

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

MICHAEL HICKS,

Petitioner,

Case Number: 01-70951

v.

HON. ARTHUR J. TARNOW

DENNIS M. STRAUB,

Respondent.

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**OPINION AND ORDER DENYING RESPONDENT'S MOTION  
TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND  
SETTING DEADLINE FOR RESPONSIVE PLEADING<sup>1</sup>**

**I. Introduction**

Petitioner Michael Hicks, a state inmate currently incarcerated at the G. Robert Cotton Correctional Facility in Jackson, Michigan, through his attorney, Carole M. Stanyar, has filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Now before the Court is Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus. For the reasons set forth below, the Court denies the motion to dismiss and orders Respondent to file a responsive pleading.

**II. Procedural History**

Following a jury trial in Calhoun County Circuit Court, Petitioner was convicted of one count of first-degree murder and one count of felony firearm. On December 3, 1993, he was sentenced to life imprisonment without parole for the first-degree murder conviction and two

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<sup>1</sup> Staff Attorney Mary Beth Collery provided quality research assistance.

years imprisonment for the felony-firearm conviction, to be served consecutively.

Petitioner filed an appeal of right in the Michigan Court of Appeals. The Michigan Court of Appeals affirmed his conviction and sentence. People v. Hicks, No. 171833 (Mich. Ct. App. Nov. 6, 1996). Petitioner then filed an application for leave to appeal to the Michigan Supreme Court, which was denied on November 7, 1997. People v. Hicks, 456 Mich. 884 (Mich. 1997).

On January 26, 1999, Petitioner filed a petition for a writ of habeas corpus in this Court. On September 29, 1999, the Court approved and entered a Stipulation to Dismiss Petition Without Prejudice, in which Petitioner's counsel and Respondent's counsel agreed that "the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1) shall be tolled for the period that this action has been pending." Hicks v. Straub, No. 99-70299 (E.D. Mich. Sept. 29, 1999) (Cleland, J.).

Petitioner filed a motion for relief from judgment in the trial court on January 29, 1999. The trial court denied the motion. People v. Hicks, No. 93-2188 (Calhoun County Circuit Court Feb. 4, 2000). Petitioner filed an application for leave to appeal the trial court's denial of the motion for relief from judgment in the Michigan Court of Appeals. The Michigan Court of Appeals denied leave to appeal. People v. Hicks, No. 226074 (Mich. Ct. App. Aug. 11, 2000). Petitioner then filed an application for leave to appeal in the Michigan Supreme Court, which was denied on February 26, 2001. People v. Hicks, 463 Mich. 977 (Mich. 2001).

Petitioner filed the pending petition for a writ of habeas corpus on March 9, 2001.

### **III. Analysis**

Respondent has filed a motion to dismiss the petition for a writ of habeas corpus on the ground that the pending petition was filed one day after the limitations period expired. The

Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (“AEDPA” or “the Act”) applies to all habeas petitions filed after the effective date of the Act, April 24, 1996. Petitioner’s application for habeas corpus relief was filed after April 24, 1996. Therefore, the provisions of the AEDPA, including the limitations period for filing an application for habeas corpus relief, apply to Petitioner’s application. Lindh v. Murphy, 521 U.S. 320, 337 (1997).

A prisoner must file a federal habeas corpus petition within one year of the “date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. (d)(1)(A). The Sixth Circuit Court of Appeals has held that the one-year limitations period does not begin to run until the time for filing a petition for a writ of certiorari to the United States Supreme Court has expired. Isham v. Randle, 226 F.3d 69, 694-95 (6<sup>th</sup> Cir. 2000). Petitioner’s time for filing a petition for a writ of certiorari in the United States Supreme Court began to run on November 8, 1997, the day after the Michigan Supreme Court denied leave to appeal his conviction. Bronaugh v. Ohio, 235 F.3d 280, 284-85 (6<sup>th</sup> Cir. 2000) (citing Supreme Court Rule 30 which states that in calculating the ninety-day window for filing a petition for writ of certiorari, “the day of the act, event, or default from which the designated period begins to run is not included”).

The ninety-day period during which petitioner could petition for a writ of certiorari concluded on February 5, 1998. The last day on which a petitioner can file a petition for a writ of certiorari in the United States Supreme Court is not counted toward the one-year limitations period applicable to habeas corpus petitions. Bronaugh, 235 F.3d at 285. Thus, absent tolling of the limitations period, the last day on which petitioner could timely file a petition for a writ of

habeas corpus in this Court was February 6, 1999.

Petitioner filed his first petition for a writ of habeas corpus in this Court on January 26, 1999. Pursuant to the stipulation agreed to by Petitioner and the Respondent in that action, the AEDPA's one-year limitations period was tolled during the pendency of the first habeas corpus petition, that is, from January 26, 1999 until September 29, 1999. Thus, the first habeas corpus petition, tolled the limitations period, with twelve days remaining.

Petitioner filed a motion for relief from judgment in the trial court on January 29, 1999. That motion, a properly filed motion for state collateral review, also served to toll the limitations period. The trial court denied Petitioner's motion for relief from judgment and the Michigan Court of Appeals denied Petitioner's application for leave to appeal that decision. Petitioner then filed an application for leave to appeal to the Michigan Supreme Court. On February 26, 2001, the Michigan Supreme Court denied leave to appeal. The limitations period continued to be tolled until the time for filing a petition for a writ of certiorari to the United States Supreme Court expired, ninety days after the Michigan Supreme Court's denial of leave to appeal. The ninety-day period expired on May 27, 2001. However, May 27, 2001, was a Sunday, and May 28, 2001, was Memorial Day, a federal holiday. Therefore, pursuant to Sup. Ct. R. 30, Petitioner's ninety-day period expired on May 29, 2001. The limitations period, of which twelve days remained, thus would have commenced running on May 30, 2001. Petitioner filed his habeas corpus petition on March 9, 2001. Therefore, his petition was timely.

Even if the one-year limitations period was not tolled for the time period during which Petitioner could have petitioned for a writ of certiorari to the United States Supreme Court, the petition still was timely filed. Absent that ninety-day tolling period, the limitations period would

have been tolled by virtue of the pending application for state collateral review until February 26, 2001, when the Michigan Supreme Court denied Petitioner's application for leave to appeal. The limitations period, of which twelve days remained, thus would have commenced running on February 27, 2001. The twelve-day period then would have concluded on March 10, 2001. However, March 10, 2001, fell on a Saturday. Federal Rule of Civil Procedure 6 provides that the last day of a filing period shall be included in the time computation, unless it falls on a Saturday, Sunday or legal holiday. In such a case, the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Thus, Petitioner's one-year limitations period ran until Monday, March 12, 2001. Petitioner filed the pending petition for a writ of habeas corpus on March 9, 2001. Accordingly, even without giving Petitioner the benefit of tolling the limitations period for the time during which he could have petitioned for a writ of certiorari to the United States Supreme Court, the petition is timely.

**IV. Conclusion**

For the foregoing reasons, **IT IS ORDERED** that Respondent's Motion to Dismiss is **DENIED**.

**IT IS FURTHER ORDERED** that Respondent shall file an answer, in accordance with Rule 5, Rules Governing Section 2254 cases, addressing the merits of the application for a writ of habeas corpus on or before **December 15, 2001**.

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/s/  
ARTHUR J. TARNOW  
UNITED STATES DISTRICT JUDGE

DATED: October 15, 2001