

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

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FIRLANDO RIVERA,		)	
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Petitioner,		)	
		)	
v.		)	C.A. No. 14-23 S
		)	
ASHBEL T. WALL,		)	
		)	
Respondent.		)	
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**MEMORANDUM AND ORDER**

WILLIAM E. SMITH, Chief Judge.

Before the Court is Respondent Ashbel T. Wall's Motion to Dismiss Petitioner's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus ("Petition") for being time-barred. (ECF No. 4.) The Petition is based on several grounds, including but not limited to: ineffective assistance of counsel, attorney conflict of interest, and a litany of alleged deficiencies in trial counsel's performance leading up to and during Petitioner's criminal trial in Providence Superior Court. (Petition 4, ECF No. 1.)

A person in state custody has one year to file a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). This period of limitation begins on the date that the judgment of conviction "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 statute of limitations is tolled, however, during the pendency of a properly filed application for postconviction relief ("PCR"). 28 U.S.C. § 2244(d)(2). A review of the procedural history of Petitioner's contact with the Rhode Island state courts and this Court reveals that the Petition was, in fact, filed after the statute of limitations had run.

Petitioner's state court convictions for first degree murder and firearm violations were affirmed by the Rhode Island Supreme Court on November 19, 2003. State v. Rivera, 839 A.2d 497, 499 (R.I. 2003). Petitioner's judgment of conviction became final ninety days later, on February 17, 2004, when the time in which Petitioner could have sought review by the United States Supreme Court through a writ of certiorari expired. See Kholi v. Wall, 582 F.3d 147, 150-51 (1st Cir. 2009) (citing Jiménez v. Quarterman, 555 U.S. 113, 119 (2009)). The statute of limitations for seeking habeas relief in this Court, therefore, began to run on February 17, 2004.

The limitations period was tolled, however, on February 26, 2004, when Petitioner filed a motion to reduce his sentence pursuant to Rule 35 of the Rhode Island Rules of Criminal Procedure. See 28 U.S.C. § 2244(d)(2); Wall v. Kholi, 562 U.S. 545, 556 (2011). Petitioner also filed a PCR application on

February 27, 2004. The PCR was denied by a hearing justice of the Superior Court and the denial was affirmed by the Rhode Island Supreme Court on January 14, 2013.<sup>1</sup> Rivera v. State, 58 A.3d 171 (R.I. 2013). The statute of limitations began to run again immediately on January 14, 2013, because “[w]hen the state courts have issued a final judgment on a state application [for PCR], [the PCR] is no longer pending even if a prisoner has additional time for seeking review of that judgment through a petition for certiorari.” Lawrence v. Florida, 549 U.S. 327, 334 (2007).

Petitioner filed the pending Petition on January 13, 2014. (ECF No. 1.) Respondent argues that the Petition is time-barred because it was filed more than one year after the judgment of conviction became final. When the eight days between the final judgment of conviction in 2004 and the date Petitioner filed his Rule 35 motion to reduce his sentence are added to the 364 days that elapsed between the date that the Rhode Island Supreme Court affirmed the denial of Petitioner’s PCR application and the date that Petitioner filed the pending Petition, the total is 372 days. (Mot. to Dismiss 3, ECF No. 4.)<sup>2</sup> Defendants’ Motion

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<sup>1</sup> The Rule 35 motion was denied on July 21, 2004.

<sup>2</sup> Petitioner filed an objection, but did not provide any argument or authority to counter the facts and authority set forth in Respondent’s motion to dismiss. Instead, he argued the merits of his Petition.

to Dismiss is therefore GRANTED.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "WESMITH". The signature is written in a cursive, somewhat stylized font.

William E. Smith

Chief Judge

Date: November 29, 2016