

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

JOHN J. GAGNON, SR.,                    )  
  )  
                  Petitioner                    )  
  )  
v.    )     Civil No. 99-0289-B  
  )  
STATE OF MAINE,                        )  
  )  
                  Respondent                )

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

Petitioner filed this Petition for Writ of Habeas Corpus on December 20, 1999. Respondent has Answered the Petition. In that Answer, Respondent asserts that the Petition should be dismissed as untimely under the Antiterrorism and Effective Death Penalty Act of 1996 [“AEDPA”] as it amended 28 U.S.C. section 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***

***Conviction and Sentencing.***

Petitioner was convicted in the state court on April 12, 1996, following a jury trial, on one count of burglary and one count of theft by unauthorized taking or transfer. Petitioner was sentenced on June 27, 1996 to a term of imprisonment

of eight years on count I, two years on count II, six months on a conviction from a separate jury trial for eluding a law enforcement officer, and full revocation of three terms of probation, all sentences to be served concurrently. Petitioner has now been discharged of all but the terms of imprisonment imposed in counts I and II.

***Appeals.***

Petitioner filed a timely application to permit an appeal of his sentences. The Sentencing Review Panel denied that application by Order dated November 12, 1996.

Petitioner filed a timely notice of appeal relative to the criminal judgments on July 16, 1996. That appeal was denied by the Maine Law Court on June 27, 1997. *State v. Gagnon*, Decision No. Mem-97-117 (Me. June 27, 1997). The Law Court Mandate was entered on the docket on June 30, 1997.

***Post-Conviction Review.***

On July 9, 1996, Petitioner filed a petition for post-conviction review in the state court. That petition remained pending until it was voluntarily withdrawn on August 22, 1996.

On August 28, 1998, Petitioner filed a second petition for post-conviction review. Petitioner was afforded an evidentiary hearing on this second petition.

An order dismissing the petition and rejecting each of Petitioner’s stated grounds on the merits was entered on August 12, 1999. Petitioner appealed that denial on August 18, and the Law Court issued an “Order Denying Certificate of Probable Cause” on October 20, 1999.

*Discussion*

The statute of limitations applicable to petitions for writs of habeas corpus pursuant to 28 U.S.C. section 2254 provides in relevant part as follows:

(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 –

(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 limitation under this subsection.

28 U.S.C. § 2244.

Applying the terms of this provision to the procedural history of this case results in the following calculation. Petitioner’s direct appeal of his conviction was denied by the Maine Law Court on June 30, 1997. The conviction became

final for purposes of section 2244 after Petitioner's opportunity to seek a writ of certiorari from the United States Supreme Court expired ninety days thereafter pursuant to Supreme Court Rule 13(1). In this case, that deadline fell on September 28, 1997, and it is from this date the Court begins calculating the one-year time period.

On August 28, 1998, with 32 days remaining in the one-year limitation period, Petitioner filed his second post-conviction review. The limitation period was therefore tolled until the post-conviction was finally resolved on October 20, 1999. The remaining 32 days expired on November 22, 1999. Even applying the "prisoner mailbox rule," see *Morales-Rivera v. United States*, 184 F.3d 109 (1<sup>st</sup> Cir. 1999), and assuming Petitioner mailed the Petition on the date it was signed, this Petition for Writ of Habeas Corpus would be deemed filed no earlier than December 13, 1999. It is therefore untimely under the AEDPA.

### ***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.

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Margaret J. Kravchuk  
United States Magistrate Judge

Dated on: February 16, 2000