

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

JOSHUA D. STUMP,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CIV-05-397-R
	)	
STATE OF OKLAHOMA, et al,	)	
	)	
Respondents.	)	

**BRIEF IN SUPPORT OF MOTION TO DISMISS  
HABEAS CORPUS PETITION AS TIME-BARRED  
BY THE STATUTE OF LIMITATIONS**

Comes now the Respondent and in support of his Motion to Dismiss Petition for Writ of Habeas Corpus as Time Barred, files the following brief in support. For the reasons stated herein, Respondent respectfully asks this Court to dismiss the instant Petition pursuant to 28 U.S.C. § 2244(d)(1)(D).

**ARGUMENT AND AUTHORITY**

The petitioner has failed to file his petition within the one-year statute of limitations contained within the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), and therefore his petition is barred. Furthermore, the Petitioner has failed to exercise due diligence regarding his request for habeas relief as required by 28 U.S.C. § 2244(d)(1)(D). This Court has ordered the Respondent to answer a standard order according to Rule 5, however, the Respondent would incorporate the Magistrate Judge's Report and Recommendation for all questions ordered by this Court, excluding the specific question ordered by the Tenth Circuit. (See Docs. 8 & 26). The Report and Recommendation provided that the Petitioner untimely filed his petition under § 2244(d)(1)(A), calculating the Petitioner's statutory year from the day his Judgment and

Case 5:05-cv-00397-R Document 29-1 Filed 08/09/2006 Page 2 of 9

Sentence became final, ten days after his guilty plea. *Fisher v. Gibson*, 262 F.3d 1135, 1142 (10<sup>th</sup> Cir. 2001). (See Doc. 8, p. 3-4).

However, the Tenth Circuit ordered that this Court order briefing on the question:

Whether a petitioner, alleging that he received mistaken advice from his counsel regarding parole eligibility, exercises due diligence under § 2244(d)(1)(D) if he does not file a habeas petition until the asserted parole release date.

This issue of due diligence under § 2244(d)(1)(D) was not addressed by this Court in this context in the Report and Recommendation.<sup>1</sup> The current issue and brief are calculating Petitioner's statutory year from the latest day he should have known or could have been known of his claim with the exercise of due diligence under § 2244(d)(1)(D). Therefore, this Court must exercise independent review of the issue presented by the Tenth Circuit. *McCracken v. Gibson*, 268 F.3d 970, 975 (10<sup>th</sup> Cir. 2001).

The Petitioner claims that he received ineffective assistance of counsel because his counsel informed him to take a plea of second degree murder for a sentence of seventy-five (75) years instead of going to trial. Specifically, the Petitioner claims that his counsel informed him he would be out on parole in seven (7) to nine (9) years. However, the defendant did not become parole eligible until February 2007, when his expected parole eligibility date would have been March 2004. With this change in parole eligibility the defendant's claim fails because the defendant failed to exercise due diligence and timely file his habeas petition.

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<sup>1</sup>This Court addressed the issue of due diligence in terms of equitable tolling, but the Tenth Circuit has remanded the case for proceedings pertaining to § 2244(d)(1)(D), which requires the exercise of due diligence to determine the factual predicate to begin the statutory year for Petitioner to file. In her Report and Recommendation the Magistrate Judge footnoted that the Petitioner did not present any factual basis for a claim under § 2244(d)(1)(D). (See Doc. 8, p. 3, n. 2).

Case 5:05-cv-00397-R Document 29-1 Filed 08/09/2006 Page 3 of 9

The AEDPA granted the petitioner one year to file a petition for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Pursuant to 28 U.S.C. § 2244(d)(1)(D), that year ran from May 19, 1999 until May 19, 2000, construing the Oklahoma Department of Corrections' ("DOC") documents in favor of the Petitioner. However, the petitioner failed to timely his petition by not filing his petition until April 2005. In order for the Petitioner's habeas petition to be timely filed he must demonstrate that he exercised due diligence. Title 28 § 2244(d)(1)(D) states:

A 1-year period of limitation shall apply to an application for a 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—

...  
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Thus, the defendant had to file within a year from when he could have discovered, with due diligence, the factual predicate of his claim.

Due diligence is defined as: "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Black's Law Dictionary* 468 (7<sup>th</sup> ed. 1999). It is also defined as reasonable diligence, which is defined as: "[a] fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue." *Id.* The Petitioner bears the burden of proving that he exercised due diligence. *Frazier v. Rogerson*, 248 F. Supp. 2d 825, 833 (N.D. Iowa 2003). A Petitioner's due diligence should be considered in light of the conditions of incarceration and the prison system. *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10<sup>th</sup> Cir. 2000). However, § 2244(d)(1)(D) is not applicable to those Petitioner's who "sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5<sup>th</sup> Cir. 1999). Furthermore, "[c]ourts appear to require that the defendant show some kind of

measure of prudence, activities or assiduity as may be properly expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances." *Frazier*, 248 F. Supp. 2d 825, 833 (N.D. Iowa 2003)(citing *Wims v. United States*, 225 F.3d 186, 190 (2<sup>nd</sup> Cir. 2000)). In the present case, the Petitioner failed to exercise due diligence by waiting until his asserted parole date to begin the appellate procedure regarding his parole.

According to the DOC documentation, the Petitioner's original parole hearing date was March of 2004, which would be consistent with the Petitioner's counsel's advice. (See Docs. 1 & 8, p. 1-2; Exhibits 1& 2). However, the DOC documents also show that the Petitioner's parole eligibility date changed in 1998. The change in Petitioner's parole docket status is reflected in two (2) separate documents, his "Adjustment Review" dated November 23, 1998 and his "Notification of Parole Consideration Date" dated March 17, 1998. (See Exhibits 3 & 4). Furthermore, there is a subsequent "Adjustment Review" dated May 19, 1999, which again states his parole docket date is February 2007, consistent with the prior review in November. (See Exhibit 5). Thus, the documents establish that the Petitioner's parole status changed well before April of 2005.

In *Smith v. Parker*, WL 1322996, 1-2 (W.D. OK 2005)<sup>2</sup> this Court found appellant's petition untimely. The appellant filed his habeas petition after an Oklahoma Statute, regarding punishment for drug convictions, changed on July 1, 2001. *Smith*, WL 1322996, at 1-2. However, the appellant did not file his habeas petition until December 10, 2004, over two (2) years after the statutory year ended according to § 2244(d)(1)(D). *Id.* This Court held that the petition was untimely absent statutory or equitable tolling. *Id.*, at 2. Furthermore, the Tenth Circuit addressed a similar issue in

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<sup>2</sup>Unpublished disposition cited as persuasive authority pursuant to Tenth Circuit Rule 36.3. A copy is attached hereto as Exhibit "6".

Case 5:05-cv-00397-R Document 29-1 Filed 08/09/2006 Page 5 of 9

a recent opinion. In *Berry v. Oklahoma*, 163 Fed. Appx. 703, 703 (10<sup>th</sup> Cir. 2006)<sup>3</sup>, the Petitioner's classification had changed due to a misconduct proceeding, which lengthened the Petitioner's imprisonment. The Petitioner claimed that changes in the DOC's policy in March 1996 and April 1997 changed his class. *Berry*, 163 Fed. Appx. at 703. The Tenth Circuit held that the defendant was time-barred because the latest date the Petitioner learned of this change was December 2003, thus the statute of limitations ran in December of 2004, but the Petitioner did not file his habeas petition until March 2005. *Id.*, at 703-704. The Court also noted that there were earlier dates the Petitioner would have known of the change with the exercise of due diligence, but did not discuss those dates as this later date was sufficient to deny the claim. *Id.*

Applying these cases to the present claim, it is apparent that the Petitioner filed an untimely petition. The DOC documents make it obvious that the Petitioner failed to exercise due diligence. A copy of both the "Adjustment Review" and "Notification of Parole Consideration Date" are provided to the inmate. (See Exhibit 8). Looking over the documents reveals that they inform the inmate of his/her parole docket status and the number of days that are left to serve. (See Exhibits 1, 3 & 5). Most importantly, the inmates must sign the "Adjustment Review", which shows that the inmate read the document or at a minimum had an opportunity to. (See Exhibits 1, 3, 5).

Reviewing the Petitioner's "Adjustment Reviews" dated November 23, 1998 and May 19, 1999, reveals that the Petitioner signed both copies. (See Exhibits 3 & 5). Thus, informing the Petitioner that his parole status had changed. Even if the Petitioner did not read the document or his copy of the document he could have discovered the change with due diligence. This information

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<sup>3</sup>Unpublished disposition cited as persuasive authority pursuant to Tenth Circuit Rule 36.3. A copy is attached hereto as Exhibit "7".

leaves the Petitioner's claim completely lacking merit. The only explanation for the Petitioner's failure to file in a timely fashion under § 2244(d)(1)(D) can be complete disregard for the legal system. The Petitioner cannot say that he exercised due diligence by failing to read his own "Adjustment Review" documents. Moreover, the change in parole status does not simply appear on just one document but is represented in three (3) documents, within a little over a year, all of which the Petitioner received or had access to. (See Exhibits 3-5 & 8). Obviously, the Petitioner failed to exercise due diligence in discovering his claim and untimely filed his habeas Petition by almost five (5) years, construing the dates liberally in Petitioner's favor.

While the Petitioner did file an Application for Post-Conviction Relief with the District Court of Washington County, as well as, an Appeal of the Districts Court's Denial of Post-Conviction Relief to the OCCA, followed by an appeal of the OCCA's denial, which was ultimately denied, none of these filings occurred during the statutory year under 28 U.S.C. § 2244(d)(1). (See Doc. 8, p. 5; Exhibits 9-11). Petitioner's first Application for Post-Conviction Relief was not filed until February 13, 2004, almost five (5) years after the AEDPA statute of limitations had expired, using the latest date of the parole change. (See Exhibits 5 & 9). According to the March 17, 1998 "Notification of Parole Consideration", the Petitioner filed his application almost six (6) years after he could have known his parole status changed. (See Exhibit 4). Therefore, this application did not "toll" the AEDPA statute of limitations. As 28 U.S.C. § 2244(d)(2) provides:

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.

Case 5:05-cv-00397-R Document 29-1 Filed 08/09/2006 Page 7 of 9

*Id.* Only a state petition filed within the one year allowed by the AEDPA can toll the statute of limitations. *Burger v. Scott*, 317 F.3d 1133, 1136-1137 (10<sup>th</sup> Cir. 2003). In *Gibson v. Klinger*, 232 F.3d 799, 803-804 (10<sup>th</sup> Cir. 2000), the Tenth Circuit held that absent tolling, a Federal Habeas Petition that is filed more than one year after the deadline under the AEDPA is untimely. The pendency of a Post-Conviction Application filed after the AEDPA statute of limitations has run cannot serve to statutorily toll. *May v. Workman*, 339 F.3d 1236, 1236-1237 (10<sup>th</sup> Cir. 2003).

Finally, the Petitioner's appeal of the District Court of Washington County's denial of Application for Post-Conviction Relief, filed on March 31, 2004 and subsequent appeal do not provide any statutory tolling for the same reason that the Petitioner's first Application for Post-Conviction Relief did not. Only a state petition filed within the one (1) year allowed by the AEDPA can toll the statute of limitations. *Burger*, 317 F.3d at 1136-1137. Therefore, because the Petitioner waited until April 28, 2005, to file the instant habeas petition, and he is not entitled to any statutory tolling, he is at a minimum of 1,805 days past the deadline for filing under the AEDPA.

Furthermore, the Petitioner is not entitled to equitable tolling. Equitable tolling is only available for rare and exceptional circumstances, which would include an actual innocence claim, uncontrollable circumstances that prevent the Petitioner from timely filing, or the Petitioner actively pursued his judicial remedies but filed a defective pleading within the statutory period. *Gibson*, 232 F.3d at 808. The Petitioner has the burden of proving the circumstances justify equitable tolling and he must show that he diligently pursued his habeas claim. *Marsh v. Soares*, 223 F.3d 1217, 1220 (10<sup>th</sup> Cir. 2000). The Petitioner cannot demonstrate that he diligently pursued his habeas claim when he failed to file his habeas almost five (5) years after the one (1) year statute of limitations ran. Furthermore, the Petitioner's claim would not fit the "exceptional" circumstances since the failure

Case 5:05-cv-00397-R Document 29-1 Filed 08/09/2006 Page 8 of 9

to timely file was completely the fault of Petitioner. Thus, Petitioner's claim is not timely and he has failed to show that he exercised due diligence in discovering the factual predicate of his claim and pursuing his claim. Therefore, the Petitioner's petition should be dismissed as time-barred according to § 2244(d)(1)(D) for failing to exercise due diligence in filing his petition.

**CONCLUSION**

The Petitioner has failed to exercise due diligence and timely file the instant petition within the one-year period of limitations pursuant to 28 U.S.C. § 2244(d)(1)(D). For the aforementioned reasons Respondent respectfully asks this Court to dismiss the instant Petition for Writ of Habeas Corpus.

Respectfully submitted,

**W.A. DREW EDMONDSON  
ATTORNEY GENERAL OF OKLAHOMA**

**s/ Heath Robinson  
HEATH ROBINSON, OBA #20819  
ASSISTANT ATTORNEY GENERAL**

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ATTORNEYS FOR RESPONDENT**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of August, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

M. Michael Arnett  
3133 N.W. 63<sup>rd</sup> St.  
Oklahoma City, OK 73116

s/ HEATH ROBINSON

UNITED STATES DISTRICT COURT

Western District of Oklahoma

JOSHUA D. STUMP,
Petitioner,

vs.

STATE OF OKLAHOMA, et. al.,
Respondent.

ENTRY OF APPEARANCE

CASE NUMBER: CIV-05-397-R

To the Clerk of this court and all parties of record:

Enter my appearance as counsel in this case for Respondent.

I certify that I am admitted to practice in this court.

I am registered in this Court's Electronic Filing System.

August 9, 2006
Date

s/ HEATH ROBINSON
Signature

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Case 5:05-cv-00397-R Document 27 Filed 08/09/2006 Page 2 of 2

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of August, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

M. Michael Arnett  
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Oklahoma City, OK 73116

s/ HEATH ROBINSON

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JOSHUA D. STUMP, )
Petitioner, )
vs. ) Case No. CIV-05-397-R
STATE OF OKLAHOMA, et al, )
Respondent. )

MOTION TO DISMISS PETITION FOR HABEAS CORPUS AS TIME BARRED BY THE STATUTE OF LIMITATIONS

Comes now the Respondent, by and through the Attorney General of the State of Oklahoma and respectfully asks that the instant Petition for Habeas Corpus be dismissed as it is untimely filed pursuant to 28 U.S.C. § 2244(d)(1)(D). Respondent has filed a brief in support of this Motion which is being filed simultaneously herewith which more fully explains and supports Respondent's position.

Wherefore, for the reasons contained within Respondent's brief in support, Respondent respectfully requests that this Court dismiss the instant Petition as it is barred by the statute of limitations.

Respectfully submitted,

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

s/ Heath Robinson
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Case 5:05-cv-00397-R Document 28 Filed 08/09/2006 Page 2 of 2

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ATTORNEYS FOR RESPONDENT

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Oklahoma City, OK 73116

s/ HEATH ROBINSON

**INACTIVE**

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

JOSHUAD D. STUMP,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent

**RECEIVED**  
CAPITOL OF OKLAHOMA 2004-334  
JUL 19 2004  
#4  
**ATTORNEY GENERAL**

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

JUL 16 2004.

MICHAEL S. RICHIE  
CLERK


**ORDER DISMISSING MOTION FOR RECONSIDERATION**


In *Stump v. State*, PC-2004-334, (Ok. Cr. April 16, 2004)(not for publication), this Court affirmed the District Court's denial of post-conviction relief for Petitioner. On April 26, 2004, Petitioner, *pro se*, filed in this Court a Motion to Reconsider.

Once this Court has rendered a decision on a post-conviction appeal, that decision shall constitute a final order. A petition for rehearing is not allowed. Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2004). Because Petitioner has failed to properly invoke the jurisdiction of this Court, his Application should be, and is hereby, **DISMISSED**.

**IT IS SO ORDERED.**

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 16<sup>th</sup> day of July, 2004.

  
CHARLES A. JOHNSON, Presiding Judge

  
STEVE LILE, Vice Presiding Judge

**EXHIBIT**  
11