

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ROBERT MERLE PRATT, Petitioner, vs. PEOPLE OF THE STATE OF SOUTH DAKOTA, Respondent.	4:17-CV-04115-LLP ORDER
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Petitioner, Robert Merle Pratt, an inmate at the Mike Durfee State Prison in Springfield, South Dakota, submitted a document titled “Notice of Motion to Vacate Dismissal on Grounds Due to Attorney Abandonment, Rule 60(b)(6).” The document was filed as a new habeas action pursuant to 28 U.S.C. § 2254. However, it appears that Mr. Pratt may instead be seeking to reopen his 1997 habeas case. See Civ. 97-4246. In that case, Mr. Pratt challenged his 1992 conviction for first degree manslaughter for which he received a 100 year sentence of imprisonment.

Petitions for habeas relief in federal court collaterally attacking state court convictions are governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA contains a one-year statute of limitations. Specifically, 28 U.S.C. § 2244(d) provides in relevant part:

(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 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;

(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.

See 28 U.S.C. § 2244(d)(1) and (2).

A judgment or state conviction is final, for purposes of commencing the statute of limitation period, at “(1) either the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (2) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ.” Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998). The time allotted for filing a petition for writ of certiorari with the Supreme Court is ninety days. Jihad v. Hvass, 267 F.3d 803, 804 (8th Cir. 2001).

The statute of limitation for § 2254 petitions is subject to tolling. See 28 U.S.C. § 2244(d)(2). This one-year statute of limitation period is tolled, or does

not include, the time during which a properly filed application for state post-conviction relief or other collateral review is pending in state court. Faulks v. Weber, 459 F.3d 871, 873 (8th Cir. 2006); 28 U.S.C. § 2244(d)(2). The phrase “post-conviction or other collateral review” in § 2254’s tolling provision encompasses the “diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction.” Duncan v. Walker, 533 U.S. 167, 177 (2001). Thus, § 2254’s tolling provision “applies to all types of state collateral review available after a conviction.” Id. State collateral or post-conviction proceedings “are ‘pending’ for the period between the trial court’s denial of the [post-conviction relief] and the timely filing of an appeal from it.” Maghee v. Ault, 410 F.3d 473, 475 (8th Cir. 2005) (citing Peterson v. Gammon, 200 F.3d 1202, 1203 (8th Cir. 2000)); see also Johnson v. Kemna, 451 F.3d 938, 939 (8th Cir. 2006) (an application for state post-conviction review is pending until a mandate is issued).

However, state proceedings are not pending for the ninety-day period “following the final denial of state post-conviction relief, the period during which an unsuccessful state court petitioner may seek a writ of certiorari from the United States Supreme Court.” Jihad, 267 F.3d at 805. Additionally, “[s]tate proceedings are not pending during the time between the end of direct review and the date an application for state [post-conviction relief] is filed.” Maghee, 410 F.3d at 475 (citing Painter v. Iowa, 247 F.3d 1255, 1256 (8th Cir. 2001)). In short, the one-year statute of limitations begins to run after the state conviction is final, is tolled while state habeas proceedings are pending,

and then begins running again when state habeas proceedings become final. Curtiss v. Mount Pleasant Corr. Facility, 338 F.3d 851, 853 (8th Cir. 2003).

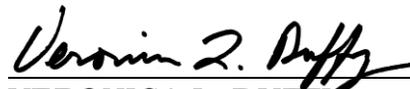
The Court may raise the statute of limitations issue *sua sponte*. Day v. McDonough, 547 U.S. 198, 209 (2006). The Court must, before acting on its own initiative to dismiss the federal petition based on the AEDPA statute of limitations, “accord the parties fair notice and opportunity to present their positions.” Day, 547 U.S. at 210. Further, the Court must “assure itself that the Petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of justice would be better served by addressing the merits or dismissing the petition as time barred.” Id.¹

Because there is a lack of clarity in Mr. Pratt’s filings, it is hereby

ORDERED that the clerk of court shall send Mr. Pratt a 2254 packet. If Mr. Pratt wishes to file a new 2254 action he should fully complete the forms and return them by September 29, 2017. In the alternative, if Mr. Pratt wishes to reopen his prior 2254 case (Civ. 97-4246) he should advise the court in writing by September 29, 2017.

DATED this 30th day of August, 2017.

BY THE COURT:



VERONICA L. DUFFY
United States Magistrate Judge

¹ The Day Court did not displace the district court’s duty pursuant to Rule 4, to screen and dismiss, if indicated, a petition that is clearly barred by the AEDPA statute of limitations. Day, 547 U.S. at 207-10.