

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TRAVIS LEE,

Petitioner,

CASE NO. 2:08-cv-415
JUDGE GRAHAM
MAGISTRATE JUDGE KEMP

v.

WARDEN, CHILLICOTHE CORRECTIONAL
INSTITUTION,

Respondent.

OPINION AND ORDER

On May 22, 2009, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed as barred by the one-year statute of limitations under 28 U.S.C. §2244(d). Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. For the reasons that follow, petitioner's objections are **OVERRULED**. This action is hereby **DISMISSED**.

Petitioner objects to the Magistrate Judge's recommendation of dismissal of his claims as time-barred. Petitioner again contends that the statute of limitations was tolled an additional ninety days from the Ohio Supreme Court's May 2, 2007, denial of his motion for delayed appeal, or the time period within which he could have filed a petition for a writ of certiorari in the United States Supreme Court. He now contends that *Clay v. United States*, 537 U.S. 522, 527-29 (2003) supports his position. This Court is not persuaded by petitioner's argument. In *Clay v. United States, supra*, the United States Supreme Court held that a federal prisoner's judgment of conviction becomes final, for statute of limitations

purposes under 28 U.S.C. §2255, when the time period expires to file a petition for a writ of *certiorari* from the appellate court's decision affirming the conviction. *Id.*, at 525. As discussed by the Magistrate Judge, however, state court motions for delayed appeal are considered to be post conviction or collateral proceedings, and the statute of limitations therefore is not tolled during the time period that petitioner could have filed a petition for a *writ of certiorari* to the United States Supreme Court from the Ohio Supreme Court's denial of such a motion. *Lawrence v. Florida*, 549 U.S. 327 (2007); *Sudberry v. Warden*, 2009 WL 275418 (S.D. Ohio February 4, 2009)(" [I]t is well-settled in the Sixth Circuit that a delayed appeal motion is considered an application for state collateral review for tolling purposes under § 2244(d)(2)", citing *Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001); *DiCenzi v. Rose*, 452 F.3d 465, 468 (6th cir. 2006); *Miller v. Collins*, 305 F.3d 491, 494 (6th Cir. 2002); see also *Plaza v. Hudson*, 2008 WL 5273899 (N.D. Ohio December 17, 2008), n. 6, citing *Sanders v. Bobby*, 2008 WL 276415 (N.D. Ohio January 31, 2008).

Pursuant to 28 U.S.C. §636(b), this Court has conducted a de novo review of the Magistrate Judge's *Report and Recommendation*. For the foregoing reasons, and for the reasons detailed therein, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

It is so ORDERED.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: June 30, 2009