



Not Reported in F.Supp.2d, 2012 WL 5389513 (E.D.Pa.)

(Cite as: 2012 WL 5389513 (E.D.Pa.))

H

Only the Westlaw citation is currently available.

United States District Court,

E.D. Pennsylvania.

Donald CAPERS, Petitioner,

v.

Jerome WALSH, et al., Respondents.

Civil Action No. 12–4780.

Oct. 5, 2012.

Donald Capers, Dallas, PA, pro se.

REPORT AND RECOMMENDATION

[TIMOTHY R. RICE](#), United States Magistrate Judge.

*1 Petitioner Donald Capers, a prisoner at the State Correctional Institution in Dallas, Pennsylvania, has filed a pro se petition for a writ of habeas corpus pursuant to [28 U.S.C. § 2254](#) (“Habeas Petition”). For the following reasons, I recommend Capers' claims be denied with prejudice as untimely.

FACTUAL AND PROCEDURAL HISTORY

On September 23, 1998, a jury convicted Capers of second-degree murder, robbery, and possessing instruments of a crime. *See Commonwealth v. Capers*, CP–51–CR–807181–1997 (C.C.P.Phila.Co.), at 3–4 (“Criminal Docket”). The Philadelphia trial court then sentenced Capers to life imprisonment, followed by two-and-one-half to five years of imprisonment. *See id.* The charges arose from the robbery of a store and the murder of its owner, James Hurt. *See Commonwealth v. Capers*, 1072 EDA 2001, Pa.Super. Apr. 23, 2002 Memo. Op., at 2.

After having his appellate rights reinstated nunc pro tunc, Capers appealed to the Superior Court in April 2001. *See Commonwealth v. Capers*, 1072 EDA 2001, Appeal Docket at 2. On April 23, 2002, the Superior Court affirmed Capers' judgment of sentence, finding his claims were waived because his counsel failed to file a Statement of Matters Complained of on Appeal as required by

[Pennsylvania Rule of Appellate Procedure 1925\(b\)](#). *See* April 2002 Super. Ct. Op. at 1–2. Capers did not seek review of this decision from the Pennsylvania Supreme Court.

On February 18, 2003, Capers filed a pro se petition under Pennsylvania's Post Conviction Relief Act, [42 Pa.C.S. § 9541 et seq.](#) (“PCRA”). *See* Criminal Docket at 5. Appointed counsel filed amended and supplemental amended petitions, alleging: (1) Capers' trial counsel was ineffective for failing to present three alibi witnesses at trial; (2) Capers' appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness related to the alibi witnesses; and (3) newly-discovered evidence based on an affidavit from a prosecution witness, James Daughtry, in which he recanted his trial testimony. *See Commonwealth v. Capers*, 1405 EDA 2005, Pa.Super. Feb. 14, 2006 Memo. Op. at 3; Mem. Law in Supp. Petitioner's Fed. Habeas Corpus Pet. Pursuant to [28 U.S.C. § 2254](#) (“Capers' Bf.”) at 3.

On April 18, 2005, the PCRA court denied Capers' petition without a hearing, finding: (1) Capers waived his ineffectiveness claims by stating during an on-the-record colloquy that he was satisfied with his attorney's representation and he did not want to call any witnesses at trial, and (2) Daughtry's affidavit did not warrant relief because it contradicted itself and Daughtry's trial testimony, which was likewise contradictory, was rejected by the jury. *See* Feb. 2006 Super. Ct. Op. at 3, 6–7. The Superior Court affirmed the PCRA court's decision on February 14, 2006, and the Pennsylvania Supreme Court denied Capers' petition for allowance of appeal on August 30, 2006. *See id.* at 1; [Commonwealth v. Capers](#), 906 A.2d 538 (Pa.2006).

*2 Capers filed a second PCRA petition on January 17, 2007. *See Commonwealth v. Capers*, No. 133 EDA 2010, Pa.Super. Nov. 30, 2010 Memo. Op. at 1. On December 24, 2009, the PCRA court denied the petition as untimely. *See id.*; Criminal Docket at 11. While his appeal to the Superior Court was pending, Capers filed an application for remand of appeal to the trial court for

Not Reported in F.Supp.2d, 2012 WL 5389513 (E.D.Pa.)

(Cite as: 2012 WL 5389513 (E.D.Pa.))

review of newly discovered evidence based on an affidavit from Alfred Bonaparte, in which Bonaparte states that someone other than Capers murdered Hurt.^{FN1} See Nov. 2010 Super. Ct. Op. at 1; Capers' Bf. at 4–5, Ex. E.

^{FN1} Bonaparte states in the affidavit that he was present at the scene of Hurt's murder, although he did not see the murder, a male named “Chuck” killed Hurt, “Chuck” left the murder scene with two people he does not know, he also does not know Capers, but Capers was not at the murder scene. See Capers' Bf., Ex E.

On November 30, 2010, the Superior Court affirmed the denial of Capers' PCRA petition and denied without prejudice Capers' application for a remand, allowing Capers to file a new PCRA petition raising the issues in his application. See *id.* at 1–2. On June 21, 2011, the Supreme Court denied Capers' petition for allowance of appeal from that decision. [Commonwealth v. Capers, 611 Pa. 631, 23 A.3d 1054 \(Pa.2011\)](#).

On June 30, 2011, Capers filed a third PCRA petition, alleging newly discovered evidence based on Bonaparte's affidavit and actual innocence. See Criminal Docket, at 12; Ex. A, Capers' 6/30/2011 Motion for Post Conviction Relief, at 2–3. This petition remains pending before the PCRA court. See Criminal Docket at 12.

On August 14, 2012, Capers filed his Habeas Petition, claiming: (1) ineffective assistance of counsel for failing to call three alibi witness: Erica Little, Tanya Capers, and Rashan Berry; (2) his due process rights were violated when the PCRA court failed to conduct an evidentiary hearing regarding Daughtry's affidavit recanting his prior testimony; and (3) ineffective assistance of trial, appellate, and PCRA counsel for failing to investigate and interview Bonaparte when he gave a statement to the police in December 1995 identifying someone other than Capers as Hurt's assailant.^{FN2} Capers also requests an evidentiary hearing on the merits of his claims.

^{FN2} Capers' claim that counsel was ineffective for failing to investigate Bonapart's police statement is distinguishable from his claim currently pending in his third PCRA petition: that

Bonapart's affidavit is newly discovered evidence of his innocence. See Capers' 6/30/2011 PCRA Motion.

DISCUSSION

A. Timeliness

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) provides:

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.

*3 [28 U.S.C. § 2244\(d\)\(1\)](#). [Section 2244](#) further provides that “[t]he 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.” [Id. § 2244\(d\) \(2\)](#).

Capers acknowledges his Habeas Petition is untimely under [Section 2244\(d\)\(1\)\(A\)](#),^{FN3} but asserts it is timely under [Sections 2244\(d\)\(1\)\(C\)](#) and [2244\(d\)\(1\)\(D\)](#) because he filed it within one year of the United States Supreme Court's decision in [Martinez v. Ryan, — U.S. —, 132](#)

Not Reported in F.Supp.2d, 2012 WL 5389513 (E.D.Pa.)

(Cite as: 2012 WL 5389513 (E.D.Pa.))

[S.Ct. 1309, 182 L.Ed.2d 272 \(March 20, 2012\)](#).^{FN4} See Capers' Bf., at 7–8.

FN3. Capers' judgment of sentence became final on May 23, 2002, thirty days after the Pennsylvania Superior Court affirmed his sentence. See [Gonzalez v. Thaler](#), — U.S. —, —, [132 S.Ct. 641, 656, 181 L.Ed.2d 619 \(2012\)](#) (if direct review is not pursued to the state's highest court, judgment becomes final when time for seeking review in that court expires); [Pa. R.A.P. 1113\(a\)](#) (petition for allowance of appeal to Supreme Court shall be filed 30 days after entry of Superior Court order). The federal limitations period was tolled 271 days later, on February 18, 2003, when Capers filed his first PCRA petition. See [28 U.S.C. § 2244\(d\)\(2\)](#). The limitations period resumed on August 31, 2006, the day after the Pennsylvania Supreme Court denied Capers' petition for allowance of appeal from the Superior Court decision affirming the denial of his first PCRA petition. See [Lawrence v. Florida](#), [549 U.S. 327, 332, 127 S.Ct. 1079, 166 L.Ed.2d 924 \(2007\)](#) (habeas limitations period is tolled only when state courts review the application). Capers' federal limitations period expired 94 days later, on December 3, 2006. The federal limitations was not tolled when Capers filed his second PCRA petition on January 17, 2008, because it was found untimely and therefore was not properly filed. See [Pace v. DiGuglielmo](#), [544 U.S. 408, 417, 125 S.Ct. 1807, 161 L.Ed.2d 669 \(2005\)](#) (PCRA petition rejected as untimely was not “properly filed” and, thus, did not trigger statutory tolling under [Section 2244\(d\)\(2\)](#)). Similarly, Capers' pending third PCRA petition has no effect on the timeliness of his Habeas Petition because a pending state petition cannot toll an expired federal limitations period. Thus, Capers is correct that his August 14, 2012 Habeas Petition is untimely because it was filed more than five years after his federal limitations period expired.

FN4. Although Capers also states in his brief that

his petition is timely under [Section 2244\(d\)\(1\)\(B\)](#), he does not identify a state impediment that prevented him from timely filing his petition. I also cannot identify any impediment.

In *Martinez*, the Supreme Court recognized a “narrow exception” to the rule that ineffective assistance of counsel on collateral review does not constitute cause excusing a procedural default. [132 S.Ct. at 1315](#). Pursuant to that exception, “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.” *Id.* Initial-review collateral proceedings are “occasions which provide the first occasion to raise a claim of ineffective assistance at trial.” *Id.*

The *Martinez* decision does not render Capers' habeas petition timely pursuant to either [§§ 2244\(d\)\(1\)\(C\)](#) or [2244\(d\)\(1\)\(D\)](#). The narrow exception created by *Martinez* applies only to procedurally-defaulted federal habeas claims; *Martinez* did not address or otherwise allow for the review of untimely claims. See [132 S.Ct. at 1315](#); see also [Stromberg v. Varano](#), No. 09–401, 2012 WL 2849266, at *5 n. 37 (E.D.Pa. July 11, 2012) (*Martinez* exception does alleviate petitioner's burden to overcome the AEDPA statute of limitations); [Perez v. Williams](#), No. 12–605, 2012 WL 2389669, at *2 n. 1 (D. Nev. June 25, 2012) (“Nothing in the *Martinez* decision has any bearing on the present timeliness inquiry.”); [Arthur v. Thomas](#), No. 01–983, 2012 WL 2357919, at *8–*10 (“*Martinez* did not excuse petitioner's failure to comply with AEDPA's limitations period...”); [Yow v. Thaler](#), No. 10–0005, 2012 WL 2795850, at *2 (N.D.Tex. June 20, 2012) (“[T]he *Martinez* case is inapplicable to Petitioner's statute of limitations issues.”).

The Supreme Court also emphasized that its *Martinez* decision was an “equitable ruling,” not a constitutional one. See [132 S.Ct. at 1319](#). Thus, *Martinez* does not create an alternate start date for the statute of limitations under [§ 2244\(d\)\(1\)\(C\)](#), which applies only where the Supreme Court has recognized a new constitutional right. See [Adams v. Thaler](#), 679 F.3d 312, 323 n. 6 (5th Cir.2012). Similarly, because the Supreme Court's decision in

Not Reported in F.Supp.2d, 2012 WL 5389513 (E.D.Pa.)

(Cite as: 2012 WL 5389513 (E.D.Pa.))

Martinez did not concern the facts underlying Capers' federal habeas claims, it was not a factual predicate of his claims that would permit the running of an alternate start date under § 2244(d)(1)(D).^{FN5} See, e.g., *Shannon v. Newland*, 410 F.3d 1083, 1089 (9th Cir.2005) (stating “state-court decision establishing abstract proposition of law arguably helpful to the petitioner's claim does not constitute the ‘factual predicate’ for that claim”); *Wilder v. United States*, No. 10–997, 2011 WL 3444178, *8 (W.D.Pa. Aug.8, 2011) (United States Supreme Court decision relevant to petitioner's claims did not permit new start date for limitations period under § 2255(f)(4) because decision was not a fact in the case at issue).

^{FN5} The state court decisions and Capers' brief also show that Capers was aware of the “vital” facts underlying his federal habeas claims well before his federal limitations period expired in December 2006. See *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir.2007) (holding § 2244(d)(1)(D) provides a petitioner with a later accrual date “only if vital facts could not have been known”); see also Feb. 2006 Super. Ct. Op. at 3 (Capers raised ineffectiveness claim for failure to present alibi witnesses in his initial pro se 2003 PCRA petition and trial court denied Capers' claim of newly discovered evidence based on Daughtry's affidavit without an evidentiary hearing in April 2005); Capers' Bf., at 20, 26 (Capers requested that both appellate and PCRA counsel raise a trial counsel ineffectiveness claim relating to failure to call Bonaparte); *id.* at Ex. B (August 2004 letter from Capers to PCRA counsel requesting that PCRA counsel raise an ineffective assistance of counsel claim based on prior counsels' failure to locate and interview Bonaparte).

*4 Capers also is not entitled to an equitable tolling of the AEDPA statute of limitations. The AEDPA statute of limitations “can be tolled when principles of equity would make [its] rigid application unfair.” *Urcinoli v. Cathel*, 546 F.3d 269, 272 (3d Cir.2008) (quoting *Shendock v. Dir. Office of Workers' Comp. Programs*, 893 F.2d 1458, 1462 (3d Cir.1990)). Equitable tolling is appropriate, however, only when a petitioner demonstrates

two elements: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way’ and prevented timely filing.” *Holland v. Florida*, — U.S. —, —, 130 S.Ct. 2549, 2562, 177 L.Ed.2d 130 (2010) (quoting *Pace*, 544 U.S. at 418); see also *Schlueter v. Varner*, 384 F.3d 69, 75–76 (3d Cir.2004). “[E]quitable tolling ‘may be appropriate 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) (quoting *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir.1998)).

Capers does not point to any circumstance that prevented him from filing a timely federal habeas petition after final judgment was entered in his case on April 23, 2002 and before the one-year AEDPA statute of limitations period expired on December 3, 2006, see *supra* at 1–2, 5 n. 3. Although Capers contends his claims would have been deemed procedurally-defaulted under pre-*Martinez* law,^{FN6} see Capers' Bf. at 8, that law did not prevent him from filing a timely federal habeas petition. See *E.J.R.E. v. United States*, 453 F.3d 1094, 1098 (8th Cir.2006) (mere fact that recent decision made it more likely that “Appellants' collateral attack would be successful does not change the reality that Appellants were free, at any time, to file their Section 2255 petitions after final judgment”). The *Martinez* decision also did not allow for equitable tolling of the AEDPA deadlines. See *Martinez*, 132 S.Ct. at 132 S.Ct. at 1315 (limiting decision to issue of whether there was cause for prisoner's procedural default on collateral review); *Kingsberry v. Maryland*, No. 12–1556, 2012 WL 2031991, at *1 (D.Md. June 4, 2012) (“*Martinez* did not address equitable tolling in the context of ineffective assistance of counsel and provides no relief here.”); *Peeples v. Citta*, Nos. 11–6238, 12–2203, 2012 WL 1344819, at *6 n. 10 (D.N.J. Apr. 16, 2012) (*Martinez* does not provide a basis for equitable tolling). Thus, the change in law created by *Martinez* did not stand in Capers' way by preventing him from filing a timely federal habeas petition to protect his rights, and Capers has not demonstrated that equitable tolling of the AEDPA statute of limitations is warranted.^{FN7}

Not Reported in F.Supp.2d, 2012 WL 5389513 (E.D.Pa.)

(Cite as: 2012 WL 5389513 (E.D.Pa.))

[FN6](#). Capers is incorrect that his first two federal habeas claims would have been deemed procedurally defaulted if raised before *Martinez*, but now are reviewable under *Martinez*. Because Capers raised these claims in connection with his first PCRA petition, *see supra* at 2, they were not procedurally defaulted by his PCRA counsel and, thus, the narrow exception created by *Martinez* does not apply to these claims. *See [Martinez, 132 S.Ct. at 1315](#)* (exception only applies to procedural default at initial review collateral proceeding).

[FN7](#). Capers also has not shown that he acted diligently in pursuing his rights where he was aware of the facts underlying his federal habeas claims well before the federal limitations period expired. *See supra* at 5, n. 3.

B. Evidentiary Hearing

A district court has discretion to grant an evidentiary hearing if the petitioner meets the limitations of [section 2254\(e\)\(2\)](#).^{[FN8](#)} *See [Goldblum v. Klem, 510 F.3d 204, 220–21 \(3d Cir.2007\)](#)*. The decision to hold an evidentiary hearing should focus on whether the hearing would be meaningful. *See [Campbell v. Vaughn, 209 F.3d 280, 287 \(3d Cir.2000\)](#)*. A petitioner bears the burden of showing “evidence beyond that already contained in the record” that could be presented at an evidentiary hearing to help his “cause,” or otherwise explaining how his “claim would be advanced by an evidentiary hearing.” *Id.* An evidentiary hearing also “is not required on issues that can be resolved by reference to the state record.” *Id.* at 221 (quoting *[Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 \(2007\)](#)*).

[FN8](#). Under [§ 2254\(e\)\(2\)](#), a federal court cannot hold an evidentiary hearing unless the applicant shows the claim relies on a new rule of constitutional law or a factual predicate that could not have been previously discovered, or the applicant shows the “facts underlying the claim would be sufficient to establish ... that but for the constitutional error, no reasonable factfinder would have found the applicant guilty.” [28 U.S.C. § 2254\(e\)\(2\)](#).

*5 Capers summarily requests an evidentiary hearing in both his Habeas Petition and brief without explaining how a hearing will advance his claims. As I have discussed, the underlying state court decisions sufficiently establish that Capers' Habeas Petition is untimely. Capers does not demonstrate how a hearing will help him in avoiding that conclusion.^{[FN9](#)} Because an evidentiary hearing would not be meaningful, I deny Capers' request.

[FN9](#). Although Capers attaches Bonaparte's affidavit to his brief, that affidavit does not address the timeliness of Capers' Habeas Petition. *See Capers' Bf., Ex. E.*

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 5th day of October 2012, it is respectfully recommended that the petition for writ of habeas corpus be DENIED with prejudice. It is further recommended that there is no probable cause to issue a certificate of appealability.^{[FN10](#)} The petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy. *See Local Civ. Rule 72.1*. Failure to file timely objections may constitute a waiver of any appellate rights. *See [Leyva v. Williams, 504 F.3d 357, 364 \(3d Cir.2007\)](#)*.

[FN10](#). Because jurists of reason would not debate my recommended disposition of the petitioner's claims, a certificate of appealability also should not be granted. *See [Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 \(2000\)](#)*.

E.D.Pa.,2012.

Capers v. Walsh
Not Reported in F.Supp.2d, 2012 WL 5389513 (E.D.Pa.)
END OF DOCUMENT