

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

|                |   |                               |
|----------------|---|-------------------------------|
| ANGEL DIAZ,    | ) |                               |
| Petitioner,    | ) |                               |
|                | ) |                               |
| v.             | ) | Civil Action No. 08cv11781-NG |
|                | ) |                               |
| LUIS SPENCER,  | ) |                               |
| Respondent.    | ) |                               |
| GERTNER, D.J.: | ) |                               |

**MEMORANDUM AND ORDER**  
**DISMISSING PETITION FOR WRIT OF HABEAS CORPUS**  
September 24, 2009

**I. INTRODUCTION**

In 1995, Angel Diaz (“Petitioner”) was convicted of murder. He does not contest his guilt, but instead argues that a number of errors at trial resulted in his conviction for first-degree, as opposed to second-degree murder. His arguments are based on four overlapping grounds: The trial judge erred by failing to question the jury regarding bias towards gang-affiliated individuals, that subsequent cases have shown that a significant portion of jurors do harbor such biases, and that the judge’s failure to issue limiting instructions regarding the purpose of evidence of gang affiliation likely exacerbated this failure.<sup>1</sup> Petitioner claims that these errors, in combination, constituted a miscarriage of justice, and that his conviction for first-degree murder was a result.

**II. BACKGROUND**

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<sup>1</sup> The four grounds for relief raised by Petitioner also contain allegations that the state courts have mischaracterized his claims at various stages of his post-conviction litigation. See, e.g., Pet. for Writ of Habeas Corpus 6A, 8A. Because Petitioner’s claims are time barred, and therefore it is not necessary to reach issues of exhaustion and state procedural default, this Court declines to address these allegations.

A jury found Petitioner guilty of murder in the first degree in the death of Jose Fonseca. Judgment was entered by the Hampden County Superior Court on September 27, 1995.

Petitioner appealed to the Massachusetts Supreme Judicial Court (SJC) based on a hearsay statement that was allowed at trial, and on an alleged error in the jury instructions. The SJC found these errors to be harmless and affirmed the conviction on January 29, 1998.

Commonwealth v. Diaz, 426 Mass. 548 (1998). The conviction became final on April 29, 1998, when the deadline for the Petitioner to seek *certiorari* from the United States Supreme Court expired.

On May 22, 2002, Petitioner filed a motion for a new trial with the Hampden County Superior Court. Petitioner asserted five grounds: 1) ineffective assistance of trial counsel, 2) inappropriate jury instructions, 3) unfair prejudice based on prosecutor's remarks regarding Petitioner's gang affiliation, 4) ineffective assistance of appellate counsel based on failure to assert the three previously mentioned claims, and 5) deprivation of a fair and impartial trial based on the totality of these alleged errors. The motion was denied on May 28, 2002; Petitioner filed an application for leave to appeal this decision with the SJC. That application was denied on June 4, 2004. Petitioner next filed another motion for a new trial based on the trial judge's failure to question the jurors regarding potential bias towards gang members, as well as his failure to issue limiting instructions and to take other steps to minimize the prejudicial effect of evidence regarding gang affiliation. This motion was filed on September 17, 2007, and denied by the Hampden County Superior Court on September 25, 2007. Petitioner again applied to the SJC for leave to appeal; leave was denied on February 14, 2008.

Petitioner filed the instant action via a petition for a writ of habeas corpus on October 14, 2008 (document #1). On November 21, 2008, Luis Spencer (“Respondent”) filed a motion to dismiss the petition (document #4) arguing that the petition is time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2244(d). Petitioner counters that his petition challenges only the most recent denial by the SJC of leave to appeal the denial of his second motion for a new trial, not his underlying conviction, and thus is not time barred.

### **III. DISCUSSION**

The claim that Petitioner's habeas petition avoids being time-barred because he is not challenging his 1995 conviction, but is instead challenging the February 14, 2008, decision of the SJC regarding his second motion for a new trial is unavailing. The writ of habeas corpus affords a state prisoner an avenue to challenge the lawfulness of his detention under the Constitution and laws of the United States.<sup>2</sup> Although in the course of federal habeas proceedings it may be necessary to review state post-conviction proceedings, the primary inquiry goes to the legality of the detention, and is necessarily focused on the validity of the underlying conviction. With this in mind, the Court reads AEDPA as barring Petitioner’s application.

Under AEDPA, there is a one-year statute of limitations. 28 U.S.C. § 2244(d). While many have challenged this provision as being unduly restrictive,<sup>3</sup> it nevertheless stands as a statutory directive, which cannot be ignored. The one-year period begins to run on 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;

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<sup>2</sup>Under 28 U.S.C. § 2241(c)(3) the writ of habeas corpus extends to a state prisoner who is “in custody in violation of the Constitution or laws or treaties of the United States.”

<sup>3</sup> Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Anti Terrorism and Effective Death Penalty Act. of 1996*, 41 Harv. C.R. - C.L.L. Ret. 299 (summary 2006).

(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.

Id.

Petitioner's argument that he is only challenging the February 14, 2008, denial, and is therefore not time-barred, fails because AEDPA's statute of limitations applies to all habeas applications by persons in state custody; it does not create any special exception for challenging state post-conviction processes. Furthermore, although Petitioner argues that his application challenges only the denial of leave to challenge his denial of a second motion for a new trial, the four grounds for the application all allege errors at trial. For these reasons the Court rejects Petitioner's argument that he should be allowed to proceed to challenge the SJC's 2008 decision.

Petitioner's murder conviction was affirmed by the SJC on January 29, 1998, and became final on April 29, 1998, following the 90-day period to file for certiorari. This later date is the trigger date for the statute of limitations concerning any of Petitioner's claims, unless the claim fits into the narrow exceptions created by paragraphs (B), (C) or (D) above. Petitioner has not alleged any set of facts that would fit into the exception. There was no impediment to his pursuit of habeas relief created by state action in accordance with paragraph (B) above, nor has he put forth a claim based on previously unavailable evidence in accordance with paragraph (D) above. While he has asserted that numerous state cases subsequent to his trial and initial appeal have

recognized the danger of bias from gang affiliation, and have set out procedures necessary to mitigate the resulting bias, this evolving case law is not sufficient to allow otherwise barred claims. Paragraph (C) applies only to new rights recognized by the *Supreme* Court. Furthermore, in order to invoke paragraph (C), the right must be made retroactive. No recent Supreme Court precedent exists which recognizes a retroactive right regarding procedures to be used to mitigate bias flowing from a defendant's gang affiliation. For these reasons, the Court finds that the one-year statute of limitations began running on petitioner's claims as of April 29, 1998, when his conviction became final.

To be sure, the one-year period was subject to tolling during periods of time when applications for state post conviction review "with respect to the pertinent judgment" were pending. 28 U.S.C. § 2244(d)(2). However, as Respondent correctly points out, the Petitioner in this case was time barred under AEDPA before he even filed for state post-conviction relief in 2002, and thus his state court motions cannot function to revive the statute of limitations. See Cordle v. Guarino, 428 F.3d 46, 48 (1st Cir. 2005) ("Section 2244(d)(2) only stops, but does not reset, the [AEDPA] clock from ticking and cannot revive a time period that has already expired" (quoting Dunker v. Bissonnette, 154 F. Supp.2d 95, 103 (D. Mass. 2001))).

Additionally, Petitioner's claims are not saved by the doctrine of equitable tolling.<sup>4</sup> Under that doctrine, a petitioner may avoid being time-barred if he can show: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). Courts in this circuit analyze six factors in determining whether equitable tolling is applicable to a claim that would otherwise be time-barred

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<sup>4</sup> See e.g. Gutierrez-Sanchez v. United States, 2008 U.S. Dist. Lexis 52196 (D. Mass., April 28, 2009).

under AEDPA: (1) the petitioner's diligence in pursuing habeas relief, (2) whether some extraordinary circumstance prevented the petitioner from making a timely filing, (3) the petitioner's diligence in the pursuit of other post-conviction remedies and the process already afforded in the state system, (4) the prejudice to the prosecution that would flow from tolling and possible retrial, (5) the likelihood of success on the merits, and (6), whether the case involves the death penalty. Trapp v. Spencer, 479 F.3d 53, 61 (1st Cir. 2007).

In the case at bar, the Petitioner has not argued for equitable tolling, and even if he did, the facts before me do not warrant its application to the case at bar. The Petitioner waited over ten years after his conviction became final before he filed this habeas action. While state post-conviction proceedings were pending for approximately two-and-a-half years of this period, no explanation has been put forth for Petitioner's seven-and-a-half year delay in pursuing his federal habeas claims. In contrast, Petitioner does appear to have been diligent in his pursuit of his state post-conviction remedies, but that diligence is not enough to justify the substantial federal delay. The length of time that has transpired is particularly problematic in light of the fourth factor in that, if equitable tolling were granted, the Commonwealth would be severely limited in its ability to retry this case since the crime took place approximately fifteen years ago. As to the likelihood of success on the merits of Petitioner's claims, the granting of relief would be unlikely. Even without the specter of gang affiliation of which Petitioner complains, it is hard to imagine that a reasonable jury would have found Mr. Diaz guilty of anything short of murder in the first degree. As the SJC pointed out in its disposition of Mr. Diaz's direct appeal, the record contained testimony that Diaz himself told a friend that he was going to kill Fonseca, as well as a confession which supported a finding of premeditation. Commonwealth v. Diaz, 546 Mass. 548, 552 (1998).

Furthermore, the facts of the shooting itself suggest deliberation and forethought.<sup>5</sup> As to the last of the factors, this is not a capital case, and therefore the heightened premium on “avoidance of error” that applies in the capital context does not apply here. See Trapp, 479 F.3d at 62.

Looking at these factors in combination, there is no basis for equitable tolling in this case. The petition is time-barred.

#### IV. CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus (**document #1**) is **DISMISSED WITH PREJUDICE**, and Respondent's Motion to Dismiss (**document #4**) is **GRANTED**.

**SO ORDERED.**

**Date: September 24, 2009**

*/s/ Nancy Gertner*  
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NANCY GERTNER, U.S.D.C.

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<sup>5</sup>“Diaz came up the stairs after the beating had stopped . . . the hood on his sweatshirt was raised . . . Fonseca was hunched and cowering, and . . . Diaz shot him four times.” Commonwealth v. Diaz, 546 Mass. 548, 552 (1998).