

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

WILSON C. MORENO,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-06-3941
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Moreno’s application for writ of habeas corpus pursuant to U.S.C. 2254 has been referred to this magistrate judge for a report and recommendation. The court recommends that Moreno’s petition be denied as time-barred.

BACKGROUND

On May 10, 2002, Moreno was convicted by a jury of aggravated robbery with a deadly weapon and sentenced to 25 years in prison.¹ Moreno’s conviction was affirmed by the Fourteenth Court of Appeals for Harris County, Texas on May 29, 2003. Moreno did not file a petition for discretionary review (PDR). Therefore, his conviction became final on June 30, 2003.

On or about February 8, 2006, Moreno filed applications² for state writ of habeas

¹ Moreno was convicted in two causes of action, 00CR1950 and 00CR1951.

² Moreno filed application WR64,351-01 challenging his conviction in 00CR1950, and application WR64,351-02 challenging his conviction in 00CR1951. Moreno alleges he

corpus, on the ground that he was not informed by counsel that the appellate court had confirmed his conviction, and thus was deprived of his right to file a PDR. The court of criminal appeals remanded Moreno's state applications to the trial court for findings as to whether his appellate attorney failed to notify him of the appellate court's action. On September 13, 2006, the court of criminal appeals denied Moreno relief without written order on the findings of the trial court without a hearing.

ANALYSIS

Moreno's application is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, a petition for habeas relief filed by a person in state custody is subject to a one-year period of limitations which runs 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.

filed these applications on February 8, 2006; the state gives the date as February 23, 2006. The court accepts Moreno's allegation as true for current purposes.

28 U.S.C. § 2244(d)(1).

Moreno's one-year statute of limitations period began on June 30, 2003, when his conviction became final, and expired on June 30, 2004. Moreno's applications for state writs of habeas corpus did not toll his federal statute of limitations because they were not filed until after the limitations period expired. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). The issue is whether Moreno's allegation of ineffective assistance of his appellate counsel is a basis for equitable tolling of the limitations period. The AEDPA's statute of limitations is subject to equitable tolling only in "rare and exceptional circumstances." *Salinas v. Dretke*, 354 F.3d 425, 431 (5th Cir. 2004). Such circumstances exist "only in situations where the plaintiff is actively misled by the defendant . . . or is prevented in some extraordinary way from asserting his rights. *Id.* at 432.

As in this case, the petitioner in *Salinas* contended that his lawyer had not notified him of the result of his appeal. The court found that Salinas was not entitled to equitable tolling in this situation because "mere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified." *Id.* at 432. Under the reasoning and precedent of *Salinas*, Moreno is not entitled to equitable tolling in this case.

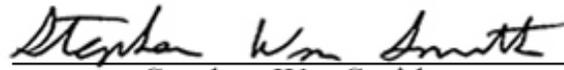
CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the court recommends that Moreno's application for writ of habeas corpus be denied.

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 August 21, 2007.



Stephen Wm Smith
United States Magistrate Judge