

JAN 6 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Michael N. Milby, Clerk of Court

Kelvin Peron West	§	
<i>Petitioner,</i>	§	
vs.	§	
	§	
Douglas Dretke,	§	Civil Action: H-04-4549
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division	§	
<i>Respondent.</i>	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Kelvin Peron West , a state inmate, filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254, which has been referred to this magistrate judge for report and recommendation. Dkt.No. 2.

West was convicted of possession of a controlled substance in the 232nd District Court of Harris County, Texas on March 27, 1997. He unsuccessfully appealed his conviction through the Texas courts, and ultimately filed a petition for writ of certiorari with the United States Supreme Court, which was denied on October 2, 2000. *West v. Texas*, 531 U.S. 816 (2000). West filed his current writ application on December 4, 2004, challenging his conviction on the single ground that it was based on evidence obtained through an unconstitutional search and seizure.

The Antiterrorism and Effective Death Penalty Act provides a one year limitation period for habeas petitions, running from the latest of several start dates, including “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). The “conclusion of direct review” is when the Supreme Court either rejects the petition for certiorari or rules on its merits. *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). In this case, the limitations period under section 2244(d)(1)(A) expired on

October 2, 2001, one year after the Supreme Court denied West's certiorari petition. West filed this habeas petition on December 2, 2004, more than three years late. West makes no argument for tolling or otherwise avoiding the limitations period, and the record affords no basis for such an argument. Therefore, the court recommends that this application be DISMISSED as time barred under 28 U.S.C. § 2244(d).

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties. The parties have ten days from receipt to file written objections to the Memorandum and Recommendation. *See* FED. R. CIV. P. 72. Failure to file written objections within that time may bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections must be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas, 77208. Copies of the objections must be mailed to opposing parties and to the chambers of the magistrate judge, 515 Rusk, Suite 7727, Houston, Texas 77002.

Signed at Houston, Texas, on January 5, 2005.



Stephen Wm. Smith
United States Magistrate Judge