

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARVIN MCMILLION, :
 :
 Petitioner, :
 :
 v. : Civil Action No. 99-74-JJF
 :
 ROBERT SNYDER, Warden, and :
 ATTORNEY GENERAL OF THE :
 STATE OF DELAWARE, :
 :
 Respondents. :

Marvin McMillion, Smyrna, Delaware.
Pro Se Petitioner.

Loren C. Meyers, Esquire, Chief of Appeals Division, and William E. Molchen, Esquire, Deputy
Attorney General, DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorneys for Respondents.

MEMORANDUM OPINION

February 20, 2001

Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is a Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (D.I. 2), as amended (D.I. 24)(collectively the “Petition”), filed by Petitioner Marvin McMillion (“Petitioner”). Pursuant to Rule 5 of the Rules Governing Section 2254 Actions, Respondents have filed Answers to the Petition. (D.I. 11; D.I. 25). For the reasons set forth below, the Court will dismiss the Petition and deny Petitioner’s request for a Writ of Habeas Corpus.

BACKGROUND

On August 10, 1994, a jury in the Delaware Superior Court convicted Petitioner of attempted first degree unlawful sexual intercourse, first degree robbery, second degree burglary, third degree unlawful sexual penetration, and criminal mischief. Petitioner was sentenced on September 9, 1994, to 41 years of imprisonment followed by six years of probation. Petitioner appealed his convictions to the Delaware Supreme Court on October 6, 1994. On May 19, 1995, the Delaware Supreme Court affirmed Petitioner’s convictions. On August 22, 1997, Petitioner sought post-conviction relief in the Delaware Superior Court, but such relief was denied on October 24, 1997. Petitioner subsequently appealed this decision to the Delaware Supreme Court. On February 6, 1998, the Delaware Supreme Court affirmed the Superior Court’s denial of post-conviction relief.

On August 7, 1998, Petitioner filed the instant Petition for Writ of Habeas Corpus. In the Petition, as amended, Petitioner contends that: (1) there was insufficient evidence to convict him

of attempted first degree unlawful sexual intercourse, (2) he received ineffective assistance of counsel, (3) he was denied the right to confront witnesses, and (4) he was denied a fair trial. (D.I. 2; D.I. 24).

DISCUSSION

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) amended 28 U.S.C. § 2254 when it was signed into law on April 24, 1996. The AEDPA applies to all petitions for writ of habeas corpus filed after April 24, 1996. Lindh v. Murphy, 521 U.S. 320, 336 (1997). In the instant case, the original Petition is dated August 7, 1998, and the amended Petition is dated August 10, 2000. (D.I. 2; D.I. 24). Since the original Petition was filed subsequent to April 24, 1996, the AEDPA is applicable.

Under the AEDPA, petitions for writ of habeas corpus must be filed within one year from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). In the context of a Section 2254 petition, a judgment of the Delaware Supreme Court on direct review becomes “final” on the later of two dates: (1) “at the conclusion of review [of the Delaware Supreme Court’s decision] in the United States Supreme Court,” or (2) “when the time for seeking certiorari review [in the United States Supreme Court] expires.” Kapral v. United States, 166 F.3d 565, 575 (3d Cir. 1999). However, if a petitioner’s conviction became final prior to April 24, 1996, the petitioner is afforded one year after the enactment of the AEDPA to file a habeas petition. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998); Johnson v. Brewington-Carr, C.A. No. 99-181-JJF, slip op. at 5 (D. Del. Feb. 22, 2000). As a result, no petitions filed on or before April

23, 1997 may be dismissed for failing to comply with the one year statute of limitations. This one year time limit is effectively tolled, however, when a “properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

In the instant case, the Delaware Supreme Court affirmed Petitioner’s convictions on May 19, 1995. Petitioner did not seek certiorari review of the Delaware Supreme Court’s decision, and therefore, Petitioner’s convictions became final on August 17, 1995, ninety (90) days from the date of the Delaware Supreme Court’s decision. Kapral, 166 F.3d at 570-71 (citing SUP. CT. R. 13). Because Petitioner’s convictions became final prior to the enactment of the AEDPA, Petitioner had until April 23, 1997 to file his Petition with the Court. However, Petitioner’s Petition is dated August 7, 1998. Although a habeas petitioner is deemed to have filed his petition at “the moment he delivers it to prison officials for mailing to the district court,” Burns, 134 F.3d at 113, absent any evidence of the date on which a petitioner hands his petition to prison officials for mailing, courts consider the date of the petition’s signatures as the filing date. Murphy v. Snyder, C.A. No. 98-415-JJF, slip op. at 4 (D. Del. March 8, 1999). Since Petitioner in the instant case has not offered any evidence of the date he presented his Petition to prison officials for mailing, the Court will deem the Petition filed as of August 7, 1998, which is more than a year after the limitations period expired.

Further, although Petitioner sought post-conviction relief in the state courts, the tolling provision contained in 28 U.S.C. § 2244(d)(2) does not prevent the instant Petition from being time barred. Petitioner’s state post-conviction relief motion is dated August 22, 1997, well after

the expiration of the one year limitations period. Because an expired limitations period cannot be tolled, the tolling provision contained in 28 U.S.C. § 2244(d)(2) does not prevent the Petition from being time barred by 28 U.S.C. § 2244(d)(1). See, e.g., Rashid v. Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)(holding that 28 U.S.C. § 2244(d)(2) does not “revive” the limitations period, but merely “pauses” the limitations period if it has not yet expired). Therefore, the Court concludes that the Petition must be dismissed.

CONCLUSION

For the reasons discussed, the Court concludes that Petitioner has failed to comply with the time limitations set forth in 28 U.S.C. § 2244(d), and therefore, the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody must be dismissed and the Writ of Habeas Corpus denied.

An appropriate Order will be entered.

