

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

<p>JERMAINE A. WILLIAMS,</p> <p style="padding-left: 100px;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>MICHELLE R. RICCI, et al.,</p> <p style="padding-left: 100px;">Respondents.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>Civil Action No. 09-1822 (DRD)</p> <p><u>MEMORANDUM OPINION</u></p>
---	---	---

IT IS APPEARING THAT:

1. On April 17, 2009, Petitioner filed his instant Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254(a), and submitted due filing fee. See Docket Entries Nos. 1 and 2. In his Petition, Petitioner raised various grounds challenging his conviction. See id. Docket Entry No. 1.
2. The information contained in the Petition did not allow this Court to determine, with a sufficient degree of certainty whether the Petition was duly exhausted or timely filed. See id.
4. On June 26, 2009, the Clerk docketed Petitioner's motion ("Motion") seeking stay of his Petition for the purposes of Petitioner's exhaustion of an additional challenge. See Docket Entry No. 4. The motion provided the Court with a more exact time-line of Petitioner's state proceedings. See

id. at 2-3. Specifically, Petitioner informed the Court that:

- a. On January 4, 2002, following a jury trial (as a result of which Petitioner was convicted on various charges), Petitioner was sentenced to life imprisonment, rendering him ineligible for parole for thirty years. See id. at 2.
- b. Petitioner's direct appeal of his conviction and/or sentence was dismissed by the Superior Court of New Jersey, Appellate Division, on February 26, 2004, and the Supreme Court of New Jersey denied Petitioner certification, as to his direct appeal, on September 10, 2004. See id.
- c. According to the Motion, Petitioner filed his application for post-conviction relief ("PCR") on December 9, 2006, that is, more than two years after the Supreme Court of New Jersey denied him certification as to his direct appeal. See id. Yet, the Motion states that the Superior Court of New Jersey, Law Division, held a hearing and denied Petitioner's PCR application on October 18, 2006, i.e., about two months prior to Petitioner's filing of his PCR application. See id.

5. Although the Motion is silent as to the treatment of Petitioner's PCR application on appellate review, the Petition fills this gap by stating that the Appellate Division affirmed the trial court's decision on September 9, 2008, and the Supreme Court of New Jersey denied Petitioner certification as to his PCR application on December 10, 2008. See Docket Entry No. 1, at 3-4.
6. The limitation period for a § 2254 habeas petition is set forth in 28 U.S.C. § 2244(d),¹ which provides in pertinent part:
- (1) A 1-year period of limitations 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; . . .
 - (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 section.

28 U.S.C. § 2244(d).

¹ Section 2244(d) became effective on April 24, 1996 when the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998); Duarte v. Hershberger, 947 F. Supp. 146, 147 (D.N.J. 1996).

Thus, 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." A state-court criminal judgment becomes "final" within the meaning of § 2244(d)(1) by the conclusion of direct review or by the expiration of time for seeking such review, including the 90-day period for filing a petition for writ of certiorari in the United States Supreme Court. See Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000); Morris v. Horn, 187 F.3d 333, 337 n.1 (3d Cir. 1999); U.S. Sup. Ct. R. 13.

7. The limitations period is statutorily tolled, however, during the time a properly filed application for state post-conviction relief is pending. See 28 U.S.C. § 2244(d)(2). An application for state post-conviction relief is considered "pending" within the meaning of § 2244(d)(2), and the limitations period is statutorily tolled, from the time it is "properly filed," then during the period between a lower state court's decision and the filing of a notice of appeal to a higher state court, see Carey v. Saffold, 536 U.S. 214 (2002), and through the time in which an appeal

could be filed, even if the appeal is never filed. See Swartz v. Meyers, 204 F.3d at 420-24.

8. Here, the statements made by Petitioner in his Motion suggest that the instant Petition is untimely, since Petitioner asserts that he filed his application for PCR on December 9, 2006, that is, twenty-seven months after September 10, 2004 (the date when the Supreme Court of New Jersey denied him certification as to his direct appeal), which means that Petitioner's AEDPA statute of limitation was triggered at the beginning of December of 2004 and expired at the beginning of December 2005, i.e., about a year prior to Petitioner's filing of his PCR. Which, in turn, indicates that -- unless Petitioner can provide this Court with valid grounds for equitable tolling for the period spanning from early December 2005 to April 2009 -- his instant Petition is time-barred and must be dismissed.
9. However, it appears that Petitioner's Motion contains an inadvertent mistake as to the date of Petitioner's filing of his PCR application. Indeed, it appears wholly impossible that Petitioner filed his application for PCR on December 9, 2006, but the Superior Court of New Jersey, Law Division, held a hearing and denied that very PCR application on October 18, 2006, i.e., two months prior to Petitioner's filing of that application. Moreover, the Court's own

research indicates that Petitioner filed his PCR application in 2004, specifically, on October 8, 2004. See State v. Williams, 2008 WL 4345452, at *3 (N.J. Super. App. Div. Sep. 25, 2008) ("On October 8, 2004, defendant filed a pro se petition for PCR in the trial court"). Thus, if the Court's research date is correct, then Petitioner statutorily tolled his AEDPA limitations period by filing his PCR application, and did so before his AEDPA period of limitations was even triggered. In such scenario, his period of limitations to bring this action began running only when the Supreme Court of New Jersey denied him certification as to his PCR application, that is, on December 10, 2008, and will not expire until December 9, 2009, i.e., about five months from now.² Such deducement, obviously, raises the issue of whether grant of stay is warranted in this matter.

10. The enactment in 1996 of a one-year limitations period for § 2254 habeas petitions, see 28 U.S.C. § 2244(d), however, ``has altered the context in which the choice of mechanisms

² The Court stresses that the Court's presumption as to timeliness of Petitioner's instant Petition (which ensues from the data obtained by the Court as a result of the Court's own research) is made for the purposes of this Opinion and accompanying Order only, and -- in no event -- this presumption should be construed as a factual finding that the Petition filed in this matter is timely: such finding is reserved for the tribunal which will preside over Petitioner's § 2254 action filed upon expiration of the stay granted in the Order accompanying this Opinion, and this Court takes no position as to what such finding should be.

for handling mixed petitions is to be made.'" Crews v. Horn, 360 F.3d 146, 151 (3d Cir. 2004) (quoting Zarvela v. Artuz, 254 F.3d 374, 379 (2d Cir.), cert. denied, 534 U.S. 1015 (2001)). Because of the one-year limitations period, dismissal of a timely-filed mixed petition may forever bar a petitioner from returning to federal court. "Staying a habeas petition pending exhaustion of state remedies is a permissible and effective way to avoid barring from federal court a petitioner who timely files a mixed petition." Crews, 360 F.3d at 151. Indeed, the Court of Appeals for the Third Circuit has held that "when an outright dismissal could jeopardize the timeliness of a collateral attack, a stay is the only appropriate course of action." Crews, 360 F.3d at 154.

11. That being said, the Supreme Court set forth the limitations of the stay-and-abeyance rule in Crews.

[S]tay and abeyance should be available only in limited circumstances. . . . [S]tay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

. . .

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had

good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition. . . . For the same reason, if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief.

Rhines v. Weber, 544 U.S. 269, 277-78 (2005) (citations omitted).

12. However, the overall gist of the pertinent law suggests that, when faced with an ambiguous situation, the District Court should, out of abundance of caution, err on the side of ensuring that the litigant's opportunity to seek federal habeas review is preserved. See Urcinoli v. Cathel, 546 F.3d 269, 273-76 (3d Cir. 2008) (discussing relevant considerations); see also Gully v. Ortiz, 2007 U.S. Dist. LEXIS 77825 (D.N.J. Oct. 19, 2007) (granting Petitioner stay out of abundance of caution, even though Petitioner failed to articulate clear grounds for stay, and his AEDPA period of limitations was still running at the time the stay was granted), certif. denied, Gully v. Ortiz, Appellate No. 07-4503 (3d Cir. Feb. 14, 2008, mandate filed as Docket Entry

No. 19 in Gully v. Ortiz, Civil Action No. 06-5397 (KSH) (D.N.J.)).

13. Here, Petitioner has approximately five months of his AEDPA period of limitations left. Generally, in the event Petitioner files another PCR application (seeking to exhaust his additional challenge) within these five months, such filing should statutorily toll his period of limitations for the purposes of filings another § 2254 petition after full exhaustion of this additional challenge is undertaken. However, this Court is mindful of the possibility that -- in the event the state courts find that this new PCR application is "improperly filed" -- Petitioner's AEDPA statute of limitations might long expire by the time Petitioner completes challenging that finding at all three levels of the state courts. Hence, guided by the gist of the Court of Appeals' decision in Urcinoli v. Cathel, 546 F.3d 269, this Court concludes that the abundance of caution approach appears to be proper in this matter and, for this reason, will grant Petitioner's Motion, subject to certain temporal limitations detailed in the Order accompanying this Memorandum Opinion.

Dated: July 6, 2009

s/ Dickinson R. Debevoise
Dickinson R. Debevoise
United States District Judge