

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

RICARDO ENRIQUE SERNA,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-07-2113
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Serna'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 (Dkt. 3). The court ordered Serna to show cause why his petition should not be denied as time-barred (Dkt. 8). Serna filed his response on September 17, 2007 (Dkt. 9). The court now recommends that Serna's petition be denied with prejudice as time-barred.

Background

On August 20, 1996, Serna was found guilty of murder after a jury trial and was sentenced to life in prison. Serna appealed his conviction to the First Court of Appeals, which confirmed his conviction on May 7, 1998. He did not file a petition for discretionary review. He filed a state application for writ of habeas corpus on January 19, 2007, which was denied without written order on the findings of the trial court on February 7, 2007. Serna filed this federal petition for writ of habeas corpus on June 28, 2007.

Analysis

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, a petition for habeas relief filed by a person in state custody is subject to a one-year period of limitations which runs 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.

28 U.S.C. § 2244(d)(1).

It is clear from the face of Serna's federal petition that it is time-barred. His state applications for writ of habeas corpus did not toll his statute of limitations because all were filed well after his one-year limitations period expired in 1999. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

The AEDPA's limitation period is not jurisdictional and is subject to equitable tolling in "rare and exceptional" circumstances. *Felder v. Johnson*, 204 F.3d 168, 170-71 (5th Cir.

2000) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). Equitable tolling “applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from pursuing his rights.” *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996). The court examines each case on its facts to determine whether it presents “rare and extraordinary circumstances.” *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999).

Serna asserts as grounds for equitable tolling of his limitations period that serious medical problems prevented him from pursuing post-conviction relief. Serna has submitted an affidavit (Dkt. 7) stating that he has been placed in infirmaries throughout the Texas Department of Corrections since 1998. From February 2000 through October 2005 he was housed at the Estelle Unit Regional Medical Facility. He has been in a wheelchair since April 2000 due to complications from hip replacement and a neuro-muscular disorder. Serna also alleges that he is blind in one eye and needs a magnifying glass to read.

Serna’s has not presented sufficient evidence that his condition prevented him from pursuing his legal rights over the last several years. The fact that Serna was under medical care is not enough, he must show that his condition actually prevented him from timely filing his application. Absent equitable tolling, Serna’s statute of limitations expired in 1999. Serna’s evidence is insufficient to establish that he was wholly unable to pursue his legal rights during his one year limitation period, or for the approximately 8 years that passed thereafter. *See Fisher*, 174 F.3d at 715-16; *Caldwell v. Dretke*, 182 Fed. Appx. 346, 347 (5th Cir. 2006); *Rashad v. Quarterman*, Civil Action No. 4:07-cv-280, 2007 WL 2404575, *1

n.8 (August 23, 2007); *Matthews v. Quarterman*, Civil Action No. G-06-327, 2007 WL 869514, *3 (March 20, 2007). Moreover, Serna was released to his current unit in January, 2006, but did not file his state habeas application until January 2007. After his state application was denied in February 2007, he did not file his federal petition until June 28, 2007. Such delay makes equitable tolling unavailable. *See Fisher*, 174 F.3d at 715.

Conclusion

The court recommends that Serna's petition be denied with prejudice as time-barred.

The court further finds that Serna has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on September 21, 2007.


Stephen Wm Smith
United States Magistrate Judge