

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LONEY MORRIS III,
Petitioner,

v.

DOUGLAS DRETKE,
Director of the Texas Department
of Criminal Justice,
Correctional Institutions Division
Respondent.

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CIVIL ACTION H-04-4282

MEMORANDUM AND RECOMMENDATION

Petitioner Loney Morris III's application for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 has been referred to this magistrate judge for a report and recommendation. Respondent has filed a motion for summary judgment (Dkt. 11), and Morris has filed a response (Dkt. 16). The court recommends that the respondent's motion be granted and Morris's application be denied.

BACKGROUND

Loney Morris III pleaded guilty to the offense of auto theft and was sentenced on December 9, 1988, to thirty-five years imprisonment. Morris was released on parole for this conviction on April 23, 1992. On December 29, 1997, a warrant for Morris's arrest was issued for the offenses of theft and auto theft. On April 2, 1998, a state court jury found Morris guilty on these charges and assessed punishment at 15 years confinement. That verdict was withdrawn due to jury misconduct and Morris was granted a new trial on April 23, 1998. Nonetheless, a proclamation of parole revocation and warrant of arrest was issued for Morris on May 4, 1998, based on the April 2, 1998, conviction.

On July 10, 1998, a second trial was conducted in cause number 771121. Morris was again convicted and was sentenced to two years imprisonment. Morris did not appeal this conviction. Because his parole was revoked, Morris is currently in prison serving the remainder of his sentence for his 1988 conviction.

Morris filed his federal petition for writ of habeas corpus on November 5, 2004. Morris has filed six writ of habeas corpus applications in state court, but his federal petition identifies only his state writ application filed on May 22, 2003, which was denied May 5, 2004, as relevant to the issues raised here.¹

ANALYSIS

Morris does not contest his 1988 or 1998 convictions in this case. Morris contends only that it was error to revoke his parole in May 1998 based on the April 1998 conviction because he was granted a new trial in that case. He contends that no decision should have been made regarding his parole until after the second trial was concluded. Respondent argues that Morris's writ petition is barred by the statute of limitations, that he has not exhausted his claims, and that his claims have no merit. Because the statute of limitations is dispositive, the court need not address other issues raised by respondent's motion.

Morris filed his petition for federal habeas corpus relief on November 5, 2004. Petitions filed after April 24, 1996 are subject to review under The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254; *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997).

Section 2244 of the AEDPA provides:

(d)(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 –

1. Morris confirms in his response that only the May 2003 state writ is relevant to the issues in this case. Respondent has been unable to file records from Morris's state court writ proceedings in this court because certain of his petitions remain pending. Because the statute of limitations issue is dispositive, the state court writ records are not necessary to the disposition of this case.

- (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.
- (2) The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claims is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (West 2004).

This case is governed by § 2244(d)(1)(D). Thus, Morris’s one-year period of limitation began running from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” Morris should have had notice of his parole revocation when he signed a notice of his “Rights of Releasee in the Revocation Process” on April 7, 1998. However, even if it was reasonable for Morris to assume that the revocation process was terminated by the grant of a new trial, he had notice that his parole had been revoked in December 1999 when he was returned to state jail custody after serving his two-year sentence for the July 1998 conviction (based on credit allowed from his December 1997 arrest).² Thus, absent tolling, the statute of limitations for Morris’s federal habeas corpus application expired at the latest in December 2000.

Morris filed his state court application for habeas corpus on the parole revocation

² In his response, Morris contends that he did not know his parole had been revoked and did not receive a copy of the May 4, 1998 Proclamation of Revocation. Nonetheless, Morris states he became aware that he had a further sentence to serve in January 2000, over four years before he filed this federal writ application.

issue on May 22, 2003. Morris's application was filed at least two and one half years after the expiration of the one-year statute of limitations. Filing an application after the one-year statute of limitations period has ended does not toll the statute of limitations period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (holding that a state habeas application did not toll the limitation period because it was not filed until *after* the period of limitation had expired).

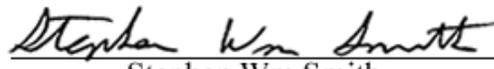
Morris does not claim that there was any "impediment to filing an application created by state action in violation of the constitution or laws of the United States." 28 U.S.C. § 2244(d)(1)(B). Nor has the Supreme Court recently recognized a constitutional right that applies retroactively to Morris's case. *See* 28 U.S.C. § 2244(d)(1)(C).

In light of the information provided, Morris does not have grounds for equitable tolling. Equitable tolling applies only in "rare and exceptional circumstances." *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (quoting *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). In Morris's case, there are no "rare and exceptional circumstances" that prevented him from timely pursuing his § 2254 claim.

CONCLUSION AND RECOMMENDATION

Because Morris's claim that his parole was improperly revoked is barred by the statute of limitations, the court recommends that respondent's motion for summary judgment be granted and Morris's petition for writ of habeas corpus be denied with prejudice.

Signed at Houston, Texas this 30th day of June, 2005.


Stephen Wm Smith
United States Magistrate Judge