Exhibit R.) On July 14, 2014, the Pennsylvania Superior Court also issued a *per curiam* order that denied Curran's Application for Reargument in this case. (Doc. 22, Exhibit S.)

Undeterred, in the Summer and Fall of 2014 Curran persisted in a pattern of random, prolix, repetitive filing of pleadings in state court. This pattern led one state trial judge to enter a recusal order in July of 2014, a recusal order which Curran now seeks to transmogrify into some sort of license to forego the federal habeas corpus statute of limitations.

However, Curran's contemporaneous conduct in 2014 reflects that he understood the need to exhaust his state appellate court remedies. Thus, on August 20, 2014, Curran filed a Petition for Allowance to Appeal to the Supreme Court of Pennsylvania. (Doc. 22, Exhibit T.) On August 28, 2014, Curran then filed a Petition

for Leave to File Petition for Allowance of Appeal *Nunc Pro Tunc* to the Supreme Court of Pennsylvania[9]. (Doc. 22 Exhibit U.) On October 23, 2014, the Supreme Court denied Curran's Petition. (Doc. 22 Exhibit V.) November 17, 2014, Curran filed a Petition for Writ of Mandamus to the Pennsylvania Supreme Court, which was denied by the Supreme Court on December 11, 2014. (Doc. 22, Exhibit X.) On January 5, 2015, the Pennsylvania Supreme Court closed Curran's last appeal. (Doc. 22, Exhibit B, specifically page 3 of Docket Number 176 MM 2014.) Thus, by January 2015, Curran's state proceedings had concluded and he had fully exhausted his state remedies. The exhaustion of these state remedies, in turn, triggered Curran's obligation to timely file a federal petition for writ of habeas corpus within the one-year limitations period prescribed by law.

Curran did not timely file this petition. Instead, he allowed 1177 days to elapse before he belatedly submitted his federal habeas corpus petition on March 27, 2018. (Doc. 1.) On these facts respondents argue that, absent equitable tolling, Curran's application for a writ of habeas corpus is untimely and should be dismissed. Curran has responded by blaming his delay in filing this petition upon the state courts, implausibly suggesting that a single trial judge's recusal order from July of 0214, somehow completely abrogated AEDPA's statute of limitations.

For the reasons set forth below, we reject Curran's claims, agree that this petition is now time-barred and recommend that this petition for writ of habeas corpus be denied as untimely.

II. Discussion

A. State Prisoner Habeas Relief–The Legal Standard.

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 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.
>
> **(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).

B. Procedural Requirements--Statute of Limitations

Furthermore, state prisoners seeking relief under Section 2254 must also satisfy specific, and precise, procedural standards. Among these procedural prerequisites is a requirement that petitioners 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 Dept. of Corrections 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)(2), which 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 relating to the time when a case is "pending" state review, it is clear that "the term 'pending' must include the time between a court's ruling and the timely filing of an appeal, [and] 'pending' must include the time during which an appeal could be filed even if the appeal is not eventually filed." Swartz, 204 F.3d at 424. Thus, 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. However, 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).

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 United States Court of Appeals for the Third Circuit 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: "In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling. See 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); 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)." Id. 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 benchmarks, for the reasons set forth below, Curran's petition for writ of habeas corpus fails and should be denied.

C. Curran's Petition is Untimely

In this case, the Commonwealth argues that this petition is now barred by § 2244(d)'s one-year statute of limitations. Our analysis of the delays which have plagued this litigation convinces us that these claims are, in fact, now time-barred.

The history of this case reveals that in August of 2005, Curran executed the mother of his two children. Caught as he attempted to flee across the Canadian border Currans was charged, convicted and sentenced for his role in this murder in June of 2008, Curran then pursued a halting, random, occasionally meandering but consistently fruitless course of post-conviction litigation in the state courts for almost seven years until he fully exhausted his state court remedies in January of 2015. More

than 1,100 days, or three years, then elapsed before Curran filed the instant federal habeas corpus petition on March 27, 2018.

On the face of these state court records–which reflect three years of delay by Curran in filing this federal habeas corpus petition–we believe that this federal habeas petition is clearly untimely, and is now barred by AEDPA's one-year statute of limitations. Indeed, even the most straightforward, and generous, application of § 2244's statute of limitations to this case leads to a finding that this petition is time-barred since Curran allowed years to pass without taking any effective action to litigate these claims in federal court after he had exhausted his state appeals. Nor can Curran rely upon his alleged attempts to file other, untimely state post-conviction petitions to toll this limitations period. Quite the contrary, it is well-settled that an untimely petition will not be considered a "properly filed application for State post-conviction or other collateral review" which may 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).

While Curran attempts to justify this delay by claiming that he is entitled to equitable tolling of this statute of limitations, we find that Curran has not carried his burden of showing 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). Indeed, this argument fails because we find that Curran

has failed to satisfy 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 omitted). Rather than showing reasonable diligence, we find that Curran's approach to this litigation is marked by years of inexplicable indolence.

On this score, it is entirely undisputed that after he had exhausted his state court appeals in January of 2015, Curran permitted three years to pass by before acting to challenge his conviction and sentence in this federal habeas corpus proceeding his PCRA proceedings. In the face of this undeniable record of inaction, no form of tolling analysis can save this petition from the fate which AEDPA's one-year statute of limitations dictates in this case. Rather, this petition is untimely and falls outside § 2244(d)'s one-year limitation period, and we cannot find any extraordinary circumstances of the type which would justify equitable tolling of this limitations period.

In particular, Curran's efforts to rely upon a state trial court recusal order in July of 2014 as a license to ignore AEDPA's statute of limitations are entirely unpersuasive for a host of reasons. Simply put, as a defense to the bar of the statute of limitations this claim is a legal and logical *non sequitur*. In fact, it has been held that a motion for recusal is not the type of extraordinary circumstance which justifies

tolling AEDPA's statute of limitations. See Myers v. Terrell, No. CIV.A. 11-0353, 2012 WL 2915692, at *3 n. 26 (E.D. La. May 31, 2012), report and recommendation adopted, No. CIV.A. 11-0353, 2012 WL 2915502 (E.D. La. July 17, 2012)("The court agrees with the State's contention that the motion to recuse and subsequent appeal of the motions' denial would not alter the tolling of the limitations period in this case.") There are sound reasons why a recusal motion would not toll the limitations period. Simply put, a recusal request should follow the filing of a substantive pleading. It may not serve as an excuse for not filing that pleading in the first instance. In fact, adopting Curran's suggestion that recusal issues toll filing deadlines would lead to a curious and mischievous result. This position, if embraced by the courts, would effectively excuse the petitioner from taking any timely action based upon his insistence that a different judge needed to be assigned to his case once it was filed.

Moreover, Curran's tolling argument makes no sense on the facts of this case. Curran cites a July 2014 recusal decision by a state trial judge as grounds for tolling this federal statute of limitations, but it is evident that in the Summer of 2014 Curran's post-conviction claims were before the state appellate courts, not the state trial court. Thus, the trial judge's recusal is not relevant to the issue of state appeals exhaustion. In the same vein, the state trial court's recusal decision is completely

irrelevant to filing deadlines in federal court. In short, the action of one sovereign court cannot be imputed as a constraint on an entirely different court system. Therefore, Curran cannot be heard to claim that a state court recusal decision completely tolled and abrogated a federal statute of limitations.

But even if we found that this 2014 state court recusal decision had some hypothetical relevance to the federal statute of limitations under AEDPA, Curran's own pleadings reveal that he was fully aware of these issues by January of 2017, when he was alerting the state courts that they had not acted in accord with his wishes and "that these matters are not over by any means." (Doc. 35-1, p.3.) Yet, after Curran voiced this awareness in January of 2017 that the state courts were not acting on whatever issues he perceived to still exist, he delayed another 13 months before filing his federal habeas corpus petition. On these facts it simply cannot be said "that [t]he [petitioner] . . . 'exercised reasonable diligence in investigating and bringing [the] claims'" when he delayed a decade or more before asserting these claims. Miller, 145 F.3d at 618-19 (citations omitted).

While Curran has made no showing of extraordinary circumstances on his part which would justify tolling this limitations period, there are substantial interests that weigh in favor of holding Curran 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 in the context of a belated collateral attack upon a criminal conviction arising out of the calculated killing of his own children's mother, there is also an important human dimension to the statute of limitations. To ignore the limitations period prescribed by law, and permit Curran to belatedly re-open this case, would compel his victim's family to, once again, experience the trauma of these events. Since Curran 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 his victims to revisit these events.

In short, Curran's petition invites this Court to ignore his procedural defaults, discount the statute of limitations, and re-open this case, without considering the potential harm which could be experienced by the victim's family if they were required to endure these events once again. Since this request flies in the face of the law, and cannot be justified on the facts, this Court should decline this invitation, and deny his petition for writ of habeas corpus.

Finally, we note that Curran has filed a motion demanding a hearing in this case. (Doc. 45.) This motion should also be denied. In this regard, it is well-settled

that: "The ability of a federal district court to hold an evidentiary hearing in habeas review is limited under [28 U.S.C. § 2254]." Rolan v. Vaughn 445 F.3d 671, 680 (3d. Cir. 2006). Thus, a district court should generally decline to hold an evidentiary hearing on a state prisoner habeas petition where the petitioner has had a full opportunity to develop a factual record in the course of state proceedings. Id. Instead, in such instances the district court should rely upon the factual record developed in the state proceedings since § 2254(e) expressly 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).

Moreover, in those instances where a full record has not been developed by the petitioner in state criminal proceedings, we are also cautioned to conduct evidentiary hearings sparingly. The circumstances in which a hearing may be permitted under § 2254(e)(2) are defined narrowly. In fact, in this regard 28 U.S.C. § 2254(e)(2) only provides for an opportunity for a hearing, at the court's discretion, in the following, specifically enumerated situations:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
> (A) the claim relies on-

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Rolan, 445 F.3d at 680, n.3.

At this time, the petitioner has not made a showing justifying an evidentiary hearing on this habeas petition. Given his time-barred petition he has failed to plead or prove any facts justifying a hearing under 28 U.S.C. § 2254(e)(2). Therefore, this motion for a hearing should also be denied.

III. Recommendation

Accordingly, for the foregoing reasons, upon consideration of this Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, and the Response in Opposition to this Petition, IT IS RECOMMENDED that the Petition be DENIED, that Curran's motion for a hearing (Doc. 45), be DENIED, and that a certificate of appealability should not issue.

The parties are 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 8th day of March 2019.

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

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

RICHARD C. CURRAN,	:	
Petitioner	:	**No. 1:18-cv-679**
	:	
v.	:	**(Judge Kane)**
	:	**(Magistrate Judge Carlson)**
COMMONWEALTH, et al.,	:	
Respondents	:	

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Before the Court is the March 8, 2019 Report and Recommendation of Magistrate Judge Carlson (Doc. No. 46), recommending that the Court deny the Petition for a Writ of Habeas Corpus filed by Petitioner Richard Curran ("Petitioner") pursuant to 28 U.S.C. § 2254 (Doc. No. 1), because the petition is untimely. Petitioner has filed a response, which the Court construes as objections, to the Report and Recommendation. (Doc. No. 48.)

In 2008, following a jury trial, Petitioner was convicted of first-degree murder, aggravated assault, and reckless endangerment of another person for the fatal shooting of his ex-wife, and was sentenced by the Court of Common Pleas for Northumberland County to serve life in prison. See Commonwealth v. Curran, Docket No. CP-49-CR-0000992-2005 (C.P. Northumberland Cty.).[1] After pursuing several unsuccessful post-trial motions (Doc. No. 22, Exs. C, D), Petitioner filed a Post-Conviction Relief Act ("PCRA") petition on March 12, 2009 (id., Ex. E). On May 5, 2009, the PCRA court granted this petition and reinstated Petitioner's direct appeal rights nunc pro tunc. (Id., Ex. F.) On September 8, 2010, the Pennsylvania

[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).

Superior Court affirmed Petitioner's conviction and sentence. (See id., Ex. I.) The Pennsylvania Supreme Court denied his petition for allowance of appeal on March 7, 2011. (Id., Exs. J, K.)

Petitioner subsequently filed a second PCRA petition, raising several allegations of ineffective assistance of counsel. (Id., Ex. L.) The PCRA court appointed counsel to represent Petitioner, and on November 26, 2012, counsel filed an amended PCRA petition. (Id., Ex. M.) On July 10, 2013, the court denied Petitioner's PCRA petition. (Id., Ex. O.) On May 14, 2014, the Pennsylvania Superior Court affirmed the denial of his PCRA petition. (Id., Ex. R.) On July 14, 2014, the Pennsylvania Superior Court denied Petitioner's application for re-argument. (Id., Ex. S.)

As Magistrate Judge Carlson notes in his Report and Recommendation, Petitioner then "persisted in a pattern of random, prolix, repetitive filing of pleadings in state court." (Doc. No. 46 at 5.) This led one state trial judge to enter a recusal order in July of 2014. (Doc. No. 1, Ex. A-5.) On August 20, 2014, Petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court. (Doc. No. 22, Ex. T.) Eight (8) days later, Petitioner filed a petition for leave to file petition for allowance of appeal nunc pro tunc to the Pennsylvania Supreme Court. (Id., Ex. U.) His petition was denied on October 23, 2014. (Id., Ex. V.) On January 5, 2015, the Supreme Court of Pennsylvania closed Petitioner's last appeal. (Id., Ex. B.)

Petitioner did not file his § 2254 petition until March 20, 2018, the date that he states he placed the petition in the prison mail system for mailing to this Court. (Doc. No. 1 at 17); see also Houston v. Lack, 487 U.S. 266, 276 (1988). In his petition, Petitioner raises several claims of error. In his Report and Recommendation, Magistrate Judge Carlson concludes that Petitioner's § 2254 is untimely under 28 U.S.C. § 2244(d)(1) and that Petitioner is not entitled to equitable tolling of the statute of limitations. (Doc. No. 46 at 8-17.) Specifically, Magistrate

Judge Carlson rejected Petitioner's argument that equitable tolling should apply based upon the recusal order entered by a state court trial judge in July of 2014. (Id. at 14-16.)

Petitioner now raises multiple objections to Magistrate Judge Carlson's Report and Recommendation. Several of these objections again focus on the recusal order entered in July of 2014. Petitioner contends that this recusal order actually recused all judges in Northumberland County from hearing his case and that his case was never reassigned to another county. As an initial matter, there is nothing in the record, aside from Petitioner's assertion, that all judges in Northumberland County were recused from hearing his case. Moreover, as Magistrate Judge Carlson correctly notes, the recusal order has no bearing on the statute of limitations because Petitioner was pursuing his appeal of the denial of his second PCRA petition when the recusal order was entered. Having considered Petitioner's challenge, the Court concludes that Magistrate Judge Carlson correctly and comprehensively addressed Petitioner's arguments regarding the recusal order. Accordingly, these objections will be overruled.

Petitioner also faults Magistrate Judge Carlson for not addressing certain facts in the Report and Recommendation. For example, Petitioner believes that Magistrate Judge Carlson should have mentioned that attorney Reitz never provided a copy of his criminal file, that Reitz "just quit representing [him]," and that he was the police chief for Bernville Borough at the time of the shooting. (Doc. No. 48 at 1-2.) These additional facts, however, have no bearing on Magistrate Judge Carlson's conclusion that Petitioner's § 2254 petition is untimely. Accordingly, these objections will be overruled.

Petitioner now suggests, for the first time, that his § 2254 petition should be deemed timely pursuant to 28 U.S.C. § 2244(d)(1)(B). (Id. at 3, 5.) That statutory section provides that the limitations period runs from "the date on which the impediment to filing [a § 2254 petition]

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." See 28 U.S.C. § 2244(d)(1)(B). In support of his argument, Petitioner asserts that he tried to file a PCRA petition with the Pennsylvania Supreme Court, but that the court instructed him to file it in Northumberland County. (Doc. No. 48 at 3.) Petitioner again mentions that his case was never reassigned to another county. (Id. at 4.) However, Petitioner fails to demonstrate any state action that prevented him from filing his § 2254 petition in a timely fashion. Accordingly, these objections will be overruled.

AND SO, on this 30th day of April 2019, upon independent review of the record and applicable law, **IT IS ORDERED THAT**:

1. The Court **ADOPTS** the Report and Recommendation (Doc. No. 46) of Magistrate Judge Carlson;
2. Petitioner's objections to the Report and Recommendation (Doc. No. 48) are **OVERRULED**;
3. The petition for a writ of habeas corpus (Doc. No. 1) is **DENIED**;
4. Petitioner's motion for a hearing (Doc. No. 45) 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

Additional material from this filing is available in the Clerk's Office.