

of a state conviction by [the Supreme Court]”); *see also* Sup. Ct. R. 13.

Prisoners whose convictions became final before the effective date of Antiterrorism and Effective Death Penalty Act (“AEDPA”), April 24, 1996, had a grace period of one year, until April 24, 1997, to file their habeas application. *See Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998).

“[T]he district court has the authority to raise a petitioner's apparent failure to comply with the AEDPA statute of limitation on its own motion.” *Acosta v. Artuz*, 221 F.3d 117, 121 (2d Cir. 2000). “If the court chooses to raise sua sponte the affirmative defense of failure to comply with the AEDPA statute of limitation, however, the court must provide the petitioner with notice and an opportunity to be heard before dismissing on such ground.” *Id.*

In calculating the one-year limitation period, 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.” 28 U.S.C. § 2244(d)(2).

The “filing of creative, unrecognized motions for leave to appeal” does not toll the statute of limitations. *Adeline v. Stinson*, 206 F.3d 249, 253 (2d Cir. 2000); *see also Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (“[A]n application is ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. . . . The question whether an application has been ‘properly filed’ is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar.” (emphasis in original; footnote omitted)).

In addition, the term “pending” in the statute has been construed broadly to encompass all the

time during which a state prisoner attempts, through proper use of state procedures, to exhaust state court remedies with regard to a particular post-conviction application. *See Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir. 1999), *aff'd*, 531 U.S. 4 (2000). “[A] state-court petition is ‘pending’ from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures.” *Bennett*, 199 F.3d at 120; *Carey v. Saffold*, 536 U.S. 214 (2002) (holding that the term “pending” includes the intervals between a lower court decision and a filing in a higher court for motions for collateral review). A motion for extension of time to file an appeal does not toll AEDPA’s limitations period unless an extension is actually granted. *See Bertha v. Girdich*, 293 F.3d 577, 579 (2d Cir. 2002).

The period of limitations set forth in AEDPA ordinarily does not violate the Suspension Clause. *See Muniz v. United States*, 236 F.3d 122, 128 (2d Cir. 2001) (“[T]he Suspension Clause does not always require that a first federal petition be decided on the merits and not barred procedurally” (quotation omitted)); *Rodriguez v. Artuz*, 990 F. Supp. 275, 283 (S.D.N.Y. 1998) (AEDPA statute of limitations is not, “at least in general,” an unconstitutional suspension of the writ).

The AEDPA statute of limitations is not jurisdictional and may be tolled equitably. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). “Equitable tolling . . . is only appropriate in ‘rare and exceptional circumstances.’ To merit application of equitable tolling, the petitioner must demonstrate that he acted with ‘reasonable diligence’ during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances ‘beyond his control’ prevented successful filing during that time.” *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001). Although state prisoners are not entitled to counsel as of right in either New York state collateral or federal habeas corpus proceedings, the

Court of Appeals for the Second Circuit has stated that “an attorney’s conduct, if it is sufficiently egregious, may constitute the sort of ‘extraordinary circumstances’ that would justify the application of equitable tolling to the one-year limitations period of AEDPA.” *Baldayaque v. United States*, No. 02-2611, 2003 U.S. App. LEXIS 15063, at *17 (2d Cir. July 30, 2003); *compare Smaldone*, 273 F.3d at 138–39 (attorney calculation error does not justify equitable tolling).

A certificate of appealability may be granted with respect to any one of petitioner’s claims only if petitioner can make a substantial showing of the denial of a constitutional right. Petitioner has a right to seek a certificate of appealability from the Court of Appeals for the Second Circuit. *See* 28 U.S.C. § 2253; *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003).

II. Application

[Computation of days expired, statutory and equitable tolling.]

Petitioner was not prevented from filing his petition by any State action in violation of the Constitution, he asserts no constitutional right newly recognized by the Supreme Court, and none of his claims rely on facts that could not have been discovered in a timely manner through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1)(B)–(D).

Petitioner does not make a colorable claim that he is actually innocent of the crime and that the time bar should therefore be waived.

This opinion complies with *Miranda v. Bennett*, 322 F.3d. 171, 175–77 (2d Cir. 2003), and Rule 52 of the Federal Rules of Civil Procedure.

III. Conclusion

The petition for a writ of habeas corpus is dismissed as time-barred.

No certificate of appealability is granted with respect to any of petitioner's claims, petitioner having made no substantial showing of the denial of a constitutional right. Petitioner has a right to seek a certificate of appealability from the Court of Appeals for the Second Circuit. *See* 28 U.S.C. § 2253; *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003).

SO ORDERED.

District Judge

Dated: _____, 2004
Brooklyn, NY