

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

DAVID KEITH TATE,	§	
	§	
<i>Petitioner,</i>	§	
v.	§	CIVIL ACTION: H-06-1821
	§	
DOUG DRETKE,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division	§	
	§	
<i>Respondent.</i>	§	

MEMORANDUM AND RECOMMENDATION

Petitioner David Keith Tate’s application for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 has been referred to this magistrate judge for a report and recommendation (Dkt. 5). The court recommends that petitioner’s application be dismissed as time-barred.¹

1. Procedural Background

Tate alleges in his petition that he was convicted on June 25, 2004 in the 183rd District Court of Harris County, Texas on the charge of burglary of a habitation with intent to commit theft. He was sentenced to 18 years in prison. The 14th Court of Appeals dismissed his appeal on August 26, 2004. He did not file a petition for discretionary review.

¹ Tate’s motion to proceed *in forma pauperis* (Dkt. 3) is denied.

Tate filed an application for writ of habeas corpus in state court on January 26, 2006. The Texas Court of Criminal Appeals denied his application on February 22, 2006. He filed this federal application on May 31, 2006.

2. Statute of Limitations

Tate's federal application is governed by the amendments to the federal habeas corpus statutes contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254.

The AEDPA provides as follows:

- (d)(1) A 1-year period of limitation shall apply to an application for 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;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (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(d).

Tate's conviction became final on March 24, 2005, when his deadline for filing a petition for discretionary review expired. Under § 2244(d)(1)(A), Tate's limitation period expired on March 24, 2006. Tate filed his state court writ application on January 26, 2006, and it was denied on February 22, 2006. Thus, Tate's statute of limitations was tolled for 27 days, until April 17, 2006 (April 15, 2006 falling on a Saturday). Tate filed his application on May 23, 2006.

The court recommends that petitioner's application for writ of habeas corpus be denied with prejudice.

The court further finds that Tate has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on July 24, 2006.



Stephen Wm Smith
United States Magistrate Judge