UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
ENTERED
MAR 11 2005
Michael N. Milby, Clerk of Court

CHARLES THOMAS KUPKA,	§	
	§	
Petitioner,	§	
	§	
vs.	§	CIVIL ACTION NO. H-04-3543
	§	
DOUG DRETKE,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Before the court is Petitioner Charles Thomas Kupka's Motion to Reinstate Petition (Dkt. No. 10). This court previously dismissed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 for want of prosecution and for failure to comply with the court's order to either pay the filing fee or move to proceed *in forma pauperis* within 30 days from the order dated September 29, 2004 (Dkt. Nos. 4, 8).

In his motion Kupka asserts that he placed his correspondence in the institutional mail system within the 30 day period. Because the documentation attached to his motion did not fully support the claim, the court ordered respondent Dretke to provide prison mail logs to resolve the issue. (Dkt. No. 13). Those records have now been provided to the court, and demonstrate that during the relevant time Kupka delivered no mail to prison authorities addressed to the Clerk of the U.S. District Court. (Dkt. No. 14, Exhibit A). For that reason, Kupka may not rely on the modified mailbox rule of *Houston v. Lack,* 487 U.S. 266, 275 (1988), to excuse his noncompliance with this court's order of September 29, 2004.

In response, Kupka offers another excuse: complying with the court's 30-day order was an "impossibility" due to a combination of "terribly inefficient" prison mailrooms and the lengthy procedure for withdrawals from inmate accounts. To avoid those problems he acknowledges that he used an "outside agent" to submit the $5.00 filing fee. He mailed a letter to this agent "several days before the ordered time", and the agent enclosed the filing fee and forwarded it on to the court, where it was received on November 8, 2004, ten days after the 30 day period had expired. Kupka offers no explanation why he waited so long to enlist his friend's help. He does not assert any inordinate delay in receiving the September 29, 2004 order. Assuming Kupka's claims about institutional inefficiencies to be true, his failure to take action until several days before the deadline still constitutes a lack of diligence.

It should also be noted that the September 29, 2004 order did not toss any new or unexpected procedural hurdles in Kupka's path. The habeas petition form itself advises petitioners like Kupka that one of the prerequisites for filing is a $5.00 filing fee, or alternatively an *in forma pauperis* application. Kupka was given ample time to satisfy either requirement, and failed to do so. For these reasons, it is recommended that Kupka's motion to reinstate be denied.

Finally, Kupka requests clarification whether the final judgment entered was with or without prejudice. Because the dismissal is based on essentially procedural grounds, it is recommended that the court enter an amended final judgment dismissing the case without prejudice.

Signed on March 11, 2005, at Houston, Texas.

Stephen Wm. Smith
United States Magistrate Judge