

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALTONIO D. WARREN,

Petitioner,

OPINION & ORDER
CV-07-4117

-against-

JAMES CONWAY,

Respondent.

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FEUERSTEIN, J.

Presently before this Court is petitioner's third application for an extension of time to file a notice of appeal dated February 19, 2009.

I. Procedural History

On or about September 26, 2007, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging two (2) judgments of conviction entered against him on October 28, 2003 in the County Court of the State of New York, Suffolk County (Hinrichs, J.). The first judgment of conviction was entered upon a jury verdict finding petitioner guilty of manslaughter in the first degree (N.Y. Penal Law § 125.20), gang assault in the first degree (N.Y. Penal Law § 120.07), assault in the first degree (N.Y. Penal Law § 120.10(3)) and two counts of assault in the third degree (N.Y. Penal Law §§ 120.00(1)(2)), and imposition of sentence. The second judgment of conviction was entered upon petitioner's plea of guilty to attempted promoting prison contraband in the first degree (N.Y. Penal Law §§ 110/205.25(2), and

imposition of sentence. By opinion and order entered November 20, 2008, petitioner's petition was denied, the proceeding was dismissed and a certificate of appealability was denied. Final judgment was entered in favor of respondent and against petitioner on November 24, 2008.

Petitioner filed an application for an extension of time to file a notice of appeal of the final judgment dated January 23, 2009, which was not received by the clerk of the Court until January 29, 2009. In his application, petitioner stated that he did not timely file a notice of appeal of the final judgment because, *inter alia*, he did not receive notice of the order and final judgment until January 16, 2009, when he returned to Upstate Correctional Facility after being housed in Riverhead County Correctional Facility on "a criminal matter." By order dated February 11, 2009, petitioner's application for an extension of time to file a notice of appeal was denied without prejudice to renewal within ten (10) days from the date of the order upon proof of filing the application in accordance with the "prisoner mailbox rule." As petitioner did not timely renew his application in accordance with that order, his first application for an extension of time to file a notice of appeal is deemed denied with prejudice.

On February 13, 2009, the clerk of the Court received another request by petitioner for an extension of time to file a notice of appeal of the final judgment, this time by way of notice of motion with an affidavit of service indicating that the motion was served on February 9, 2009. By order dated February 22, 2009, petitioner's second application for an extension of time to file a notice of appeal was denied on the basis that the application was untimely pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure and, thus, this Court lacked jurisdiction to grant the relief requested.

Presently before this Court is petitioner's third application for an extension of time to file

a notice of appeal, together with an affidavit of service indicating that the motion was served on February 19, 2009.

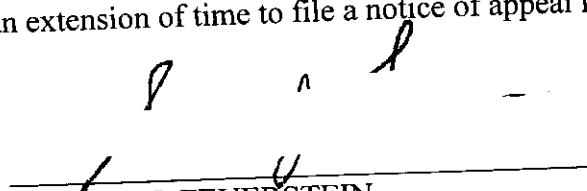
II. Discussion

As noted in the prior orders denying petitioner's two (2) prior applications for leave to file a late notice of appeal: (1) Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure required petitioner to file a notice of appeal of the final judgment by December 24, 2008; and (2) Rule 4(a)(5) of the Federal Rules of Appellate Procedure required petitioner to move for leave to file a late notice of appeal on or before January 23, 2009, the thirtieth day after the time to file the notice of appeal had expired. Since petitioner's affidavit of service indicates that he did not file his third application for leave to file a late notice of appeal until February 19, 2009, this Court lacks jurisdiction to grant the relief requested in that motion. See Goode v. Winkler, 252 F.3d 242, 245 (2d Cir. 2001). Petitioner is advised that any further applications for the relief requested will be summarily denied and that the Court is considering enjoining him from any future filings with first obtaining leave of this Court.

III. Conclusion

Petitioner's third motion for an extension of time to file a notice of appeal is denied.

SO ORDERED.


SANDRA J. FEUERSTEIN
United States District Judge

Dated: March 3, 2009
Central Islip, New York

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