

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM J. MACLARY, :
 :
 Petitioner, :
 :
 v. : Civil Action No. 00-806-JJF
 :
 ROBERT SNYDER, Warden, and :
 M. JANE BRADY, Attorney :
 General of the State of :
 Delaware, :
 :
 Respondents. :

William J. Maclary, Pro Se Petitioner.

Elizabeth R. McFarlan, Esquire of THE STATE OF DELAWARE
DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Respondents.

MEMORANDUM OPINION

February 7, 2001

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (the "Petition") (D.I. 2) filed by Petitioner, William J. Maclary. For the reasons set forth below, the Petition will be dismissed and the Writ of Habeas Corpus will be denied.

BACKGROUND

In November 1995, a Delaware Superior Court jury convicted Petitioner of second degree burglary, misdemeanor theft, criminal mischief and possession of burglary tools. Pursuant to 11 Del. C. § 4214(b), the Delaware Superior Court declared Petitioner a habitual offender and sentenced him to life imprisonment for the burglary charge, followed by four years and thirty days on the remaining charges. Petitioner appealed, and the Delaware Supreme Court affirmed the conviction and sentence. Maclary v. State, No. 472, 1995 (Del. May 21, 1996).

On March 8, 1999, Petitioner filed a motion for state post-conviction relief pursuant to Superior Court Criminal Rule 61. The Delaware Superior Court summarily dismissed Petitioner's motion, and Petitioner appealed. State v. Maclary, I.D. No. 92010500DI-R1 (Del. Super. Mar. 12, 1999). On appeal, the Delaware Supreme Court affirmed the superior court's decision. Maclary v. State, No. 145, 1999 (Del. Oct. 5, 1999).

In seeking federal habeas relief, Petitioner raises four

claims. Specifically, Petitioner contends that (1) trial counsel's opening statement was prejudicial and biased against Petitioner; (2) trial counsel was ineffective for failing to prepare for the case and present a viable defense for Petitioner; (3) there was insufficient evidence to support the jury's decision to convict Petitioner for second degree burglary; (4) the trial judge was biased and prejudiced against Petitioner in his trial rulings. After filing his Petition, Petitioner filed a Motion To Stay This Proceeding And Remand Back To State Court For Further Consideration (D.I.8) in which he requests permission to "Amend/Supplement this proceeding with the newly discovered and recently decided material found in the Apprendi case under the Federal Rules of Civil Procedure, Rule 15(d)." Thereafter, Petitioner filed an Amended/Supplemental Brief (D.I. 9) adding a claim under Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). Specifically, Petitioner contends that the indictment should have raised the possibility that Petitioner could receive an enhanced sentence, and the jury should have been provided with evidence and an opportunity to pass on the question of whether Petitioner should receive an enhanced sentence. The State filed an Answer to the Petition, and therefore, this matter is ripe for the Court's review.

DISCUSSION

Before turning to the merits of Petitioner's claims, the

Court must determine, as a threshold matter, whether the Petition is time barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Effective April 24, 1996, the AEDPA amended 28 U.S.C. § 2254 to impose a one year limitations period on the filing of federal habeas petitions. In pertinent part, Section § 2244(d) 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 limitations 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. . .

(2) 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 toward any period of limitations under this subsection.

28 U.S.C. § 2244(d).

In the context of a Section 2254 petition, the Third Circuit has concluded that a judgment becomes "final" on the later of two dates: (1) the date on which the United States Supreme Court affirms the conviction and sentence on the merits or denies a timely petition for certiori review; or (2) the date on which the time for filing a timely petition for certiori review expires. Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). In this case, Petitioner's conviction and sentence were affirmed on

direct appeal by the Delaware Supreme Court on May 21, 1996.¹ Petitioner did not seek certiorari review of the Delaware Supreme Court's dismissal, and therefore, for purposes of applying the AEDPA limitations period, Petitioner's conviction would have become final in August 1996, ninety days from the date of the Delaware Supreme Court's dismissal. Id. at 575; U.S. Supr. Ct. R. 13 (requiring writ of certiorari to be filed within 90 days of judgment entered by state court of last resort). Applying the one year limitations period of the AEDPA, Petitioner was required to file his Petition in August 1997.

For purposes of determining the filing date of a pro se prisoner's petition, the Third Circuit has concluded that a petition is deemed filed "the moment it is delivered to the prison officials for mailing to the district court." Burns, 134 F.3d at 113. Petitioner does not indicate the date on which the

¹ The Court observes that the State's Answering Brief is internally inconsistent as to many of the dates pertaining to Petitioner's direct appeal and post-conviction motions. For example, the State indicates that the Delaware Supreme Court's order determining Petitioner's direct appeal is dated June 7, 1996 (D.I. 10 at 3), but elsewhere, the State cites the Delaware Supreme Court's Order as dated May 21, 1996 (D.I. 10 at 1). Similarly, the State contends in one portion of their Answering Brief that Petitioner filed his motion for post-conviction relief on March 8, 1999 (D.I. 10 at 1); however, elsewhere in the brief, the State contends that Petitioner filed his post-conviction application on August 28, 1998 (D.I. 10 at 4). The Court has reviewed the record in this case and notes that the Delaware Supreme Court's order affirming Petitioner's conviction and sentence on direct appeal is dated May 21, 1999. As for Petitioner's motion for post-conviction relief, the record indicates that it was filed on March 8, 1999.

Petition was delivered to prison authorities for mailing. However, absent proof of mailing, this Court has treated the date on the petition as the date of filing. See e.g. Fennell v. Snyder, Civ. Act. No. 99-289-SLR, order at 4(D. Del. Feb. 8, 2000) (citing Murphy v. Snyder, Civ. Act. No. 98-415-JJF at 4 (D. Del. Mar. 8, 1999)).

In this case, the Petition is dated August 14, 2000. Because the Petition is deemed filed approximately three years after the August 1997 filing deadline, the Court concludes that the Petition is time barred under Section 2244(d), unless the statute of limitations has been tolled pursuant to 28 U.S.C. §2244(d)(2). Pursuant to 28 U.S.C. § 2244(d)(2), the one year statute of limitations imposed by 28 U.S.C. § 2244(d)(1) is tolled during the pendency of a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim. However, if the one year limitations period has already expired, the tolling provision cannot revive it. See Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000); Jones v. Snyder, Civ. Act. No. 00-179-JJF, mem. op. at 5 (D. Del. Jan. 28, 2000) (citing Rashid v. Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)).

In this case, Petitioner filed his motion for post-conviction relief in the state courts in March of 1999. Because Petitioner's post-conviction motion was filed well after the expiration of the one year limitations period, the motion could

not toll the limitations period. Thus, the Court concludes that the Petition is time barred under Section 2244(d). Accordingly, the Court will dismiss the Petition as untimely.²

CONCLUSION

For the reasons discussed, the Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody filed by Petitioner, William J. Maclary, will be dismissed and the Writ of Habeas Corpus will be denied.

An appropriate Order will be entered.

² As for Petitioner's supplemental brief adding a claim under Apprendi, the Court observes that the addition of an Apprendi claim does not alter the Court's conclusion that the Petition is time barred. The Supreme Court did not state that the rule announced in Apprendi would be applied retroactively, and therefore, the one-year limitations period applies to bar Petitioner's Apprendi claim, as well. See e.g. Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2001) (holding that Apprendi does not apply retroactively); U.S. v. Duran, 2000 WL 1840083 (D. Me. Dec. 15, 2000) (declining to alter Section 2255 limitations period based on Apprendi claim, because Apprendi was not made retroactive); United States v. Hopwood, 2000 WL 1770665 (D. Neb. Dec. 4, 2000) (same)