

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL ROARY,

*

v.

* CIVIL ACTION NO. DKC-13-1842

GREGG L. HERSHBERGER, et al.,

*

MEMORANDUM

On June 19, 2013, Petitioner Gregg L. Hershberger filed the instant 28 U.S.C. § 2254 habeas corpus application attacking his conviction for murder and related offenses entered in 2003 in the Circuit Court for Baltimore City.¹ ECF No. 1. Respondents filed an Answer which solely addresses the timeliness of Petitioner's application. ECF No. 4. Petitioner was advised of his opportunity to file a reply. ECF No. 5. This he has done. ECF No. 6.

Petitioner was convicted by the Circuit Court for Baltimore City, Maryland of second degree felony murder, involuntary manslaughter, first and second degree assault, conspiracy, and transporting a handgun in a vehicle on August 1, 2003. ECF No. 4, Exs. 1-3. On September 23, 2003, he was sentenced to 35 years imprisonment. *Id.*

Petitioner filed a motion for modification of sentence on September 26, 2003, which was denied on September 14, 2010. *Id.*, Ex. 3. Petitioner filed an application for review of sentence on November 13, 2003, which was denied on January 14, 2004. *Id.*, Ex. 1 & 3. On May 23, 2005, he filed a motion to correct an illegal sentence, which was denied on June 9, 2005. *Id.* He did not appeal the disposition of that motion and the ruling became final on July 11, 2005. *Id.*

Petitioner noted a timely appeal of his conviction and sentence. *Id.*, Ex. 2. On its own motion, the Court of Appeals of Maryland issued a writ of certiorari to review Petitioner's judgment prior to review by the Court of Special Appeals. *Id.* His conviction and sentence were

¹The petition, received on June 24, 2013, is dated June 19, 2013, and is deemed filed on that date.

affirmed by the Court of Appeals in a reported opinion filed on February 11, 2005. *Id.* See *Roary v. State*, 867 A.2d 1098 (2005). He did not seek further review. Accordingly, his convictions became final on May 12, 2005, when the time for seeking further review expired. See Sup. Ct. Rule 13.1 (petition for writ of certiorari to be filed no later than 90 days of judgment from which review is sought).

On December 27, 2005, Petitioner submitted a collateral attack on his conviction pursuant to the Maryland Uniform Post-Conviction Procedure Act, Md. Code Ann., Crim. Pro. § 7-102, *et seq.* *Id.*, Exs. 1 & 3. He withdrew the petition, without prejudice, on March 30, 2006. *Id.* Petitioner filed another petition for post-conviction relief on January 5, 2012, which was denied on August 14, 2012. *Id.* Ex. 3. Petitioner's application for leave to appeal the denial of post-conviction relief was denied by the Court of Special Appeals on June 5, 2013. The court's mandate issued on July 8, 2013. *Id.*, Ex. 1.

Title 28 U.S. C. § 2244(d)² provides a one-year statute of limitations in non-capital cases for those convicted in a state case. This one-year period is, however, tolled while properly filed

² This section provides:

(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 the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

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

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, 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.

post-conviction proceedings are pending and may otherwise be equitably tolled. *See* 28 U.S.C. § 2244(d)(2). *Harris v. Hutchinson*, 209 F.3d 325, 328 (4th Cir. 2000); *Gray v. Waters*, 26 F. Supp. 771, 771-72 (D. Md. 1998).

The statute of limitations began to run in Petitioner's case on May 12, 2005. The limitations period was statutorily tolled when Petitioner instituted post-conviction proceedings. The statutory tolling ceased, however, when petitioner withdrew his post-conviction petition on March 30, 2006. As of that date, Petitioner had no other post-conviction proceedings pending which could serve to statutorily toll the limitations period.³ Over five years passed before Petitioner again filed for post-conviction relief and statutorily tolled the limitations period.

In *Holland v. Florida*, 560 U.S. 631 (2010), the Supreme Court concluded that equitable tolling applies to the AEDPA's statute of limitations. *Id.* at 633. Specifically, the Court found that in order to be entitled to equitable tolling, the movant must show (1) that he has diligently pursued his rights and (2) that some extraordinary circumstance prevented the timely filing. *Id.* at 649. The question of whether equitable tolling applies hinges on the facts and circumstances of each particular case. *See Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000).⁴

(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.

³ Petitioner's motion for modification did not serve to toll the limitations period. *See Tasker v. State*, Civil Action No. AW-11-1869 (D. Md.) Even if Petitioner's motion for modification of sentence filed on September 26, 2003 and denied on September 14, 2010 was deemed a properly filed post-conviction proceeding which would toll the limitations period, the tolling ceased upon denial of the motion. Petitioner waited over 15 months thereafter before filing for post-conviction petition.

⁴ *See also Lusk v. Ballard*, 2010 WL 3061482 (N.D.W. Va. 2010) (holding Fourth Circuit's test for equitable tolling, as set forth in *Harris*, remains virtually unchanged after *Holland*.)

Petitioner indicates that his claim should not be time barred because the Public Defender directed him to withdraw his pro se petition and then did not file a counselled petition in a timely manner. ECF No. 6. Petitioner's claims that the delay in filing was occasioned by his lack of awareness of the law and his attorney's lack of diligence in pursuing his claims is likewise unavailing. Petitioner's pro se status and any attendant lack of knowledge of the law is not the type of extraordinary circumstance which would justify equitable tolling. *See Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991) (refusing to apply equitable tolling where the delay in filing was the result of petitioner's unfamiliarity with the legal process or his lack of legal representation). In short, the court does not find petitioner's arguments for equitable tolling compelling. *See Rouse v. Lee*, 339 F.3d 238, 248-249 (4th Cir. 2003) (negligent mistake by party's counsel in interpreting AEDPA statute of limitations does not present extraordinary circumstances warranting equitable tolling); *Smith v. McGinnis*, 208 F.3d 13, 18 (2nd Cir. 2000) (*pro se* status does not establish sufficient ground for equitable tolling); *Felder v. Johnson*, 204 F.3d 168, 171-173 (5th Cir. 2000) (lack of notice of AEDPA amendments and ignorance of the law are not rare and exceptional circumstances that warrant equitable tolling); *Francis v. Miller*, 198 F.Supp.2d 232, 235 (E.D. N.Y. 2002) (ignorance of the law and legal procedure is not so exceptional as to merit equitable tolling). Therefore, the Petition shall be dismissed as time-barred under 28 U.S.C. § 2244(d).

Under the amendments to Rule 11(a) of the Rules Governing Proceedings under Section 2254 "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant...If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court held that "[w]hen the district court denies a

habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA [certificate of appealability] should issue when the prisoner shows, at least, that ... jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484. Petitioner does not satisfy this standard, and the court declines to issue a certificate of appealability as required under the Rules Governing Section 2254 Petitions in the United States District Courts.

A separate Order follows.

October 28, 2014
Date

_____/s/_____
DEBORAH K. CHASANOW
United States District Judge