

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN COLE,)
)
 Petitioner)
)
 v.) Civil No. 00-177-B-S
)
 STATE OF MAINE,)
)
 Respondent)

**RECOMMENDED DECISION ON
PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, John Cole, filed this petition for writ of habeas corpus on September 25, 2000. Respondent, the State of Maine, has answered the petition, asserting that the petition should be dismissed as untimely under the Antiterrorism and Effective Death Penalty Act of 1996 [AAEDPA] as amended by 28 U.S.C. § 2244(d). For the reasons set forth below, I am satisfied that this petition is time-barred. I therefore recommend that the petition be dismissed.

Factual Background

Cole was convicted in the state court on one count of gross sexual assault, one count of burglary, and one count of aggravated assault by a jury verdict returned on February 23, 1996. He was sentenced on May 28, 1996. A term of imprisonment of nineteen years was imposed with respect to Count I, with four years suspended and six years of probation. He was sentenced to five years on Count II, and eight years on Count III, with all sentences to be served concurrently. Cole is currently serving his sentence.

Cole filed a timely appeal of his conviction to the Maine Supreme Judicial Court sitting as the Law Court. Before the Law Court, Cole challenged the trial court's denial of his motion to

suppress evidence of a confession, arguing that it was the product of psychological coercion by the interrogating police officers. The Law Court issued a written opinion denying, *in toto*, Cole's appeal on May 22, 1997. *See State v. Cole*, 1997 ME 112, 695 A.2d 1180.¹ The Law Court mandate was entered on May 23, 1997. Cole did not file a petition for post-conviction review. Nor did he seek to appeal the conviction directly to the United States Supreme Court.

In the petition before this court Cole asserts that in affirming the trial court's refusal to suppress his conviction, the Law Court ignored controlling federal precedent, denying him the protections afforded by federal law. Though offering, as an alternative, a brief rebuttal to Cole's substantive claim, the State's principal argument is that the petition must be dismissed because it is time barred. This argument is the only argument that this court need address.

Discussion

The statute of limitations applicable to petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2254 provides, as relevant:

(d)(1) A 1-year period of limitation 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 **B**

(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

¹ Before the Law Court, Cole also challenged two of the trial court's evidentiary rulings. He complained that the trial court's decision to allow evidence of human scent tracking, performed by a state police canine team at the scene of the assault, was in error. The Law Court concluded that there was no abuse of discretion in admitting this evidence. It cited a majority rule that such evidence is admissible to prove identity if a proper foundation is provided and concluded that the record below revealed that a sufficient foundation had been laid. *See id.* at 1183. Additionally, Cole challenged the trial court's exclusion of evidence he attempted to present in support of an alternative perpetrator theory. The Law Court reviewed the probative value of the evidence and its potential for confusion and determined that exclusion was proper under Maine Rule of Evidence 403. *See id.* Appropriately, Cole makes no attempt to resuscitate these challenges in the petition before this court.

claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Applying this provision to the procedural history of this case generates the following reckoning. Cole's direct appeal of his conviction was denied by the Law Court on May 23, 1997. The conviction became final for purposes of § 2244 after his opportunity to seek a writ of certiorari from the United States Supreme Court expired ninety days thereafter. *See* Sup. Ct. R. 13(1). In this case, that deadline fell on August 21, 1997, and it is from this date this court begins calculating the § 2244(d) one-year limitation. As Cole has filed no petitions for post-conviction review in the interim, there is no tolling of the one-year period. *See* § 4422(d)(2). Therefore, to be viable, Cole's petition for writ of habeas corpus needed to be filed no later than August 21, 1998. *See Rogers v. United States*, 180 F.3d 349, 355 & n.13 (1st Cir. 1999) (concluding that the § 4422(d) period runs through the first anniversary of either the date the review of the conviction concludes or the date the period to seek review expires, rather than one day shy of the anniversary). Cole's September 25, 2000, filing over-steps the AEDPA time limit by leaps and bounds.²

² The breadth of this margin forestalls any meaningful assistance to Cole that might be had from an application of the "prisoner mailbox rule." *See Morales-Rivera v. United States*, 184 F.3d 109 (1st Cir. 1999) (adopting the "prisoner mail box" rule in the First Circuit). His petition was signed September 5, 2000, a date still far beyond Cole's one-year § 2244(d)(2) anniversary.

Conclusion

For the foregoing reason, I hereby recommend the petition for writ of habeas corpus be DISMISSED as barred by the limitation provision of the AEDPA.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
United States Magistrate Judge

Dated on: January 4, 2001

ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-177

COLE v. MAINE, STATE OF
Assigned to: Judge GEORGE Z. SINGAL
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 09/25/00

Nature of Suit: 530
Jurisdiction: Federal Question

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

JOHN COLE
plaintiff

JOHN COLE
[COR LD NTC] [PRO SE]

DOWNEAST CORRECTIONAL FACILITY
HCR 70 BOX 428
MACHIASPORT, ME 04655

v.

MAINE, STATE OF
defendant

JOSEPH WANNEMACHER
[COR LD NTC]
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333
626-8800