

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES TERRY II,

Petitioner,

v.

PETER HUIBREGTSE,

Respondent.

MEMORANDUM and ORDER
07-C-412-S

On July 27, 2007 petitioner James Terry II filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 claiming that his Dane County Wisconsin convictions were unconstitutional. On August 30, 2007 respondent filed a motion to dismiss the petition as untimely. Petitioner responded on September 5, 2007.

FACTS

Petitioner filed this petition for a writ of habeas corpus on July 27, 2007. Petitioner was originally convicted in Dane County Circuit Court on September 9, 1999. One count of the original judgment was overturned on appeal and a second judgment was entered on September 4, 2001. Petitioner was convicted of six counts: first-degree sexual assault by use of a dangerous weapon, soliciting a child for prostitution, child enticement, kidnaping, false imprisonment and theft. He was sentenced to a total of thirty-five years and six months in prison. He did not appeal the second judgment of conviction.

On January 30, 2002 petitioner filed a petition for a writ of habeas corpus in this Court which was dismissed for his failure to exhaust his state court remedies.

On July 3, 2002 petitioner filed a motion for sentence modification in Dane County Circuit Court which was denied on July 23, 2002. Petitioner did not appeal the denial of this motion.

On April 10, 2007 petitioner filed a state court petition for a writ of habeas corpus which was denied on July 6, 2007. Petitioner's appeal from the denial of this petition is pending in the Wisconsin Court of Appeals.

MEMORANDUM

Respondent moves to dismiss petitioner's petition for a writ of habeas corpus as untimely. Pursuant to 28 U.S.C. § 2244(d) a one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to judgment of a state court. The period commences from the date on which judgment becomes final on direct review or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The statute further provides that the time during which a properly filed application for state post-conviction review concerning the pertinent judgment is pending shall not be counted toward this period of limitation. This statute took effect on April 24, 1996.

By the most generous possible standard petitioner's judgment of conviction became final on August 13, 2002, the expiration of the time period for him to file an appeal from the denial of his sentence modification. See Lozano v. Frank, 424 F.3d 554, 555 (7th Cir. 2005).

Petitioner's one year period for filing his petition for a writ of habeas corpus expired on August 13, 2003. During that one year period he did not have pending any properly filed application for state post-conviction review. Petitioner did not file this petition until almost four years after the expiration of the one year filing period.

Although petitioner now claims that he is innocent his claim is based on evidence that he knew prior to the expiration of the one year time period. He has not shown any reason why he could not have timely raised his claims. Accordingly, petitioner's petition for a writ of habeas corpus is untimely pursuant to 28 U.S.C. § 2241(d)(1) and must be dismissed.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition must be dismissed as untimely. See Newlin v. Helman, 123 F.2d 429, 433 (7th Cir. 1997).

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ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED with prejudice as untimely pursuant to 28 U.S.C. § 2244(d).

Entered this 6th day of September, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge