

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

JEFFREY GIBSON :  
v. : PRISONER  
SIMPLE : Case No. 3:12cv1255 (JBA)

**RULING ON RESPONDENT'S MOTION TO DISMISS [Doc. #8]**

Petitioner Jeffrey Gibson ("Gibson"), currently confined at the Garner Correctional Institution in Newtown, Connecticut, commenced this action for writ of habeas corpus pro se pursuant to 28 U.S.C. § 2254. He challenges his Connecticut convictions for murder and carrying a pistol without a permit. The respondent has filed a motion to dismiss the petition as untimely filed. For the reasons that follow, the respondent's motion to dismiss will be granted.

**I. Procedural Background**

Gibson was tried before a jury on charges of murder and carrying a pistol without a permit. He was convicted and sentenced to a term of imprisonment of forty-five years. See State v. Gibson, 56 Conn. App. 154, 155, 742 A.2d 397 (1999). Gibson did not file a petition for certification to appeal the December 21, 1999 decision of the Connecticut Appellate Court to the Connecticut Supreme Court.

On May 23, 2001, Gibson filed his first state habeas action, No. TSR-CV01-0808290-S, asserting a claim of ineffective assistance of trial counsel. See Resp't's Mem. App. B. After a

hearing, the petition was denied. The appeal was dismissed. See Gibson v. Commissioner of Correction, 98 Conn. App. 311, 908 A.2d 1110 (2006), cert. denied, 281 Conn. 908, 916 A.2d 49 (2007).

On September 7, 2004, Gibson filed a second state habeas action, No. TSR-CV04-4000091-S. In his final amended petition, Gibson asserted three claims: (1) the state failed to disclose that a key witness was a paid police informant in other unrelated cases, (2) ineffective assistance of trial counsel, and (3) ineffective assistance of habeas counsel. The second claim was dismissed as barred by res judicata. Following a hearing on the remaining claims, the court denied the petition. The appeal was dismissed. See Gibson v. Commissioner of Correction, 135 Conn. App. 139, 41 A.3d 700, cert. denied, 305 Conn. 922, 47 A.3d 881 (2012).

On September 27, 2012, after he commenced this action, Gibson filed a third state habeas action, No. TSR-CV12-4005001-S. That action remains pending.

Gibson filed this action by undated petition received on August 27, 2012. In response to the court's order that he show cause why the petition was timely filed, Gibson stated that he was unaware of his attorney's failure to file a petition for certification until sixteen months after the Connecticut Appellate Court dismissed his appeal. He states that he promptly filed his first state habeas when he learned of the failure.

## II. Standard

In 1996, the federal habeas corpus statutes were amended to impose a one-year statute of limitations on federal petitions for writ of habeas corpus challenging a judgment of conviction imposed by a state court. See 28 U.S.C. § 2244(d)(1) (2000). The limitations period begins on the completion of the direct appeal or the conclusion of the time within which an appeal could have been filed and may be tolled for the period during which a properly filed state habeas petition is pending. See 28 U.S.C. § 2244; Williams v. Artuz, 237 F.3d 147, 151 (2d Cir.), cert. denied, 534 U.S. 924 (2001).

The petitioner can overcome the time bar by demonstrating that the limitations period should be equitably tolled. Equitable tolling, however, applies in habeas cases only in extraordinary and rare circumstances. The petitioner would have to show that he has been pursuing his rights diligently, but extraordinary circumstances prevented him from timely filing his petition. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Diaz v. Kelly, 515 F.3d 149, 153 (2d Cir.), cert. denied sub nom. Diaz v. Conway, 129 S. Ct. 168 (2008). The threshold for a petitioner to establish equitable tolling is very high. See Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir.) (acknowledging high threshold for establishing equitable tolling), cert. denied, 531 U.S. 840 (2000).

### III. Discussion

Gibson's conviction became final on January 10, 2000, twenty days following the appellate court decision, at the conclusion of the time when the petitioner could have sought certification from the Connecticut Supreme Court. See Conn. Practice Book § 84-4 (providing twenty days to petition Connecticut Supreme Court for review of Connecticut Appellate Court decision).

The limitations period for this federal action expired on January 10, 2001. For this petition to be considered timely filed, Gibson must show that the limitations period should be equitably tolled first for 133 days, until May 23, 2001, when Gibson filed his first state habeas action, and then for 46 days, from July 11, 2012, when the Connecticut Supreme Court denied certification to appeal the denial of the second state habeas, until August 27, 2012, when this action commenced.

The standard for determining whether a petitioner diligently pursued his rights and, thus, whether equitable tolling is warranted is reasonable diligence. The court must determine whether "the petitioner act[ed] as diligently as reasonably could have been expected under the circumstances." Baldyaque v. United States, 338 F.3d 145, 153 (2d Cir. 2003) (emphasis in original). The petitioner must have acted with reasonable diligence throughout the entire period he seeks to toll, that is, during the period after the extraordinary circumstances began.

See id. at 150 (quoting Hizbulahankhamon v. Walker, 255 F.3d 65, 75 (2d Cir. 2001), cert. denied, 536 U.S. 925 (2002)).

When considering the extraordinary circumstances, the court considers "how severe an obstacle it is for the petitioner endeavoring to comply with the AEDPA's limitations period." Rivas v. Fischer, 687 F.3d 514, 538 (2d Cir. 2012) (internal quotation marks and citation omitted). The inquiries into extraordinary circumstances and reasonable diligence are related. The petitioner must show that the extraordinary circumstances caused him to miss the filing deadline. See Harper v. Ercole, 648 F.3d 132, 137 (2d Cir. 2011).

In response to the court's order, Gibson stated that he, through his attorney, had filed an appeal to the Connecticut Supreme Court. He tried unsuccessfully to contact counsel several times. Then, sixteen months after the Connecticut Appellate Court's decision, he contacted the court clerk to inquire about the appeal. Gibson does not specify when he tried to contact counsel. In opposition to the motion to dismiss, Gibson merely asks the court to disregard the respondent's arguments. He does not provide additional information to show that he diligently pursued his rights.

A breakdown of the attorney-client relationship can constitute cause to warrant equitable tolling. Excusable neglect, however, does not. See Holland v. Florida, \_\_\_ U.S. \_\_\_.

\_\_\_\_\_, 130 S. Ct. 2549, 2564 (2010). In Holland, the inmate wrote to counsel numerous times seeking information and giving directions and repeatedly contacted the state courts and clerks to get the attorney removed from his case. The court concluded that these facts required further proceedings to determine whether equitable tolling was warranted. Id. at 2565.

The Second Circuit has found extraordinary circumstances to warrant equitable tolling where the attorney did not file a habeas petition when specifically directed to do so, failed to research the limitations period, failed to meet with or speak to the petitioner and made no effort to locate the petitioner when mail was returned as undeliverable. See Baldayaque, 338 F.3d at 150-51. The Second Circuit also found extraordinary circumstances where the attorney waited until one day after the limitations period expired to file the petition despite repeated requests that he not wait until the last day. See Dillon v. Conway, 642 F.3d 358, 363-64 (2d Cir. 2011) (per curiam). In both cases, the attorney's negligence was so egregious as to constitute an abandonment of the attorney-client relationship. See Rivas, 687 F.3d at 538.

The facts here do not rise to that level. Gibson fails to allege that he spoke with his attorney about filing a petition for certification; he just assumed the attorney would do so. Although Gibson now indicates he was dissatisfied with counsel's

representation, he does not state that he raised this dissatisfaction with the court or sought to have counsel removed. Gibson has not shown an abandonment of the attorney-client relationship.

In addition, although he was unable to contact his attorney, Gibson waited sixteen months to contact the state appellate courts and inquire about the appeal. When he learned the appeal had not been filed, Gibson does not state that he inquired about the possibility of filing a late appeal. Further, as there is no requirement that the direct appeal must be concluded before a state habeas action can be filed, Gibson fails to identify any circumstance supporting his delay. The court concludes that, even if Gibson's attorney's conduct rose to the level of an extraordinary circumstance, Gibson's delay in contacting the state appellate court and filing a state habeas petition demonstrates his lack of diligence.

The court concludes that Gibson fails to present facts warranting equitable tolling. Thus, the petition is untimely.

#### IV. Conclusion

The respondent's motion to dismiss [Doc. #8] is **GRANTED**. The court concludes that an appeal of this order would not be

taken in good faith. Thus, a certificate of appealability will not issue.

**So ordered** this 23<sup>rd</sup> day of July 2013, at New Haven,  
Connecticut.

/s/  
Janet Bond Arterton  
United States District Judge