2005 WL 1837954
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United States District Court,
S.D. New York.

Amado BRITO, Petitioner,
v.
John J. BURGE, Respondent.

No. 04Civ.1815LTSRLE.
|
Aug. 3, 2005.

OPINION AND ORDER

ELLIS, Magistrate J.

***1** On February 14, 2001, *pro se* petitioner Amado Brito ("Brito") was convicted upon his plea of guilty, of Criminal Possession of a weapon in the Third Degree, and sentenced, as a second violent felony offender, to a determinate term of seven years imprisonment. Brito has filed a petition for a writ of habeas corpus in the Southern District of New York pursuant to 28 U.S.C. § 2254. On April 29, 2004, District Judge Laura Taylor Swain referred this case to the undersigned. Brito claims that: 1) the State failed to acquire jurisdiction over him; 2) evidence was obtained in violation of the Fourth Amendment; and 3) his guilty plea was coerced. Brito additionally claims Constitutional deprivation of his rights: to be free from unreasonable detention and bail; to be informed of the charges and the right to confront his accusers; to be arraigned on legally sufficient charges; to grand jury proceedings governed by integrity; to effective assistance of counsel; and to due process and equal protection.

Pending before the Court is Brito's motion for assistance of counsel pursuant to 28 U.S.C. § 2254. For the reasons set forth below, Brito's motion is DENIED.

I. DISCUSSION

Federal habeas corpus proceedings carry no constitutional right to representation. *Ferrer v. Artus,* 2005 WL 1653878, *1 (S.D.N.Y. Jul 13, 2005); *Renis v. Thomas,* 2003 WL 22358799, *3 (S.D.N.Y. Oct 16, 2003). However, a "court may request an attorney to represent any person unable to afford counsel," 28 U.S.C. § 1915(e)(1), and in its discretion, may appoint counsel where "the interests of justice so require," "so long as the Court is guided by sound legal principles." 18 U.S.C. § 3006A(a)(2)(B); *Cooper v. A. Sargenti Co.,* 877 F.2d 170, 172 (2d Cir.1989).

The Court of Appeals for the Second Circuit has set forth factors a court should consider in deciding whether to appoint counsel for an indigent civil litigant is habeas corpus proceedings. First, the court should determine whether the petitioner can afford to obtain counsel. *Terminate Control Corp. V. Horowitz,* 28 F.3d 1335, 1341 (2d. Cir.1994). If the court finds the petitioner cannot afford counsel, then the court must review the merits of the case and determine whether "the indigent's position is likely be one of substance." *Hodge v. Police Officers,* 802 F.2d 58, 61-62 (2d Cir.1986). If the finding meets the "threshold requirement [of indigence and merit], then the court should then consider the indigent's ability to investigate the crucial facts, whether conflicting evidence implication the need for cross-examination will be the major proof presented to the fact finder, the indigent's ability to present the case, the complexity of the legal issues[,] and any special reason in the case why appointment of counsel would be more likely to lead to a just determination." *Terminate,* 28 F.3d at 1341. If the petitioner's claims may fairly be heard on written submissions, the appointment of counsel is not warranted, and such applications should ordinarily be denied. *Coita,* 1998 WL 187416 at *1 (citing *Adams v. Greiner,* 1997 WL 266984 (S.D.N.Y. May 20, 1997). Moreover, the Second Circuit has expressed concern for overwhelmed volunteer lawyers and stressed the importance of evaluating the merits of a case and the likelihood of success before counsel is appointed. *Rahman v. Keane,* 1994 WL 260803 (S.D.N.Y. June 7, 1994) (*citing Cooper,* 877 F.2d at 172-174).

***2** Brito has provided enough evidence to satisfy the threshold requirement regarding his inability to afford counsel. *Terminate,* 28 F.3d 1335, 1341 (2d Cir.1994). Brito was convicted in 2001, is still incarcerated, is not employed, and cannot afford counsel. *See Velasquez v. Edwards,* 2004 WL 3030057, *2 (S.D.N.Y. Dec. 30, 2004). However, Brito has failed to demonstrate that his petition is of substance and has not met the "threshold requirement" of merit. Brito has not demonstrated that his claims are overly complex or why an appointment of counsel would be more

likely to lead to a just determination. *Terminate,* 28 F.3d at 1341 (2d Cir.1994).

II. CONCLUSION

After careful review of petitioner's application in light of the aforementioned principles, the Court finds that appointment of counsel is not warranted in this case. Petitioner's motion is DENIED without prejudice.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2005 WL 1837954

2012 WL 2864505
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Gary HALL, Petitioner,
v.
R.K. WOODS, Superintendent, Upstate Correctional Facility, Respondent.

No. 07 Civ. 9264(PAC)(LMS).
|
July 12, 2012.

ORDER ADOPTING R & R

Honorable PAUL A. CROTTY, District Judge.

***1** Petitioner Gary Hall ("Hall"), pro se, seeks habeas corpus relief from his March 23, 2004 conviction, for of second degree murder (depraved indifference). While an inmate at Sing Sing Correctional Facility in Ossining, Hall stabbed another inmate in the neck with a homemade knife, or "shank," causing the inmate to bleed to death. Hall was tried before a jury in New York Supreme Court, Westchester County, and thereafter sentenced to twenty-five years to life. On September 27, 2007, Hall filed a federal habeas petition, pursuant to 28 U.S.C. § 2254, in which he alleges four grounds for relief: (1) the evidence was legally insufficient to support a conviction of depraved indifference murder; (2) the verdict was against the weight of the evidence; (3) ineffective assistance of counsel; and (4) defective grand jury proceedings. (*See* Petition, Sept. 27, 2007 ("Pet."), Dkt. 1, at 7–8.)

On October 24, 2007, former District Judge Stephen G. Robinson referred this case to Magistrate Judge Lisa Smith. On April 29, 2011, Magistrate Judge Smith issued a Report and Recommendation ("R & R"), recommending denial of the Petition. (Dkt.14.) Hall filed objections to the R & R on June 29, 2011. (Dkt.16.) Hall also submitted a letter to the Court, dated June 13, 2011, requesting a stay of these proceedings because he is "currently in the process of filing a motion pursuant to New York Criminal Procedure Law Section 440.10 ("440.10 motion") with the original trial court." [1] Hall did not indicate what issues he intends to raise in his 440.10 motion, nor did he explain his failure to exhaust this state remedy. Respondent has not opposed the requested stay.

The Court has reviewed the R & R and Hall's objections. For the reasons that follow, the Court denies Hall's request for a stay and adopts Magistrate Judge Smith's Report and Recommendation in its entirety. Hall's petition is, therefore, denied.

BACKGROUND [2]

I. Facts

On September 7, 2002, Hall stabbed Robert Brown, a fellow inmate at Sing Sing Correctional Facility, during an altercation between them. Hall used a sharp object, or "shank," to cut Brown's jugular vein and carotid artery. Brown bled to death. Hall ran away, depositing his bloody sweatshirt in a garbage can. A corrections officer later observed blood on Hall's pants and placed him in handcuffs. The murder weapon and Hall's bloody sweatshirt were both recovered, and subsequent test results revealed that the blood found on those objects matched the victim's. There was no doubt that Hall stabbed Brown. Hall claimed on direct examination that he acted in self defense, but on cross he testified that the stabbing was accidental when he tried to disarm the victim.

II. Procedural History

On April 8, 2003, a Westchester grand jury indicted Hall for two counts of second degree murder (intentional and depraved indifference) and one count of first degree manslaughter. Hall proceeded to trial before a jury on January 22, 2004. The jury convicted Hall of one count of second degree murder (depraved indifference). On March 23, 2004, the trial court sentenced Hall to an indeterminate term of imprisonment of 25 years to life.

***2** Hall appealed to the Second Department, arguing that: (1) the evidence was legally insufficient to establish depraved indifference murder; (2) his conviction was against the weight of the evidence; (3) counsel provided ineffective assistance; and (4) the district attorney failed to instruct the grand jury on the law with respect to depraved indifference murder. On September 12, 2006, the Appellate Division affirmed Hall's conviction. *See People v. Hall,* 32 A.D.3d 864, 820 N.Y.S.2d 526 (N.Y.App. Div.2d Dep't 2006). The court found that Hall failed to preserve his claim of insufficient evidence to prove depraved indifference murder because Hall's motions to

dismiss during and after trial were "not 'specifically directed' to the depraved indifference charge." *Id.* The court concluded that "[s]ince the defendant's guilt was proven beyond a reasonable doubt at trial, there can be no appellate review of the issue of whether a prima facie case had been presented to the grand jury." *Id.*

On October 5, 2006, Hall sought leave to appeal to the New York Court of Appeals, but not on all issues raised before the Appellate Division. Instead, Hall raised only two issues: (1) whether the issue of the legal sufficiency of the evidence was preserved at trial, and (2) whether the evidence at trial was legally insufficient to establish guilt of depraved indifference murder. On November 16, 2006, the New York Court of Appeals denied leave to appeal. Hall did not seek reconsideration of the denial of leave.

On September 27, 2007, Hall filed his federal habeas corpus petition, and attached the table of contents from his brief to the Appellate Division. The Court assumes that Hall seeks habeas review of those same arguments articulated on direct appeal.

III. Magistrate Judge Smith's R & R

On, April 29, 2011, Magistrate Judge Smith issued her Report and Recommendation that this Court deny Hall's petition. Magistrate Judge Smith addressed each of Hall's claims and found that they were each procedurally barred. With respect to Hall's ineffective assistance of counsel claim, Magistrate Judge Smith also found the claim to be without merit.

A. *AEDPA and Exhaustion Requirements*

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Prior to seeking federal habeas review, the petitioner must first exhaust available state remedies. *See id.* § 2254(b). A habeas petitioner exhausts his state remedies when he has: (1) "fairly presented" his federal constitutional claim to the state courts; and (2) after having been denied relief, utilized all available mechanisms to secure state appellate review of the denial of that claim. *See Klein v. Harris,* 667 F.2d 274, 282 (2d Cir.1981) (citations omitted), *overruled on other grounds, Daye v. Attorney Gen. of the State of New York,* 696 F.2d 186, 194 (2d Cir.1982) (en banc). "A claim has been 'fairly presented' if the state courts are apprised of 'both the factual and legal premises of the claim [a petitioner] asserts in federal court." *Jones v. Vacco,* 126 F.3d 408, 413 (2d Cir.1997). A petitioner can satisfy this requirement by:

> ***3** (a) [relying] on pertinent federal cases employing constitutional analysis, (b) [relying] on state cases employing constitutional analysis in like fact situations, (c) [asserting] the claim in terms so particular as to call to mind a specific right protected by the Constitution, [or] (d) [alleging] a pattern of facts that is well within the mainstream of constitutional litigation.

Daye, 696 F.2d at 194. Exhaustion is not satisfied until a habeas petitioner appeals the conviction to the highest state court. *See Klein,* 667 F.2d at 282.

B. *Legal Sufficiency of the Evidence*

Magistrate Judge Smith found that Hall failed to raise a federal claim for legal sufficiency of the evidence on direct appeal, and that his claim was therefore not fairly presented to the state court. Magistrate Judge Smith concluded that Hall did not cite any federal law, federal case, or Constitutional provision in his appellate brief that would alert the state court to the federal nature of his claim. (R & R 9.) Although Hall relied on state cases which employ the Supreme Court's analysis of insufficiency of the evidence, as set forth in

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), Magistrate Judge Smith found that those cases were distinguishable. (R & R 9.)

Moreover, even if the references to *Jackson* in the cases Hall cited were sufficient to alert the appellate court to the federal nature of Hall's claim, Magistrate Judge Smith found that Hall's habeas claim for insufficiency of the evidence was still procedurally barred. (R & R 9.)

A federal court may not review a claim in a habeas petition "when a state court declined to address a prisoner's federal claim because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson,* 501 U.S. 722, 730, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A petitioner can overcome a procedural default upon showing "cause for the procedural default and prejudice attributable thereto," *Harris v. Reed,* 489 U.S. 255, 260, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), or "actual innocence," *Schlup v. Delo,* 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Here, the Appellate Division ruled that Hall failed to preserve his insufficient evidence claim for appellate review because his "motion to dismiss was not specifically directed to the depraved indifference charge." Hall, 820 N.Y.S.2d at 526 (internal quotation and citation omitted). The court further held that "[t]o the extent the motion referred to [Hall's] earlier dismissal motion made at the close of the People's evidence, that too did not include the argument that the evidence was consistent only with intentional murder, as now argued on appeal." *Id.* Accordingly, Magistrate Judge Smith concluded that this procedural default bars federal habeas review on Hall's sufficiency of the evidence claim. (R & R 10.)

Magistrate Judge Smith further noted that Hall failed to show good cause for the procedural default or any resulting prejudice. Moreover, Magistrate Judge Smith found that Hall does not assert actual innocence; rather, he contends that he is in fact guilty of intentional murder, and that the killing was justified. (R & R 10–11.) Courts have refused to exercise habeas jurisdiction where petitioners seek review of a depraved indifference murder conviction based on the assertion that the killing was intentional "in the interests of justice." *See People v. Danielson,* 40 A.D.3d 174, 175, 832 N.Y.S.2d 546 (N.Y.App. Div. 1 st Dept.2007). Accordingly, Magistrate Judge Smith found that Hall's claim for insufficiency of the evidence must be dismissed.

C. *Ineffective Assistance of Counsel*

***4** Magistrate Judge Smith also found that Hall was procedurally barred from asserting his claim of ineffective assistance of counsel, since he failed to appeal the claim to the New York Court of Appeals. (R & R 12.) New York State permits only one request for review by the Court of Appeals per conviction. *See* N.Y. Ct. Rules, Court of Appeals, § 500.10(a). As Hall did not include his ineffective assistance claim in his brief to the Court of Appeals, Magistrate Judge Smith concluded that this Court cannot consider the claim on habeas review. (R & R 12.) *See* *Klein,* 667 F.2d at 282.

Magistrate Judge Smith also found Hall's claim of ineffective assistance of counsel to be without merit. (*Id.*) In order to prevail on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two requirements set forth in *Strickland v. Washington,* 446 U.S. 668, 686 (1984). First, a petitioner must establish that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Second, a petitioner must show that the deficient performance prejudiced the defense. *Id.* at 692.

Hall argues that trial counsel filed a defective motion for dismissal because it failed to address with adequate specificity the evidence concerning the depraved indifference murder charge. (R & R 14.) Hall bases this argument on a change in New York law following his conviction. At the time of Hall's trial, however, both defense counsel's strategy and Hall's conviction for depraved indifference murder were consistent with then-existing law. Consequently, Magistrate Judge Smith determined that trial counsel's arguments were based on the law as it stood at that time, and therefore did not render his representation ineffective. (*Id.*)

Magistrate Judge Smith also found that in light of his inconsistent trial testimony, Hall failed to satisfy the prejudice prong of the *Strickland* analysis. (R & R 15.) During his direct examination, Hall testified that he killed the victim in self-defense. (*Id.*) During crossexamination, however, Hall testified that the killing was accidental. (*Id.*) Given this inconsistency, Magistrate Judge Smith determined that Hall could not show that he suffered any prejudice as a result of counsel's actions. (*Id.*) Accordingly, Magistrate Judge Smith concluded that Hall's claim of ineffective assistance of counsel should be dismissed.

D. *Defect in Grand Jury Proceedings*

Magistrate Judge Smith found that Hall failed to raise his claim regarding insufficiency of the evidence presented to the Grand Jury with the New York State Court of Appeals, and that Hall's claim was therefore procedurally barred on federal habeas review. (R & R 15.) *See* *Klein,* 667 F.2d at 282. Magistrate Judge Smith further noted that because Hall was convicted by a petit jury at trial, his claims regarding the state Grant Jury proceedings are not cognizable on federal habeas review. (*Id.*) *See* *Lopez v. Riley,* 865 F.2d 30, 32 (2d Cir.1989) (holding that claimed defects in state grand jury proceedings are rendered harmless by conviction at trial and are therefore "foreclosed in a collateral attack brought in a federal court"). Accordingly, Magistrate Judge Smith recommended that the Court dismiss Hall's claim of defective grand jury proceedings.

IV. Request for Stay

***5** Before turning to Hall's objections to Judge Smith's R & R, the Court must first address Hall's request to stay these proceedings while he exhausts post-conviction relief in the state court on issues not raised in his petition.

A. *Statute of Limitations and Stay*

AEDPA imposes a one-year statute of limitations period for bringing a habeas petition in federal court. *See id.* § 2244(d)(1). This period typically begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* Although the statute of limitations period is tolled for 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," *see id.* § 2244(d)(2), the filing of a habeas petition in federal court does not toll the one-year limitations period. *See* *Duncan v. Walker,* 533 U.S. 167, 181–82, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

A district court may not rule on a "mixed petition" containing exhausted and unexhausted claims; in such cases, a district court should dismiss the petition without prejudice and give state courts the opportunity to rule on the unexhausted claims. *See* *Rose v. Lundy,* 455 U.S. 509, 518–20, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Since the AEDPA one-year limitations period can prevent a petitioner from returning to federal court for review of any of his claims, district courts have discretion to stay mixed habeas petitions and hold them in abeyance while a petitioner returns to state court to exhaust state remedies. *See* *Rhines v. Weber,* 544 U.S. 269, 275–76, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). A stay of a mixed petition should be granted "if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines,* 544 U.S. at 275–76.

Since Hall's petition currently contains only exhausted claims, the Court cannot treat his petition as "mixed" for purposes of considering a stay under *Rhines.* Hall's request for a stay is therefore premature. *See* *Williams v. Sheahan,* No. 11–cv–2435, 2011 WL 2437496, at *1 (E.D.N.Y. June 15, 2011) (denying motion for stay of habeas petition pending the filing of NYCPL § 440.10 motion as premature because petitioner had not raised the claims in his habeas petition and the petition was therefore not "mixed"); *Bethea v. Walsh,* No. 09–cv–5037, 2010 WL 2265207, at *1 (E.D.N.Y. June 2, 2010) (same). In order to assert his new, untimely, unexhausted claim, Hall must move to amend his petition and satisfy the standard under Federal Rule of Civil Procedure 15(c). [3] *See* 28 U.S.C. § 2242; *Littlejohn v. Artuz,* 271 F.3d 360, 363 (2d Cir.2001).

B. *Federal Rule of Civil Procedure 15(c)*

Where a habeas petitioner seeks to add new claims after the statute of limitations has expired, Rule 15(c) requires that the new claim "relates back" to the date of the original petition. *See* *Mayle v. Felix,* 545 U.S. 644, 655, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005). An amendment "relates back" when it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed.R.Civ.P. 15(c)(1)(B). In the habeas context, a proposed amendment arises out of the same "conduct, transaction, or occurrence" as an original petition "only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in both time and type from the originally raised episodes." *Mayle,* 545 U.S. at 657 (internal quotation omitted). New claims that merely stem from a petitioner's trial, conviction, or sentence do not satisfy Rule 15(c). *See* *id.* at 656–57.

***6** Hall has not told the Court what issues he intends to raise in his NYCPL § 440.10 motion; he states only that

it is "my belief that my collateral attack upon my conviction is meritorious and has a high probability of success." (June 13 letter at 1.) He notes elsewhere in his June 13 letter that, subsequent to his conviction, the New York Court of Appeals decided *People v. Hill,* 7 N.Y.3d 902 (2006), which "significantly altered the definition and standards for a conviction pursuant to New York Penal Law Section 125.25(2)." (June 13 letter at 1.) Hall asserts that the Court of Appeals failed to apply this new rule retroactively, and that doing so would invalidate his conviction. (*Id.*) As this Court must construe Hall's pro se habeas petition liberally, *see* *Haines v. Kemer,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam), the Court will assume for purposes of its decision that Hall intends to raise this issue in his NYCPL § 440.10 motion.

Hall's new claim asserting that he was entitled to retroactive application of a new state law redefining elements of the offense does not arise out of the same core facts that underly the exhausted claims in his petition, namely, sufficiency of the evidence, ineffective assistance of counsel, and defective grand jury proceedings. Even though Hall's new claim challenges the constitutionality of the same conviction, it is insufficient to unite Hall's new and old claims for purposes of Rule 15(c). *See* *Mayle,* 545 U.S. at 662 ("If claims asserted after the [AEDPA] oneyear period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, [the] limitation period would have slim significance."); *Soler v. U.S.,* Nos. 10 Civ. 04342, 05 Cr. 00165, 2010 WL 5173858, at *4 (S.D.N.Y. Dec.20, 2010) (affirming order to deny amended habeas petition where new claim of actual innocence "asserts a new ground for relief supported by facts that differ in both time and type from a claim of ineffective assistance of counsel") (internal quotation omitted)). Accordingly, Hall's new claim does not relate back to the date of his original petition, and the Court will not excuse Hall's failure to amend his petition before the one-year statute of limitations expired.[4] Halls' request for a stay is therefore denied.

DISCUSSION

I. Standard of Review

A district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). When a timely objection has been made to the recommendations of the magistrate judge, the court reviews the contested issues *de novo.* *Hynes v. Squillace,* 143 F.3d 653, 656 (2d Cir.1998). The Court, however, "may adopt those portions of the Report to which no objections have been made and which are not facially erroneous." *La Torres v. Walker,* 216 F.Supp.2d 157, 159 (S.D.N.Y.2000).

II. Hall's Objections to Magistrate Judge Smith's R & R

***7** Hall objects to Magistrate Judge Smith's conclusion that his conviction for depraved indifference murder should stand. (Objections at 5.) He contends that Magistrate Judge Smith failed to address that Hall cannot be guilty of both depraved indifference murder—which does not include an element of intent to kill—and intentional murder due to the different statutory *mens rea* requirements. (*Id.* at 3.)

Magistrate Judge Smith correctly determined that Hall's claim of insufficient evidence to support his conviction for depraved indifference murder is procedurally barred because Hall did not preserve this issue for appellate review. (R & R 10 (citing *Hall,* 820 N.Y.S.2d at 526). *See* *Coleman v. Thompson,* 501 U.S. 722, 730, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (district court lacks habeas jurisdiction "when a state court declined to address a prisoner's federal claim because the prisoner had failed to meet a state procedural requirement"); *Parker v. Ercole,* 666 F.3d 830, 834 (2d Cir.2012) (finding that petitioner "failed to preserve his claim that the evidence proving his guilt of depraved-indifference murder was insufficient to support the jury's verdict" and declining habeas review as "procedurally barred"). Accordingly, Hall's objection is without merit, and his petition for habeas corpus is dismissed.

CONCLUSION

For the foregoing reasons, the Court adopts Magistrate Judge Smith's R & R in its entirety. Hall's request for a stay is denied, and his petition for habeas corpus is dismissed. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253. The Clerk of Court is directed to enter judgment and terminate this case.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2864505

Footnotes

1 To the extent that Hall raises additional objections to the R & R in his June 13 letter, the Court considers those objections in its decision.

2 The facts are taken from the R & R, unless otherwise noted.

3 In the interest of efficiency, the Court will interpret Hall's June 13 letter as a combined request for leave to amend his petition.

4 Even if Hall's new claim did satisfy the test under Rule 15(c), Hall's request for leave to amend would still be inappropriate. District courts retain discretion to deny leave to amend "in order to thwart tactics that are abusive, dilatory, unfairly prejudicial or otherwise abusive." *Littlejohn,* 271 F.3d at 363 (citing *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). Leave to amend would not be appropriate at this late stage in the proceedings-nearly four years after the AEDPA statute of limitations period has expired-and would result in undue delay and prejudice the state's interest in the finality of criminal judgments.

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United States District Court,
S.D. New York.

Gustavo HOLGUIN, Petitioner,
v.
William LEE, Respondent.

No. 13 Civ. 1492(LGS)(JLC).
|
July 3, 2013.

MEMORANDUM ORDER

JAMES L. COTT, United States Magistrate Judge.

***1** On February 27, 2013, Gustavo Holguin, proceeding *pro se,* filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Dkt. No. 2). In his habeas petition, Holguin asserts five grounds for relief: (1) the People failed to prove his guilt beyond a reasonable doubt; (2) the People mischaracterized the evidence during trial and summation, which amounted to prosecutorial misconduct; (3) the pathologist who prepared the autopsy report did not testify at trial in violation of the Confrontation Clause; (4) his trial counsel was ineffective for failing to object to the People's mischaracterization of the evidence and the Confrontation Clause violation; and (5) his trial counsel was ineffective for failing to object to a 13–year delay between the date of the crime and Holguin's arrest and indictment.

By letter dated April 15, 2013, Holguin submitted a letter motion ("Holguin Motion") requesting that the Court stay the proceedings and hold his petition in abeyance so that he could exhaust two additional claims in state court: (1) that the trial court erred in failing to suppress an in-court eyewitness identification; and (2) that his incarceration is unconstitutional because the pre-trial eyewitness identification procedure was improperly tainted and there was no expert testimony about the inherent flaws of eyewitness identifications, (Dkt. No. 8). These claims are the subject of Holguin's § 440.10 motion to vacate his conviction, which is pending before the New York State Supreme Court. [1] Holguin's motion requesting a stay also appears to seek leave to amend his habeas petition to include his unexhausted claims under Rule 15(a) of the Federal Rules of Civil Procedure. (*Id.*). Respondent submitted an affirmation in opposition to Holguin's motion to stay on May 31, 2013. (Dkt. No. 13). Though the Court did not direct a response, Holguin submitted a reply dated June 12, 2013, styled as a "Memorandum of Law," which addressed certain arguments in Respondent's opposition ("Holguin Reply") (Dkt.No, 15). [2] For the reasons set forth below, Holguin's requests that the Court grant him leave to amend his petition to include unexhausted claims and grant a stay to exhaust those claims are denied.

I. *APPLICABLE STANDARDS*

A. *Standards for Amending a Habeas Petition*

A motion to amend a habeas petition is governed by Federal Rule of Civil Procedure 15(a). *Littlejohn v. Artuz,* 271 F.3d 360, 362–63 (2d Cir.2001); *see also* 28 U.S.C. § 2242 (An "[a]pplication for a writ of habeas corpus ... may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). Under Rule 15(a)(2), a party may amend its pleadings upon consent of the opposing party or leave of the court, and courts "should freely give leave when justice so requires." Fed.R.Civ.P. 15(a)(2). "Where it appears that granting leave to amend is unlikely to be productive, however, it is not an abuse of discretion to deny leave to amend." *Lucente v. International Bus. Mack Corp.,* 310 F.3d 243, 258 (2d Cir.2002) (citing *Ruffolo v. Oppenheimer & Co.,* 987 F.2d 129, 131 (2d Cir.1993)). Indeed, "[c]ourts should deny leave to amend a complaint where the amendment would be futile." *Cuevas v. United States,* No. 10 Civ. 5959(PAE)(GWG), 2013 WL 655082, at *6 (S.D.N.Y. Feb. 22, 2013) (citing *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). Allowing a petitioner to amend his habeas petition to include an unexhausted claim "would be futile if the court also declined to use the stay and abeyance procedure while the petitioner exhausts the claim in state court." *Spells v. Lee,* No. 11 Civ. 1680(KAM)(JMA), 2012 WL 3027865, at *5 (E.D.N.Y. July 23, 2012) (citing *Rivera v. Ercole,* No. 07 Civ. 3577(RMB)(AJP), 2007 WL 2706274, at *22 (S.D.N.Y. Sept. 18, 2007)); *see also Ramdeo v. Phillips,* No. 04 Civ. 1157(SLT), 2006 WL 297462, at *4 (E.D.N.Y. Feb.8, 2006) (If the court "is not prepared to grant petitioner a stay pending his exhaustion of [two unexhausted] claims, it would be futile to grant leave to amend the petition."). [3]

B. ***Standards for the Stay and Abeyance Procedure***

***2** If the Court were to grant Holguin leave to amend, his habeas petition would include both exhausted and unexhausted claims. Such petitions are deemed "mixed" and may not be adjudicated by federal district courts. *Rhines v. Weber,* 544 U.S. 269, 273, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). However, rather than dismissing a mixed petition, "a district court might stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims." *Id.* at 275. District courts may stay a habeas petition where "the petitioner can demonstrate that: (1) good cause exists for failing to exhaust the claims previously, (2) the claims are potentially meritorious, and (3) the petitioner did not intentionally engage in dilatory litigation tactics." *Perkins v. LaValley,* No. 11 Civ. 3855(JGK), 2012 WL 1948773, at *1 (S.D.N.Y. May 30, 2012) (citing *Rhines,* 544 U.S. at 277–78 and *Vasquez v. Parrott,* 397 F.Supp.2d 452, 464 (S.D.N.Y.2005)). "[S]tay and abeyance should be available only in limited circumstances" so as not to undermine the "twin purposes" of the federal habeas statute: "encouraging finality" and "streamlining federal habeas proceedings." *Rhines,* 544 U.S. at 277.

II. ***DISCUSSION***

A. ***Holguin Has Not Met His Burden of Demonstrating Good Cause For His Failure To Exhaust.***

Under *Rhines v. Weber,* "it is the petitioner who has the burden of demonstrating good cause for his failure to exhaust previously any unexhausted claims." *See Perkins,* 2012 WL 1948773, at *1. Holguin has not met this burden. Holguin's new claims about witness identification are based on statements made during his pre-trial suppression hearing, specifically regarding a photo array shown to the identifying witness, as well as the trial court's denial of motions to suppress that witness's identification and the identification at trial. Holguin Motion, at 5–6, 9–12. [4] Holguin was clearly aware of these facts at the conclusion of his trial in 2006, and he gives no explanation as to why his claims pertaining to the suppression hearing and witness identification could not have been raised on direct appeal. "The court cannot grant petitioner a stay of his habeas petition for the sole reason that petitioner failed to bring his claim earlier." *Spells,* 2012 WL 3027865, at *6 (denying stay for lack of good cause where petitioner was aware of underlying facts surrounding his claim for more than two and a half years prior to filing federal habeas petition); *see also Perkins,* 2012 WL 1948773, at *1 (refusing to grant request to stay where petitioner was seeking to exhaust claims in state court but "offered no explanation for his failure to exhaust (or even to raise) the claims asserted in the § 440.10 Petition prior to the time that he filed the original petition in this case").

The only potential justification Holguin offers in his motion (and it is unclear whether he is providing an explanation for his failure to exhaust or for his need to amend his petition) is that because he is not "an educated attorney and does not have the assistance of an educated attorney," "he should not be held to the same standards as an educated attorney." Holguin Motion, at 1. Holguin also states that "diligence standards and short statutory time limits are inequitable stumbling blocks to courthouse doors." *Id.* at 2. These rationales, however, are insufficient to show "good cause." *See, e.g., Madrid v. Ercole,* No. 08 Civ. 4397(ENV)(CLP), 2012 WL 6061004, at *2 (E.D.N.Y. Dec. 6, 2012) (holding that petitioner's arguments that he was "not a lawyer" and "was unaware of [his] newly-claimed basis for constitutional relief" did not constitute the "good cause" required for a stay-and-abeyance); *Spells v. Lee,* No. 11 Civ. 1680(KAM)(JMA), 2012 WL 3027540, at *7 (E.D.N.Y. May 23, 2012) (Report and Recommendation) (denying stay where "[p]etitioner's argument that he [was] 'not versed in the law' [was] not sufficient to constitute good cause under the *Rhines* standard"); *Marquez v. Goord,* No. 05 Civ. 3549(KMK)(LMS) 2013 U.S. Dist. LEXIS 24621, at *17–18, 28 (S.D.N.Y. Feb. 11, 2013) (finding that *pro se* petitioner was not entitled to leniency regarding statutory time limits and refusing to grant stay for untimely filed petition).

***3** In his reply, Holguin does address Respondent's argument that he lacks good cause for his failure to exhaust his claims currently pending in state court. Holguin Reply, at 1. He first states that petitioners "have to navigate a vast sea of complex, confusing procedural rules before their claim can be heard in federal courts." *Id.* The Supreme Court has, in fact, recognized that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' " under *Rhines. Pace v. DiGuglielmo,* 544 U.S. 408, 416, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005). Moreover, "[d]istrict courts have relied on this dicta to find good cause ... where the petitioner was confused as to whether his claims were properly exhausted in state court." *Keating v. People,* 708 F.Supp.2d 292, 299–300 (E.D.N.Y.2010) (citing *Fernandez v. Artuz,* No. 00

Civ. 7601(KMW)(AJP), 2006 WL 121943, at *4 (S.D.N.Y. Jan. 18, 2006). It is clear here, however, that Holguin was *not* reasonably confused as to the exhaustion of his claims. Indeed, he explicitly states in his motion that he is seeking a stay of his habeas petition so that he can exhaust his unexhausted claims in New York state court. Holguin Motion, at 1–2. As such, Holguin cannot plausibly suggest that any "reasonable confusion" should establish good cause. *See McCrae v. Alius,* No. 10 Civ. 2988(RRM), 2012 WL 3800840, at *9 (E.D.N.Y. Sept.2, 2012) (noting that "[i]n some instances, the circumstances and procedural history of a case can create 'reasonable confusion' about [a] petitioner's claims," but finding that petitioner "could not be confused about whether his claims have been adjudicated in state court" because he admitted that his claims had not been presented there). Further, to the extent that Holguin may be ignorant of state law procedures, this lack of knowledge is not enough to demonstrate reasonable confusion. *Id.* at *10 ("[A]s most habeas petitions are brought *pro se,* if an 'inadvertent failure' based on 'ignorance of the law' were enough to demonstrate reasonable confusion, the *Rhines* cause requirement would cease to exist.").

Holguin also contends in his reply that his appellate counsel was ineffective for failing to raise his unexhausted claims on direct appeal. Holguin Reply, at 2. Though the Second Circuit has not opined on the issue, "[m]ost district courts have ruled that ineffective assistance of counsel suffices to show good cause" in the stay-and-abeyance context. *Wallace v. Artus,* No. 05 Civ. 0567(SHS)(JCF), 2006 WL 738154, at *4 (S.D.N.Y. Mar. 23, 2006) (citing cases); *Rivera v. Ercole,* No. 07 Civ. 3577(RMB)(AJP), 2007 WL 2706274, at *23 (S.D.N.Y. Sept. 18, 2007); *Aessa v. Annetts,* No. 06 Civ. 5830(ARR), 2006 WL 3780392, at *2 (E.D.N.Y. Dec.21, 2006). However, Holguin has not ever before raised a claim of ineffectiveness of appellate counsel, nor does he seek a stay to bring such a claim in state court through a writ of *coram nobis. See McCrae,* 2012 WL 3800840, at *5 ("The exclusive state court remedy to raise an ineffective assistance of appellate counsel claim is the *coram nobis* petition." (citing *Daley v. Lee,* No. 10 Civ 6065(NGG), 2012 WL 2577472, at *7 (E.D.N.Y. July 3, 2012)). Accordingly, any claim of ineffectiveness of appellate counsel is unexhausted and does not constitute good cause for Holguin's failure to exhaust his pending state court claims. *Id.* at *9 (rejecting petitioner's assertion that ineffective of appellate counsel demonstrated good cause because, even assuming that "his appellate counsel was deficient in failing to raise certain issues on appeal, [it does not] explain [ ] why petitioner came to federal court before filing a ... writ of *coram nobis"); Redd v. Woughter,* No. 09 Civ. 9819(JGK), 2010 WL 4983169, at *1 (S.D.N.Y. Dec.3, 2010) (finding no good cause where petitioner provided no reason for not exhausting his ineffective assistance of appellate counsel claim before bringing his current habeas petition). [5]

***4** At the end of his reply, Holguin makes a brief unsupported contention that "he is eligible for habeas corpus relief because of his factual innocence." Holguin Reply, at 3. This is the first assertion of factual innocence that Holguin has raised before this Court. Holguin never raised a claim of innocence in state court, nor does he argue that some new, recently discovered evidence would support this claim. [6] Further, he does not indicate any intention to bring such a claim in a new § 440.10 petition. Accordingly, any claim of innocence cannot now serve as good cause to excuse his failure to exhaust. *Cf. Broxton v. Lee,* No. 09 Civ. 5373(DLI), 2011 U.S. Dist. LEXIS 130558, at *3 (E.D.N.Y. Nov. 10, 2011) (finding good cause for petitioner's failure to exhaust his claims because new evidence of innocence was only brought to his attention long after filing his initial habeas petition).

B. *Even If Holguin Could Establish Good Cause, The Claims He Seeks To Exhaust Are Procedurally Defaulted.*

Even if Holguin's unexhausted claims of innocence or the ineffectiveness of appellate counsel could serve as good cause for failure to exhaust his witness identification claims, his claims about witness identification are procedurally defaulted. *See Clark v. Perez,* 510 F.3d 382, 390 (2d Cir.2008) ("[W]hen a 'petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred,' the federal habeas court should consider the claim to be procedurally defaulted." (citing *Coleman v. Thompson,* 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991))). As discussed above, Holguin's claims are based on the record of the suppression hearing and trial and should have been brought on direct appeal; accordingly, these claims are procedurally defaulted in state court under New York Criminal Procedure Law § 440.10(2)(e), which mandates that a court deny petitioner's motion to vacate when

> [a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

N.Y.Crim. Proc. Law § 440.10(2)(c). Moreover, when a petitioner has failed to bring claims on direct appeal despite a sufficient record, his claims are deemed procedurally defaulted in federal court. *Sweet v. Bennett,* 353 F.3d 135, 139–140 (2d Cir.2003) (explaining that because "New York law requires a state court to deny a motion to vacate a judgment based on a constitutional violation where the defendant unjustifiably failed to argue the constitutional violation on direct appeal despite a sufficient record," petitioner's failure to argue such a claim on direct appeal rendered his claim procedurally defaulted for the purposes of federal habeas review) (citing N.Y.Crim. Proc. Law § 440.10(2)(c)) .[7]

***5** Review of such procedurally defaulted claims is limited because "[a] claim resolved on independent and adequate state procedural grounds is generally not subject to review on habeas." *Dunn v. Sears,* 561 F.Supp.2d 444, 452 (S.D.N.Y.2008) (citing *Coleman,* 501 U.S. at 729–30). Holguin's two new claims that he seeks to exhaust are thus unreviewable as "[f]ailure to raise a claim on direct appeal has been held to be an 'adequate and independent state ground' sufficient to bar a petitioner's habeas corpus claim." *Rodriguez v. Lee,* No. 10 Civ. 3451(RMB)(JCF), 2011 WL 1362116, at *6 (S.D.N.Y. Feb. 22, 2011) (citing *Aparicio v. Artuz,* 269 F.3d 78, 93 (2d Cir.2001)) (Report and Recommendation), *adopted by* 2011 WL 1344599 (S.D.N.Y. Apr.8, 2011).

Furthermore, a habeas petitioner can only avoid dismissal of his procedurally defaulted claims if he can demonstrate "cause for the default and prejudice from the asserted error," *House v. Bell,* 547 U.S. 518, 536, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), or a "fundamental miscarriage of justice." *Murray v. Carrier,* 477 U.S. 478, 495–96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). A miscarriage of justice is satisfied by a showing of actual innocence. *See* *Schlup,* 513 U.S. at 326–27; *Dunham v. Travis,* 313 F.3d 724, 730 (2d Cir.2002) ("Actual innocence means factual innocence, not mere legal insufficiency." (internal citations omitted)).

Holguin makes no suggestion that cause exists for his procedural default, which "ordinarily turn[s] on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray,* 477 U.S. at 488.[8] Nor does he argue he was so prejudiced by the trial court's errors in that they "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494. Finally, though Holguin does make a fleeting assertion in his reply that "he is eligible for habeas corpus relief because of his factual innocence," he presents absolutely no "new reliable evidence" that would make it "more likely than not any reasonable juror would have reasonable doubt." *House,* 547 U.S. at 538; *see also* *Rivas v. Fischer,* 687 F.3d 514, 541 (2d Cir.2012). As such, his claim of "actual innocence" is inadequate to overcome the procedural bar of his claims.

III. *CONCLUSION*

Holguin has not shown good cause to justify granting him a stay-and-abeyance to exhaust claims pertaining to the suppression hearing and witness identification. Denial of his request to stay is further warranted because the claims he seeks to exhaust are procedurally defaulted. Finally, in light of the Court's denial of Holguin's motion to stay his habeas petition, it would be futile to permit him leave to amend his petition to include his unexhausted claims.

Accordingly, Petitioner's motion to stay the instant proceedings and to hold his habeas petition in abeyance to exhaust two additional state claims is DENIED. Respondent shall file and serve his response to the petition, including the transcripts and briefs identified in Rule 5 of the Rules Governing Section 2254 Cases in the United States District

Courts, by August 5, 2013. The Petitioner may file and serve reply papers, if any, within thirty days from the date he is served with Respondent's response.

***6 SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2013 WL 3344070

Footnotes

1 According to Respondent, Holguin's case was on the state court's calendar for June 11, 2013, but the People intended to seek an adjournment to respond to Holguin's § 440.10 motion. Affirmation in Opposition to Petitioner's Motion to Stay Petition, at 2. The New York State Unified Court System "WebCrims" website indicates that Holguin's next appearance date is July 16, 2013. *See* https://iapps.courts.state.ny.us/webcrim_attorney/ DefendantSearch, search conducted using search term "Gustavo Holguin."

2 As Holguin is proceeding *pro se,* the Court must read his pleadings "liberally" and interpret them "to raise the strongest arguments" that they may suggest. *Chavis v. Chappius,* 618 F.3d 162, 170 (2d Cir.2010). Still, courts generally "do not consider issues raised in a reply brief for the first time, because if [a litigant] raises a new argument in a reply brief [the opposing party] may not have an adequate opportunity to respond to it." *In re Harris,* 464 F.3d 263, 268 n. 3 (2d Cir.2006) (internal citations omitted). However, the Court will consider issues raised in Holguin's reply papers to the extent they respond to arguments asserted in Respondent's opposition. *See, e.g., Go v. Rockefeller Univ.,* 280 F.R.D. 165, 171 (S.D.N.Y.2012).

3 Courts have also found it futile to grant leave to amend where the claims a petitioner is seeking to exhaust would be time-barred under the Antiterrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations. *Madrid v. Ercole,* No. 08 Civ. 4397(ENV)(CLP), 2012 WL 6061004, at *2 (E.D.N.Y. Dec. 6, 2012); *Jones v. Conway,* No. 09 Civ. 6045(MAT), 2010 WL 5479649, at *2 (W.D.N.Y. Dec.29, 2010); *Jorge v. Phillips,* No. 05 Civ. 6091(LAP)(MHD), 2008 WL 344718, at *1 (S.D.N.Y. Jan. 31, 2008). In his initial habeas petition, Holguin seems to acknowledge that he faces issues of timeliness with respect to his claims brought therein (Dkt. No, 2, at 6–8). And, if those claims are time-barred, the new claims that he seeks to exhaust would certainly be time-barred as well. However, also in his habeas petition, Holguin asserts grounds that may entitle him to equitable tolling. *Id.* Because any questions about AEDPA's statutory limitation will apply to all of Holguin's claims and because Respondent has not raised the issue in his opposition to Holguin's motion for a stay, the Court declines to adjudicate the issue at this time and will consider it in its full review of Holguin's petition.

4 Holguin's motion submitted to this Court attaches his § 440.10 notice of motion and affidavit in support. However, as there are different paginations for each document, citations here will refer to the ECF page number.

5 Moreover, in those cases where petitioners sought to establish good cause through ineffectiveness of appellate counsel, they were seeking a stay specifically to exhaust those claims of ineffectiveness. Holguin does not attempt to do so here.

6 In cases where a petitioner has procedurally defaulted his claim, a showing of actual innocence with "new reliable evidence" may allow petitioner to overcome that procedural bar. *See Schlup v. Delo,* 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). For further discussion of this standard, *see infra* at 10–11.

7 Such procedurally defaulted claims are also deemed "exhausted" for purposes of federal review, despite the fact that they may never have actually been presented to a state court. *See, e.g., Grey v. Hoke,* 933 F.2d 117, 120 (2d Cir.1991) ("For exhaustion purposes, 'a federal habeas court need not require that a federal

claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred,' " (citing *Harris v. Reed,* 489 U.S. 255, 263 n. 9, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)); *McCrae,* 2012 WL 3800840, at *4 ("Where a petitioner has failed to exhaust his claims, but the state court to which he must present those claims would find them procedurally barred, a federal habeas court must deem the claim to be exhausted but procedurally defaulted").

8 Holguin's belated argument that his appellate counsel was ineffective cannot serve as cause to excuse his procedural default. *Murray,* 477 U.S. at 489 ("[A] claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."). *See also* *DiSimone v. Phillips,* 461 F.3d 181, 191 (2d Cir.2006).

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United States District Court, E.D. New York.

Jerry KNIGHT, Petitioner,
v.
John COLVIN, Superintendent, Five Points Correctional Facility, Respondent.

17-CV-2278 (MKB)
|
Signed 02/11/2019

Attorneys and Law Firms

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MEMORANDUM & ORDER

MARGO K. BRODIE, United States District Judge

***1** Petitioner Jerry Knight, proceeding *pro se* and currently incarcerated at Five Points Correctional Facility, brings the above-captioned petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he alleges that he is being held in state custody in violation of his federal constitutional rights. (Pet., Docket Entry No. 1.) Petitioner's grounds for relief arise from a judgment of conviction after a jury trial in the Supreme Court of the State of New York, Kings County, for assault in the first degree and criminal possession of a weapon in the second degree. (*Id.* at 2.)

Currently before the Court is Petitioner's renewed request to hold his petition in abeyance to allow him to file a motion to vacate his conviction pursuant to section 440.10 of the New York Criminal Procedure Law ("440 Motion") in state court, and exhaust his unexhausted claims. (Mot. for Pet. to be Held in Abeyance ("Stay Mot.") 1, Docket Entry No. 17.) For the reasons set forth below, the Court denies Petitioner's motion to hold his petition in abeyance. Within sixty (60) days of this Memorandum and Order, Petitioner may amend his habeas petition to remove his unexhausted claims, and proceed solely on his exhausted claims.

I. Background

On September 20, 2012, a jury convicted Petitioner of assault in the first degree and criminal possession of a weapon in the second degree in connection with the shooting of Cleveland White. (Pet. 2.) On October 15, 2012, a judge sentenced Petitioner to concurrent prison terms of twenty-three years on the assault count and ten years on the weapon possession count, with five years of post-release supervision. (*Id.*) Petitioner appealed his conviction to the New York Appellate Division, Second Department, claiming that: (1) the conviction was not supported by legally sufficient evidence and was against the weight of the evidence; (2) the trial court improperly denied his request for new counsel after an inadequate inquiry; and (3) his sentence was excessive. (Pet'r App. Div. Brief, annexed to Affirmation in Opp'n to Pet. ("Resp't Opp'n") and Mem. in Opp'n ("Resp't Opp'n Mem.") as Ex. E, Docket Entry No. 7-10.) On December 9, 2015, the Appellate Division affirmed the conviction, rejecting each of Petitioner's claims on the merits. *People v. Knight*, 19 N.Y.S.3d 901 (App. Div. 2015). Petitioner sought leave to appeal from the New York Court of Appeals on the basis that the trial court improperly denied his request for new counsel. (Pet'r Letter Briefs, annexed to Resp't Opp'n and Resp't Opp'n Mem. as Exs. H and I, Docket Entry No. 7-10.) On April 4, 2016, the New York Court of Appeals denied leave to appeal. *People v. Knight*, 27 N.Y.3d 1001 (2016).

On March 31, 2017, Petitioner filed a timely habeas petition with the Court, which includes both exhausted and unexhausted claims. (Pet.) On June 14, 2017, the District Attorney's Office of King's County filed its opposition to the petition. (Resp't Opp'n; Resp't Opp'n Mem.) On April 26, 2018, after the Court granted multiple extensions, Petitioner filed his reply to the District Attorney's opposition. (Reply to Resp't Response to Order to Show Cause ("Pet'r Reply"), Docket Entry No. 18.)

a. Petitioner's initial stay request

***2** In his petition, Petitioner requested that the Court hold his petition in abeyance, i.e., stay his petition, to allow him to exhaust his unexhausted claims through a 440 Motion. (Pet. 1; *see also* Pet'r Letter dated Apr. 25, 2017, Docket Entry No. 5; Pet'r Letter dated June 16, 2017, Docket Entry No. 8.)[1] The petition includes four claims: (1) deprivation of right to counsel; (2) insufficient evidence to find proof of

guilt beyond a reasonable doubt; (3) ineffective assistance of trial counsel; and (4) prosecutorial misconduct at trial. (*See* Pet. 6–11.) Petitioner states that he failed to exhaust his ineffective assistance of trial counsel and prosecutorial misconduct claims in state court because the claims were "unpreserved," as "counsel did not object," and "[t]herefore the grounds w[ere] never raised" or presented on appeal in Petitioner's state court proceedings. (*Id.* at 9, 11–12.) Respondent acknowledges that these claims are unexhausted. (Resp't Opp'n Mem. 1 ("The third and fourth claims are unexhausted because petitioner has not asserted either claim in state court.").)

In support of his ineffective assistance of trial counsel claim, Petitioner alleges that:

> Counsel spoke to [his] girlfriend and made negative remarks about [him], and even told [his] girlfriend not to come to [his] trial, and how he felt [Petitioner] was guilty; counsel failed to investigate the crime scene and other witnesses without any logical reason that would benefit the case; counsel failed to object to [Petitioner] being charged with attempted murder 2 nd and assault 1 st when both charges are identical and improperly charged.

(Pet. 9.) As to his prosecutorial misconduct claim, Petitioner alleges that the "District Attorney used illegally obtained evidence as well as false information to pursue a conviction of [him]" and the "District Attorney allowed the complaining victim to give false testimony about receiving a deal in exchange for his testimony at trial against [him]." (*Id.* at 10.)

Respondent argued that a stay was not appropriate because "Petitioner ha[d] not offered a sufficient explanation for why he was unable to exhaust his ... claims in state court before he filed his habeas corpus petition," and although Petitioner asserted that his reason for failure to exhaust was "because he had not yet obtained relevant documents to support his unexhausted claims," he nevertheless failed to "identify the documents he needs to acquire, ... describe any efforts he has made to acquire those documents, [or] ... explain why he could not have acquired those document sooner." (Resp't Opp'n Mem. 24.)

By Memorandum and Order dated February 12, 2018, the Court denied Petitioner's request for abeyance without prejudice. (Mem. and Order dated Feb. 12, 2018, Docket Entry No. 12.) The Court determined that Petitioner had not shown good cause for failure "to exhaust his ineffective assistance of trial counsel and prosecutorial misconduct claims." (*Id.* at 4.) The Court reasoned that:

> ***3** Petitioner does not explain how or why the fact that his claims were "unpreserved" prevented him from exhausting those claims. Nor does Petitioner allege that any of his unexhausted claims concern matters that were unknown to him during his criminal proceedings. In his June 16, 2017 letter to the Court, Petitioner suggests that he is in the process of gathering documents in support of his claims, but does not explain how those documents support his claims, why he did not previously gather these documents, or why he filed his petition without all of the relevant support for his claims.

(*Id.* (internal citations omitted).)

b. Petitioner's renewed motion to hold the petition in abeyance

On April 13, 2018, Petitioner submitted a new motion for his petition to be held in abeyance so that he can exhaust his two unexhausted claims — ineffective assistance of trial counsel and prosecutorial misconduct at trial — in state court pursuant to a 440 Motion. [2] (Stay Mot.) On October 16, 2018, Respondent opposed Petitioner's motion. (Resp. in Opp'n re Mot. to Stay ("Resp't Stay Opp'n"), Docket Entry No. 19.)

In support of his renewed motion, Petitioner notes that he "was not responsible for the grounds raised in his direct appeal, and had no say ... about what grounds were going to be raised." (Stay Mot. 2.) Petitioner further states that he "received legal advice and assistance from the law clerks at

his facility" in drafting his petition, and "was told that all he [had] to do was put 'counsel did not object and the claims were unpreserved' where it asks why the issues were not raised in direct appeal." (*Id.*)

Petitioner alleges that although his appellate counsel "disregarded his wishes" to submit a 440 Motion prior to his direct appeal, "Petitioner continued to pursue a [440 Motion] but [has] yet to obtain all of the documentary evidence to support his motion." (*Id.*) Further, Petitioner claims that he has been "able to obtain most of the documentary evidence" needed to pursue a 440 Motion on the unexhausted claims, "and is currently in the process of getting an affidavit from his girlfriend and '*Giglio* material' (evidence that proves the complaining victim received a deal in exchange for his testimony), which would conclude his search for documentary evidence." (*Id.*)

Respondent argues that the fact that Petitioner's "appellate counsel disregarded [P]etitioner's request to file a [440 Motion]" does not constitute good cause for failure to exhaust his claims and "does not explain why [P]etitioner could not have filed such a motion *pro se* either concurrent with his direct appeal or after his direct appeal was decided." (Resp't Stay Opp'n 1.) In addition, Respondent argues that "[P]etitioner has not shown that he would be able to file his motion in state court in a timely manner should this Court grant his application for a stay." (*Id.* at 1–2.) Respondent does not respond directly to Petitioner's assertions regarding the evidence he is "in the process of getting."[3] (Stay Mot. 2.)

II. Discussion

a. Standard of review

When a habeas petition is a "mixed" one — that is, one containing both exhausted and unexhausted claims — a district court has discretion to hold the petition in abeyance to permit a petitioner to exhaust the unexhausted claims, provided that the "petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that [he] engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278 (2005).

b. Petitioner has not shown good cause

***4** Petitioner fails to show good cause under *Rhines*. As several district courts in the Second Circuit have noted, "[t]he Supreme Court and the Second Circuit have yet to define what constitutes 'good cause' under *Rhines*." *Henry v. Lee*, No. 12-CV-5483, 2013 WL 1909415, at *6 (E.D.N.Y. May 8, 2013); *see also Cordero v. Miller*, No. 15-CV-0383, 2018 WL 3342573, at *2 (W.D.N.Y. July 9, 2018), *reconsideration denied*, No. 15-CV-0383, 2018 WL 4846272 (W.D.N.Y. Oct. 5, 2018).

District courts in this Circuit have primarily followed two different approaches in determining whether the *Rhines* "good cause" requirement has been met. Some courts find "that a petitioner's showing of 'reasonable confusion' constitute[s] good cause for failure to exhaust his claims before filing in federal court."[4] *Whitley v. Ercole*, 509 F. Supp. 2d 410, 417–18 (S.D.N.Y. 2007) (collecting cases) (noting that "[t]his ... manner of defining 'good cause' would allow a petitioner to show the reasons, subjectively, for the delay in filing his petition").

Other courts require a more demanding showing — that some external factor give rise to the petitioner's failure to exhaust the claims. *See, e.g.*, *Ramdeo v. Phillips*, No. 04-CV-1157, 2006 WL 297462, at *5 (E.D.N.Y. Feb. 8, 2006) (collecting cases and noting that such "courts have reasoned that 'good cause,' like 'cause' in the procedural default context, must arise from an objective factor external to the petitioner which cannot fairly be attributed to him or her" (internal quotation marks and citations omitted)); *see also* *Whitley*, 509 F. Supp. 2d at 417 (noting that in that case and under this more demanding approach, "a 'good cause' requirement would look for some reason, external to Petitioner, to explain Petitioner's delay in raising the issue of ineffective representation, from April 18, 2002, when [the] conviction was entered, to November 28, 2006," when the 440 Motion was filed).

For the reasons set forth below, Petitioner has not shown good cause under either approach.

i. Petitioner has not expressed reasonable confusion

Petitioner has not expressed confusion, let alone reasonable confusion, regarding the delay in his state filing or the existence of his unexhausted claims. Instead, Petitioner specified in his petition that his claims were not exhausted in state court and notified the Court that he intended to file a 440 Motion, (*see* Pet. 1), and more recently again notified the Court that he intends to file a 440 Motion once he receives certain evidence, (Stay Mot. 3). Thus, prior to filing the petition, Petitioner knew that he needed to file a 440 Motion as to his unexhausted claims, and therefore cannot show reasonable confusion. *See Davis v. Graham*, 2018 WL 3996424, at *3 (finding no good cause, in part because it was not "apparent that Petitioner 'was confused as to whether his claims were properly exhausted in state court.' ") (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005)); *Young v. Great Meadow Corr. Facility Superintendent*, No. 16-CV-1420, 2017 WL 480608, at *6 (S.D.N.Y. Jan. 10, 2017) (noting that petitioner had not demonstrated confusion where "[t]o the contrary: petitioner identified the need to file a [440 motion] in his original petition"); *Holguin v. Lee*, No. 13-CV-1492, 2013 WL 3344070, at *3 (S.D.N.Y. July 3, 2013) (finding no reasonable confusion where it was "clear" that petitioner "was *not* reasonably confused as to whether his claims were properly exhausted in state court." (emphasis in original)); *but cf. Castellanos v. Kirkpatrick*, No. 10-CV-5075, 2013 WL 3777126, at *2 (E.D.N.Y. July 16, 2013) (noting that district courts have found good cause shown "where the wording of a state court decision caused a petitioner reasonable confusion about his claims and their viability ..., and where a pro se petitioner was unaware of the procedure for raising an ineffective assistance of counsel claim in the state." (internal quotation marks and citations omitted)).

ii. Petitioner has not sufficiently shown that any objective factor caused his failure to exhaust claims

***5** Petitioner has not sufficiently shown any objective factor that is responsible for his failure to exhaust his claims in state court. Districts courts "cannot grant petitioner a stay of his *habeas* petition for the sole reason that petitioner failed to bring his claim earlier." *Holguin*, 2013 WL 3344070, at *2 (quoting *Spells v. Lee*, No. 11-CV-1680, 2012 WL 3027865, at *6 (E.D.N.Y. July 23, 2012)); *see also Scott v. Phillips*, 05-CV-0142, 2007 WL 2746905, at *7 (E.D.N.Y. Sept. 19, 2007) (noting that if the court granted a stay on the basis of petitioner simply not bringing "the claim earlier, despite admittedly being previously aware of the facts supporting the claim, it would be defeating [the Anti-Terrorism and Effective Death Penalty Act of 1996's (AEDPA)] twin purposes of encouraging finality and increasing the incentives for petitioners to exhaust all claims prior to filing *habeas* petition in federal court.").

In support of his stay request, Petitioner appears to assert three potential external factors that have given rise to his failure to exhaust his ineffective assistance of trial counsel and prosecutorial misconduct claims in state court: (1) that he was not responsible for the grounds raised in his appeal; (2) that appellate counsel "disregarded his wishes" to submit an earlier 440 Motion; and (3) that Petitioner has continued to pursue a 440 Motion but has yet to obtain all of the documentary evidence he needs to file it. (Stay Mot. 2.)

Based on the facts of this case, these factors are insufficient to constitute external factors not attributable to Petitioner.

1. Petitioner's lack of legal knowledge and appellate counsel's actions are insufficient external factors

Petitioner's first two assertions — that he was not responsible for deciding the grounds to raise in his appeal, and that appellate counsel did not assist him in submitting a 440 Motion — are insufficient to establish good cause. *Simpson v. Yelich*, No. 18-CV-0417, 2018 WL 4153928, at *4 (N.D.N.Y. Aug. 30, 2018) ("Petitioner's pro se status and inexperience with the law are insufficient to establish good cause."); *see also Thomas v. Artus*, No. 16-CV-6132, 2017 WL 1046333, at *1 (W.D.N.Y. Mar. 20, 2017) (finding failure to show good cause where a correctional facility law clerk had alerted the petitioner to a new claim, because "ignorance of the law [was] the only reason [p]etitioner ha[d] offered for his failure to timely exhaust his new claim," and petitioner could not "contend that he was previously ignorant of the new claims' factual predicates"); *Craft v. Kirkpatrick,* No. 10-CV-6049, 2011 WL 2622402, at *10 (W.D.N.Y. July 5, 2011) ("The Court has found no cases supporting the proposition that a petitioner's ignorance of the law constitutes 'good cause' for the failure to exhaust."). In addition, although Petitioner argues that he was not responsible for the grounds raised in his appeal, it is unclear that Petitioner's unexhausted claims could have been pursued on direct appeal, as Petitioner himself suggests that the claims may be based on information outside of the record. (*See, e.g.*, Stay Mot. 2 (noting that Petitioner is obtaining documentary evidence to support his unexhausted

claims, has obtained some of it, and is still seeking an affidavit from his girlfriend and "*Giglio* material.").)

Further, Petitioner's assertion that he informed his appellate counsel of his desire to file a 440 Motion indicates that Petitioner knew of the factual predicates for such a Motion at the time of his appeal, and, as Respondent argues, "that [P]etitioner's appellate counsel disregarded [P]etitioner's request to file a [440 Motion] does not explain why [P]etitioner could not have filed such a [M]otion *pro se* either concurrent with his direct appeal or after his direct appeal was decided." (Resp't Stay Opp'n 1); *see also Young*, 2017 WL 480608, at *6 (noting that to the extent petitioner's ineffective assistance of trial counsel claim arose "from matters outside of the trial court record," petitioner did not offer an explanation for failure to file his 440 [M]otion while his direct appeal was pending); *Newman v. Lempke*, No. 13-CV-0531, 2014 WL 4923584, at *3 (W.D.N.Y. Sept. 30, 2014) (finding no good cause shown where petitioner had been aware "that neither his appellate counsel nor another attorney retained by petitioner would be presenting [his ineffective assistance of counsel] claim to the state courts in a [440 Motion]," and still had not presented his claims earlier).

2. Petitioner has not sufficiently shown that he is waiting for evidence due to an external factor

***6** With respect to Petitioner's last assertion, that he has continued to pursue a 440 Motion but has yet to obtain all of the documentary evidence he needs to file it, Petitioner has not sufficiently explained why he is still waiting on such evidence.[5] As of Petitioner's last update to the Court, on April 13, 2018, he was still "in the process of getting an affidavit from his girlfriend and '*Giglio* material.' " (Stay Mot. 2.)

A. Petitioner has not shown good cause for why he is waiting on evidence to exhaust his ineffective assistance of trial counsel claim

The Court presumes that the affidavit from Petitioner's girlfriend is to support his ineffective assistance of trial counsel claim, given that the asserted factual basis for that claim is that "[c]ounsel spoke to [Petitioner's] girlfriend and made negative remarks about [Petitioner], and even told [Petitioner's] girlfriend not to come to [Petitioner's] trial, and how he felt [Petitioner] was guilty." (Pet. 9.) Petitioner also claims that his trial counsel was ineffective because "counsel failed to investigate the crime scene and other witnesses ... [and] failed to object to [Petitioner] being charged with attempted murder 2 nd and assault 1 st when both charges are identical and improperly charged." (*Id.*)

Even if the Court were to assume the truth of these statements, Petitioner has known this information since his trial. Petitioner has not explained why he has been unable to obtain an affidavit from his girlfriend in the more than two-and-a-half years since the New York Court of Appeals denied Petitioner leave to appeal, and the more than one-and-a-half years since the filing of his habeas petition. *See, e.g.*, *Young*, 2017 WL 480608, at *2 (finding no good cause shown for failure to exhaust an ineffective assistance of trial counsel claim even when it hinged "on materials outside the record" and where the petitioner argued that the claim "required considerable investigation," in part because the petitioner failed to provide or describe the "off-the-record" documents); *Porter v. Keyser*, No. 15-CV-0816, 2016 WL 1417847, at *2 (S.D.N.Y. Apr. 8, 2016) (finding no good cause shown for failure to exhaust an ineffective assistance of appellate counsel claim, where petitioner provided "no explanation at all for his decision to wait ... nearly two full years after the resolution of his direct appeal" to raise the claim in state court); *Spurgeon v. Lee*, No. 11-CV-0600, 2011 WL 1303315, at *2 (E.D.N.Y. Mar. 31, 2011) (finding, where a 440 Motion had yet to be filed and petitioner was in the process of drafting a letter to his trial counsel, no good cause shown for failure to exhaust an ineffective assistance of trial counsel claim because the facts underlying petitioner's claim had "been known to petitioner since his trial," and petitioner had "not explain[ed] why he did not raise th[e] claim to a state court earlier, or why he did not request such an affirmation from his trial counsel at any point before he filed his petition").

B. Petitioner has not shown good cause for why he is waiting on evidence to exhaust his prosecutorial misconduct claim

***7** Petitioner describes the "*Giglio* material" that he is seeking as "evidence that proves the complaining victim received a deal in exchange for his testimony." (Stay Mot. 2.) Thus, the Court presumes that the "*Giglio* material" Petitioner seeks is to support his prosecutorial misconduct at trial claim, given that Petitioner's stated support for that claim includes that "[t]he District Attorney used illegally obtained evidence

as well as false information," and that the "District Attorney allowed the complaining victim to give false testimony about receiving a deal in exchange for his testimony at trial." (Pet. 10.)

Plaintiff has not sufficiently shown that there is an external factor that has prevented him from obtaining the "*Giglio* material" he seeks and exhausting his prosecutorial misconduct claim. First, the facts underlying the claim have been known to Petitioner since the time of trial. (Stay Mot. 2 (admitting that Petitioner had made previous attempts to obtain such "*Giglio* material" during the course of Petitioner's state court proceedings)); *see also Spurgeon*, 2011 WL 1303315, at *3 (finding that petitioner had not shown good cause where petitioner had yet to file a 440 Motion and "the facts underlying the alleged prosecutorial misconduct were known to the petitioner at the time of trial").

Second, Petitioner does not inform the Court whether the "*Giglio* material" he refers to is information that was disclosed during the course of his state court proceedings, newly discovered information that had been suppressed, or new information that he is seeking. During the state court proceedings, the trial judge confirmed that the District Attorney had submitted its *Brady* material. [6] (Jury Selection Tr. 6:13–6:16, annexed to Resp't Opp'n and Resp't Opp'n Mem. as Ex. B, Docket Entry No. 7-2 ("THE COURT: You already provided me with a witness list, all the *Rosario, Brady* and *Consolazio* have been turned over? MS. CHAVIS: Yes, Your Honor.").) Petitioner does not specify what the "*Giglio* evidence" consists of, nor why he does not have it, and thus it is unclear if such "*Giglio* material" even exists. Petitioner argues that the prosecutor "allowed the complaining victim to give false testimony about receiving a deal in exchange for his testimony at trial," (Pet. 10), but it appears that the complaining victim did not receive any sort of deal at trial. (*See, e.g.*, Resp't Opp'n Mem. (citing White's testimony and stating that "White was not promised anything in exchange for his testimony.").) [7]

Third, Petitioner alleges that he "made a [FOIL] request [three] years ago" during the course of his state court proceedings for "*Giglio* material," and "was denied because his direct appeal was still pending," (Stay Mot. 2), but this does not, in and of itself, amount to an external factor sufficient to show good cause, *see Williams v. Bradt*, No. 10-CV-3910, 2011 WL 531732, at *2 (E.D.N.Y. Feb. 8, 2011) (finding that petitioner had failed to show good cause because "[t]he alleged failure to receive certain unidentified documents that are in all likelihood documents that are part of the record of the state court proceedings in this case, does not constitute good cause" and "the state court documents were accessible to Petitioner prior to bringing [the] habeas petition"). Petitioner has not identified any other attempt to obtain such materials since that time, and his FOIL requests do not appear to request any information that could be deemed "*Giglio* material." *See Cordero*, 2018 WL 3342573, at *4 (finding that petitioner had not shown good cause or a sufficient factor external to him where petitioner stated that he was waiting for records from the County Court, but "ha[d] not explained why, apart from the fact that he is *pro se* and unschooled in the law, he was unable to begin the process of obtaining the ... records sooner"). Instead, Petitioner appears to ask the Court to "order the District Attorney to turn over the '*Giglio* material.' " (Stay Mot. 3.) However, "a habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Moreover, because Petitioner has failed to show good cause, the Court does not consider this request.

***8** For these reasons, based on the facts of this case, Petitioner has not sufficiently shown that an external factor as opposed to his own actions have caused the failure to collect the evidence he still seeks, and for failure to exhaust his claims. *See Ramdeo*, 2006 WL 297462, at *5 (noting that under the external factor good cause standard, such good cause "must arise from an objective factor external to the petitioner which cannot fairly be attributed to him" (internal quotation marks and citations omitted)).

III. Conclusion

For the foregoing reasons, the Court denies Petitioner's renewed motion to stay the petition. The Court grants Petitioner sixty (60) days from the date of this Memorandum and Order to amend his petition by removing the unexhausted claims, and to proceed on his exhausted claims. *Rhines*, 544 U.S. at 278 ("[I]f a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief." (citation and internal quotation marks omitted)). If the Court does not receive an amended petition, it will presume that Petitioner prefers to have the Court proceed on his exhausted claims alone, rather than dismiss his

entire petition. *See Young*, 2017 WL 480608, at *6 ("[T]he Court will presume, unless petitioner expressly indicates otherwise in his reply brief or other filing, that he would rather withdraw his unexhausted claim than face the dismissal of his entire petition.").

SO ORDERED.

All Citations

Slip Copy, 2019 WL 569032

Footnotes

1 In addition to his petition, Petitioner subsequently filed two letters with the Court dated April 25, 2017 and June 16, 2017, reiterating his request to hold his petition in abeyance, (*see* Pet'r Letter dated Apr. 25, 2017, Docket Entry No. 5; Pet'r Letter dated June 16, 2017, Docket Entry No. 8), and stating that he has filed requests pursuant to New York's Freedom of Information Law, N.Y. Pub. Off. Law § 84 *et seq.* ("FOIL") to obtain legal documents in support of his "legal issues," (Pet'r Letter dated June 16, 2017). Petitioner attached to the June 16, 2017 letter copies of his FOIL requests for documents that he suggests are relevant to his 440 Motion. (*Id.* at 3–5.) Petitioner's FOIL requests seek "copies of any and all sanctions against [him] that was [sic] imposed in May of 2012 (this includes any security changes and/or classification changes or the like)"; the names of all court reporters who reported on criminal proceedings in docket number 2012KN054632 and in another illegible docket number; and copies of all transcripts pertaining to docket number 2012KN054632. (*Id.*)

2 As Petitioner is proceeding *pro se*, the Court reads his motion "liberally" and interprets it "to raise the strongest arguments" that it may suggest. *See* *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010).

3 Since Petitioner filed his renewed request for a stay on April 13, 2018, the Court has not received an update from Petitioner on the disposition of his anticipated 440 Motion, or the status of the evidence that Petitioner sought at the time of filing his renewed request.

4 This interpretation arises from the Supreme Court's dicta in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), a case in which the Court opined that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." *Pace*, 544 U.S. at 416; *see also* *Davis v. Graham*, No. 16-CV-0275, 2018 WL 3996424, at *2 (W.D.N.Y. Aug. 21, 2018) ("Some district courts interpret the Supreme Court dictum in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), to suggest that a petitioner's reasonable confusion about exhaustion and state filing deadlines constitutes 'good cause.' " (citation omitted)); *Young v. Great Meadow Corr. Facility Superintendent*, No. 16-CV-1420, 2017 WL 480608, at *5–6 (S.D.N.Y. Jan. 10, 2017) (noting that "[s]everal district courts have interpreted *Pace* to indicate that 'good cause' for an order of stay and abeyance need not be based on any factor external to petitioner but rather is 'a broader, more forgiving concept.' ") (quoting *McCrae v. Artus*, No. 10-CV-2988, 2012 WL 3800840, at *9 (E.D.N.Y. Sept. 2, 2012)).

5 In addition, although Petitioner claims that he has been "able to obtain most of the documentary evidence" needed to pursue a 440 Motion, (Stay Mot. 2), he does not specify the nature of the evidence, *see* *Boykins v. Superintendent Auburn Corr. Facility*, No. 12-CV-548S, 2015 WL 3604030, at *3–4 (W.D.N.Y. June 5, 2015) (finding that petitioner failed to show good cause in part because he "provided no further explanation" of the "new evidence" the petitioner said he was in possession of, and that thus the existence of new evidence was not sufficient to explain why petitioner had not exhausted the claims earlier).

6 The Supreme Court's decision in *Giglio v. United States*, 405 U.S. 150 (1972) expanded upon its decision in *Brady v. Maryland*, 373 U.S. 83 (1963), which held that "[t]he prosecution has a constitutional duty to

disclose evidence favorable to an accused when such evidence is material to guilt or punishment." *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (citing *Brady*, 373 U.S. at 87).

7 The Court has previously held, and reemphasizes, that "[t]he nature of a *Brady* claim, predicated on failure to disclose material information, makes it particularly suitable for a finding of good cause." *Castellanos*, 2013 WL 3777126, at *2 (citation omitted). Here, however, Petitioner has not provided the Court with enough information to determine whether the "*Giglio* material" he seeks even exists. *Cf.* *Haywood v. Griffin*, No. 16-CV-3870, 2017 WL 961739, at *2 (S.D.N.Y. Mar. 13, 2017) (finding good cause shown for failure to exhaust *Brady* claim due to the existence of newly discovered evidence — the psychiatric records of a prosecution witness).

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Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Luperio NARANJO, Sr., Movant,
v.
UNITED STATES, Respondent.

16 Civ. 7386 (JSR)(SLC)
|
Signed 10/02/2019
|
Filed 10/03/2019

Attorneys and Law Firms

Luperio Naranjo, Sr., Minersville, PA, pro se.

Andrew Douglas Beaty, U.S. Attorney's Office for the Southern District of New, New York, NY, for Respondent.

OPINION AND ORDER

CAVE, United States Magistrate Judge:

***1** By motion dated September 15, 2016, movant Luperio Naranjo Sr. ("Mr. Naranjo") seeks an Order granting him discovery pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings. (Disc. Mot., ECF No. 3.) For the reasons set forth below, movant's motion for discovery is denied.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997); accord Charles v. Artuz, 21 F. Supp. 2d 168, 169 (E.D.N.Y. 1998): see Harris v. Nelson, 394 U.S. 286, 295 (1969). The Second Circuit has noted that "Rule 6(a) of the Rules Governing Section 2255 Proceedings ... provides that a § 2255 petitioner is entitled to undertake discovery only when 'the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.' " Lewal v. United States, 152 F.3d 919, 1998 WL 425877 at *2 (2d Cir. 1998) (unpublished summary order).

> A petitioner "bears a heavy burden in establishing a right to discovery." Renis v. Thomas, No. 02 Civ. 9256 (DAB) (RLE), 2003 WL 22358799, at *2 (S.D.N.Y. Oct. 16, 2003) (citing Bracy, 520 U.S. at 904). In order to show "good cause," a petitioner must present " 'specific allegations' " that give the Court " 'reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief.' " Bracy, 520 U.S. at 908-09 (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)). A court may deny a petitioner's request for discovery "where the petitioner provides no specific evidence that the requested discovery would support his habeas corpus petition." Hirschfeld v. Comm'r of the Div. of Parole, 215 F.R.D. 464, 465 (S.D.N.Y. 2003); see also Charles v. Artuz, 21 F. Supp. 2d 168, 170 (E.D.N.Y. 1998). Generalized statements regarding the possibility of the existence of discoverable material will not be sufficient to establish the requisite "good cause." See Gonzalez v. Bennett. No. 00 Civ. 8401(VM), 2001 WL 1537553, at *4 (S.D.N.Y. Nov. 30, 2001); Green v. Artuz, 990 F. Supp. 267, 271 (S.D.N.Y. 1998); Munoz v. Keane, 777 F. Supp. 282, 287 (S.D.N.Y. 1991), aff'd sub nom., Linares v. Senkowski, 964 F.2d 1295 (2d Cir. 1992).

Ruine v. Walsh, 00 Civ. 3798 (RWS), 2005 WL 1668855 at *6 (S.D.N.Y. July 14, 2005) (alteration in original): accord Rios v. United States, 13-CV-5577 (CBA), 2016 WL 3702966 at *9 (E.D.N.Y. July 7, 2016); Vazquez v. Maccone, 12-CV-4564 (JMA), 2016 WL 2636256 at *10 (E.D.N.Y. May 6, 2016); Cooper v. United States, 08 Cr. 356 (KMK), 13 Civ. 3769 (KMK), 2015 WL 9450625 at *5 (S.D.N.Y. Dec. 22, 2015).

Furthermore, "Rule 6 does not license a petitioner to engage in a 'fishing expedition' by seeking documents 'merely to determine whether the requested items contain any grounds that might support his petition, and not because the documents actually advance his claims of error.' " Ruine v. Walsh, 2005 WL 1668855 at *6, quoting Charles v. Artuz, 21 F. Supp. 2d at 169; accord Batista v. United States, 14-CV-895 (DLI) (LB), 2016 WL 4575784 at *1 (E.D.N.Y. Aug. 31, 2016).

***2** Here, Mr. Naranjo has failed to carry his "heavy burden" to establish his right to discovery. His motion contains "no specific evidence that the requested discovery would support his habeas corpus petition," Ruine v. Walsh, supra, 2005 WL 1668855 at *6, quoting Hirschfeld v. Comm'r of the Div. of Parole, 215 F.R.D. 464, 465 (S.D.N.Y. 2003). His claim that "[t]he evidence developed through ... depositions will materially suppor[t] the allegations as to the 'performance'

of counsel" (Disc. Mot., ECF No. 3 at 2) is merely a "[g]eneralized statement[ ] regarding the possibility of the existence of discoverable material, "which is insufficient to warrant discovery in a habeas proceeding. Ruine v. Walsh, supra, 2005 WL 1668855 at *6. Accordingly, Mr. Naranjo has failed to establish his right to discovery, and his motion must be denied.

For all of the foregoing reasons, the motion for discovery is denied. The Clerk of the Court is respectfully requested to mark Docket Item 3 closed and mail a copy to Movant at the address below.

SO ORDERED.

All Citations

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United States District Court,
N.D. New York.

David REYNOLDS, Petitioner,
v.
Gary GREENE, Respondent.

No. 9:05-CV-01539.
|
Feb. 16, 2010.

Attorneys and Law Firms

David Reynolds, Dannemora, NY, pro se.

Hon. Andrew M. Cuomo, Office of the Attorney General, Alyson J. Gill, Esq., Ass't Attorney General, of Counsel, New York, NY, for Respondent.

ORDER

DAVID N. HURD, District Judge.

***1** David Reynolds. ("petitioner" or "Reynolds"), filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on December 8, 2005. In the petition, he challenged a January 26, 1998, judgment of conviction for second degree assault and first degree promoting prison contraband, following a jury trial,. *See* Dkt. No. 1. Reynolds argued that trial counsel was ineffective because he gave misleading advice regarding whether petitioner would be treated as a persistent felony offender if convicted following a trial. Dkt. No. 1 at 6, Ground One. The petition was referred to Magistrate Judge David R. Homer who issued a Report-Recommendation and Order on January 12, 2007. In the Report-Recommendation, the Magistrate Judge recommended that the petition be denied. Dkt. No. 15. In a Decision and Order filed May 2, 2007, the Report and Recommendation was adopted. The petition was denied and dismissed. Dkt. Nos. 18-19. In a Mandate issued on September 28, 2007, the Second Circuit Court of Appeals denied petitioner's motion for a certificate of appealability, finding that he failed to make a "substantial showing of the denial of a constitutional right." Dkt. No. 26 (quoting 28 U.S.C. § 2253(c)).

Presently before the Court is petitioner's motion, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, to reverse the denial of his petition for a writ of habeas corpus. Dkt. No. 28. Petitioner has also filed a motion for leave to proceed *in forma pauperis,* a motion for the appointment of counsel, and a motion for an evidentiary hearing. Dkt Nos. 29-30. For the reasons that follow, the Court will grant the motion to proceed *in forma pauperis* (Dkt. No. 29) solely for the filing of the motion. For the reasons that follow, all of petitioner's other motions will be denied with prejudice. [1]

I. ***Petitioner's Request that a Three-Judge Panel Review his Motion***

Petitioner has requested that his Rule 60(b) motion be heard by a three-judge panel. *See* Dkt. No. 28 at 1 ("Notice of Motion Pursuant to 28 U.S. Federal Rules of Civil Procedure 60(b)(6)"). Petitioner's request will be denied because a three-judge panel is not warranted in this case. *See* 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); *Loeber v. Spargo,* No. 04-CV-1193, 2008 WL 111172, at *2 (N.D.N.Y. Jan. 8, 2008) (Kahn, J.) ("When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determine whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute.") (quoting *Idlewild Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962) (discussing pre-1976 version of § 2284)).

II. ***Motions for an Evidentiary Hearing and Appointment of Counsel***

***2** Petitioner has moved for an evidentiary hearing and for the appointment of counsel. Dkt. No. 30. He argues that there are certain legal materials no longer available to him in prison; that the claims in his motion are complex; and that he suffers from mental health issues. *Id.* at 6-7. Petitioner argues that this Court previously erroneously denied his request for

counsel, which is "one of the main reasons why the denial of petitioner's Writ of Habeas Corpus cannot stand[.]" *Id.* at 1. Petitioner states that he should be permitted counsel, and an evidentiary hearing, in order to present evidence relating to a letter written by Judge Jerome J. Richards, a St. Lawrence County Court judge who prosecuted petitioner. In the letter dated January 26, 2009, Judge Richards recommended to the New York State Division of Parole that petitioner be paroled. *See* Dkt. No. 28-1, Ex. H at 1.

There is no constitutional right to representation by counsel in habeas corpus proceedings. *See Green v. Abrams,* 984 F.2d 41, 47 (2d Cir.1993); *Urrutia v. Green,* No. 05-CV-6153, 2007 WL 1114103, at *1 (W.D.N.Y. Apr. 12, 2007) (citing *McClesky v. Zant,* 499 U.S. 467, 495 (1991)); *Soto v. Walker,* No. 00-CV-0197, 2005 WL 2260340, at *4 (N.D.N.Y. Sept. 15, 2005) (McAvoy, S.J.). A court may, however, in its discretion, appoint counsel where "the interests of justice so require[.]" *See* 18 U.S.C. § 3006A(a)(2)(B). In determining whether to appoint counsel, a habeas court should "consider the petitioner's likelihood of success on the merits of his petition, the complexity of legal issues raised by such application and the petitioner's ability to investigate and present his case to the federal habeas court." *Soto,* 2005 WL 2260340, at *4. *See Hodge v. Police Officers,* 802 F.2d 58, 60-61 (2d Cir.1986). Counsel must be appointed when an evidentiary hearing is necessary in order to resolve the issues raised in a habeas petition. *See* Rule 8(c), Rules Governing Section 2254 Cases in the United States District Courts; *Chandler v. Girdich,* No. 04-CV-432, 2007 WL 1101106, at *1 (W.D.N.Y. Apr. 12, 2007). When an evidentiary hearing is not required, and the petitioner's claims may "fairly be heard on written submissions," a habeas petitioner's request for counsel should ordinarily be denied. *See Brito v. Burge,* No. 04 Civ. 1815, 2005 WL 1837954, at *1 (S.D.N.Y. Aug. 3, 2005) (citing *Coita v. Leonardo,* No. 96-CV-1044, 1998 WL 187416, at *1 (N.D.N.Y. Apr. 14, 1998) (Pooler, J)).

Petitioner's claims in his Rule 60(b) motion may be fairly heard based upon his written submissions which include the letter from Judge Richards. Thus, an evidentiary hearing is not necessary, and the appointment of counsel on behalf of petitioner is unwarranted. Petitioner's motions for appointment of counsel and for an evidentiary hearing will therefore be denied.

III. ***The Motion***

Rule 60(b) of the Federal Rules of Civil Procedure provides that a district court, "[o]n motion and upon such terms as are just, ... may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for one of several enumerated grounds, including fraud, mistake, and newly discovered evidence. Fed.R.Civ.P. 60(b). Subsections one through five set forth specific grounds for relief. *Id.* at 60(b)(1)-(5). Under subsection six, relief may be granted "for any other reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b)(6). The Supreme Court has interpreted subsection six as requiring a showing of "extraordinary circumstances" to "justify[ ] the reopening of a final judgment." *Gonzalez v. Crosby,* 545 U.S. 524, 535 (2005); *see also Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 864 (1988) ("[Rule 60(b)(6)] should only be applied in extraordinary circumstances").

***3** A Rule 60(b) motion may be used to attack "the integrity of the previous habeas proceeding," but it may not be used as a vehicle to attack "the underlying criminal conviction." *Harris v. United States,* 367 F.3d 74, 77 (2d Cir.2004); *see Gonzalez,* 545 U.S. at 529 (a Rule 60(b) motion may be appropriate under 28 U.S.C. § 2254 if the motion "attacks not the substance of the federal court's resolution of a claim on the merits, but some defect[2] in the integrity of the federal habeas proceedings."). Rule 60(b) motions also may not be used to circumvent the AEDPA's restriction on the filing of second or successive habeas petitions. 28 U.S.C. § 2244(b)(1)-(3).[3] *Gonzalez,* 545 U.S. at 531 ("A habeas petitioner's filing that seeks vindication" of a previously denied claim is, "if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be inconsistent with the [AEDPA]."). A Rule 60(b) motion should be treated as a second or successive habeas petition under the AEDPA when

> it seeks to add a new ground for relief ... [or] attacks the federal court's previous resolution of a claim *on the merits,* since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.

Gonzalez, 545 U.S. at 532 (footnote omitted) (emphasis in original). A claim has been resolved "on the merits" when the district court has made "a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 532 n. 4. However, a petitioner is not making a habeas claim if he "merely asserts that a previous ruling which precluded a merits determination was in error-for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* If a Rule 60(b) motion simply attacks the petitioner's underlying conviction or sentence, a district court may treat the motion as a second or successive habeas petition and transfer it to the appropriate Court of Appeals for possible certification, or deny the portion of the motion attacking the underlying conviction " 'as beyond the scope of Rule 60(b).' " *Harris,* 367 F.3d at 82 (quoting *Gitten v. United States,* 311 F.3d 529, 534 (2d Cir.2002)).

In this case, petitioner's motion is brought pursuant to Rule 60(b)(6). Motions brought under subsection six must be filed "within a reasonable time." Fed R. Civ. P. 60(b). To determine whether a 60(b)(6) motion is timely, a court must "look at the particular circumstances of each case and 'balance the interest in finality with the reasons for delay.' " *Grace v. Bank Leumi Trust Co. of N.Y.,* 443 F.3d 180, 190 n. 8 (2d Cir.2006) (quoting *Kotlicky v. U.S. Fid. & Guar. Co.,* 817 F.2d 6, 9 (2d Cir.1987)), *cert. denied* 549 U.S. 1114 (2007).

***4** Here, the judgment dismissing the habeas petition was entered on May 2, 2007. Dkt. No. 19. The Second Circuit denied a certificate of appealability on September 28, 2007. Dkt. No. 26. Petitioner filed this motion on December 7, 2009-over two years later. Thus, petitioner's motion was not made within a reasonable time. *See DiGirolamo v. United States,* 279 Fed. Appx. 37, 39 (2d Cir.2008) (Rule 60(b)(6) motion made three years after late was unreasonable); see *Kellogg v. Strack,* 269 F.3d 100, 104 (2d Cir.2001) (finding a delay of twenty-six months before filing a Rule 60(b) motion to be "a patently unreasonable delay absent mitigating circumstances") (citing *Truskoski v. ESPN, Inc.,* 60 F.3d 74, 77 (2d Cir.1995) (finding that a Rule 60(b) motion made eighteen months after judgment was not made within a reasonable period of time), *cert. denied* 535 U.S. 932 (2002); *Williams v. Pastena,* No. 96 Civ. 5902, 2005 WL 1107051, at *2 (S.D.N.Y. May 10, 2005) ("Delays of eighteen months or more, absent mitigating circumstances, have been deemed unreasonable.").

While conceding that his motion is untimely, petitioner asserts that extraordinary circumstances justify his delay. Dkt. No. 28-2, Mem. at 17-19. In order to obtain relief under Rule 60(b)(6), a petitioner must demonstrate " 'extraordinary circumstances' justifying the reopening of a final judgment," which "will rarely occur in the habeas context." *Gonzalez,* 545 U.S. at 535. Petitioner asserts that he was acting *pro se,* he was in involuntary protective custody while his motion for a certificate of appealability was pending, and he suffered from mental health issues. Dkt. No. 28-2 at 19-20. Such statements are inadequate to show the extraordinary circumstances necessary to justify vacating the judgment denying his habeas petition. *Matarese v. LeFevre,* 801 F .2d 98, 107 (2d Cir.1986) (petitioner's claims "(1) that the district court had misapplied the rule of *Sandstrom v. Montana;* and (2) that he had not filed a notice of appeal from the 1981 Judgment principally because he had been proceeding *pro se,* had been ignorant of his right to appeal or to seek a certificate of probable cause, was uneducated, had difficulty reading at a fifth grade level, and no one at the prison at which he was then incarcerated would give him any advice as to his legal rights" were inadequate to show extraordinary circumstances for purposes of Rule 60(b)(6)), *cert. denied* 480 U.S. 908 (1987); *Brown v. Nelson,* No. 05 Civ. 4498, 2008 WL 4104040, at *3 (S.D.N.Y. Aug. 29, 2008) (claims that petitioner was unable to file an amended complaint within the time allotted by the court because he suffered "ongoing discrimination/retaliation", was denied "meaningful access to the law library [and] ... [the] right to hav[e] a 'legal assistant' from [the] law library" insufficient to constitute extraordinary circumstances); *Williams v. New York City Dep't of Corr.,* 219 F.R.D. 78, 85 (S.D.N.Y.2003) (holding that *pro se* plaintiff's inability to "identify an accessible law library," "lack of understanding" of Court's requests and required documents, and "failure of the Pro Se Office" to assist her were not extraordinary circumstances justifying relief under Rule 60(b)); *see New Card, Inc. v. Glenns,* No. 00 Civ. 4756(RMB), 2004 WL 540417, at *4 (S.D.N.Y. Mar. 18, 2004) (finding no extraordinary circumstances to reopen default judgment when movant's reason for failing to

appear was due to illness), *aff'd,* 137 Fed. Appx. 384, 387 (2d Cir.2005).

***5** Moreover, while "couched in the language of a true Rule 60(b) (6) motion," petitioner's claims do not satisfy that subsection. *See* *Gonzalez,* 545 U.S. at 531. He does not attack the original habeas proceedings on any procedural grounds. Instead, he reiterates his claim that counsel misinformed him that whether he pleaded guilty or was convicted following a trial, he would not be treated as a persistent felony offender. Dkt. No. 28-2, Mem. at 6-7. He further argues that his case differs from *Aeid v. Bennet,* 296 F.3d 58 (2d Cir.2002), *cert. denied* 537 U.S. 1093 (2002) because although petitioner was not entitled to a plea offer to second degree assault for an illegal sentence of two to four years, a second plea offer was made that would have permitted him to plead guilty to the non-violent crime of second degree attempted assault with a legal sentence. *Id.* at 8-9. Petitioner states that had he received accurate information, he would have opted to plead guilty to attempted assault. *Id.* at 9. He claims that this Court disregarded the existence of the offer to plead to attempted second degree assault. *Id.* at 9-10. In essence, his argument is that this Court incorrectly denied his habeas petition on the merits.

As petitioner concedes, he raised the same claims in his habeas petition, and in his later objections to Judge Homer's Report and Recommendation, which were considered by this Court and denied. *See* Dkt. No. 28-2 at 15-16; Dkt. No. 28-3, Ex. B, Objection to Recommendation for Denial of Writ of Habeas Corpus, at 2 (citing Pet. at 14, 21, 22, 24, 26, and Record on Appeal at 7a and 19a) (also at Dkt. No. 16). *See also* Dkt. No. 18 at 2 ("Based upon a de novo determination of the report and recommendation, including the portions to which petitioner objected, the Report-Recommendation is accepted and adopted in whole."). The arguments in his motion are therefore beyond the scope of Rule 60(b) review.

The letter petitioner has attached from Judge Richards does not change that result. Judge Richards wrote the letter to the Parole Board in response to petitioner's request for assistance. In the letter, Judge Richards states that:

> [p]rior to trial [petitioner] was offered a plea whereby he could have avoided being treated as a persistent violent felony offender. Overlooked and never discussed during plea negotiations prior to trial was the fact that if [petitioner] was convicted of a violent felony it was mandatory that he be sentenced to a life sentence ... I can only speculate but I am quite certain that if [petitioner] could do it all over again he would opt for the offer of pleading to the class E non-violent felony of Attempted Assault Second and being sentenced to 2-4 years. However ... the fact that he was a persistent violent felony offender only came on everyone's radar screen once he had been convicted by the jury.

Dkt. No. 28-3, Appendix, at Exhibit H. *See* Dkt. No. 28-2 at 13-14. The content of the letter simply mirrors the claims already raised by petitioner and rejected in both the state court and by this Court. Dkt. Nos. 15, 18. *See* Dkt. No. 28-3, Ex. E at 4 (Decision and Order, Nicandri, J.) (finding counsel was not ineffective for conveying incorrect advise regarding persistent felony offender status and noting "[t]he question remains whether the defendant, as he now claims, would have opted to plead to Attempted Assault 2nd, which is a non-violent felony, with a corresponding mandatory consecutive sentence. The court is sure, that, with the benefit of hindsight after the jury's guilty verdict, defendant's answer would be in the affirmative," and noting that the court would not have accepted a plea "to a non-violent felony offense with an unauthorized concurrent sentence commitment of 2-4 years."); Dkt. No. 10, Respondent's Response to the Petition, at 11-13 (citing the Decision and Order); Dkt. No. 14, Traverse at 2. Petitioner also raised these arguments in his application for a certificate of appealability, which was denied by the Second Circuit. Dkt. No. 28-3, Ex. E, at 2-4 (also at Dkt. No. 21).

***6** Thus, the letter written by Judge Richards does not constitute an extraordinary circumstance that warrants vacating the judgment in this case. *See, e.g., Earle v. United States,* No. 02 Civ. 0432, 2004 WL 1367162, at *2 (S.D.N.Y. Jun. 17, 2004) (new evidence in form of a car accident report and the report of a government agent who interviewed the petitioner about the whereabouts of the car in 1997 did not raise extraordinary circumstances required for relief under Rule 60(b) because it did not present any reason why the

court should reconsider its determination that the petition was not timely filed, and it did not indicate that the government misrepresented any facts to the Court).

"As explained in *Gonzalez,* challenging a prior denial of a habeas claim on the merits is effectively a challenge to the underlying conviction, and thus, outside the scope of Rule 60(b)." *Ackridge v. Barkley,* No. 06 Civ. 3891, 2008 WL 4555251, at *7 (S.D.N.Y. Oct. 7, 2008) (citing *Gonzalez,* 545 U.S. at 532). Since petitioner's motion attacks the constitutionality of his underlying criminal conviction and simply reiterates the same arguments previously made in his petition, it is outside the scope of Rule 60(b) and will be denied with prejudice.

THEREFORE, it is

ORDERED, that

1. Petitioner's application to proceed *in forma pauperis* (Dkt. No. 29) is GRANTED for the sole purpose of filing the Rule 60(b) motion;

2. Petitioner's request that a three-judge panel review his Rule 60(b) motion (Dkt.28) is DENIED WITH PREJUDICE;

3. Petitioner's motions for counsel and an evidentiary hearing (Dkt. No. 30) are DENIED WITH PREJUDICE;

4. Petitioner's Rule 60(b) motion (Dkt. No. 28) is *DENIED WITH PREJUDICE;* substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2);

5. No certificate of appealability shall issue because petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2); and

6. The Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 604179

Footnotes

1 Respondent was directed to file a response to petitioner's Rule 60(b) motion on December 8, 2009, and again on December 31, 2009. To date, respondent has not done so.

2 "Fraud on the federal habeas court is one example of such a defect." *Gonzalez,* 545 U.S. at 532 n. 5. Other examples include claims that a default judgment was mistakenly entered against a party, or that the judgment is void for lack of subject matter jurisdiction. *Id.* at 532, 534.

3 In order to file a successive section 2254 petition, a petitioner must first file an application with the appropriate Court of Appeals for an order authorizing the district court to consider it. *See* 28 U.S.C. § 2254; 28 U.S.C. § 2244(b)(3)(A). Absent authorization from the Second Circuit, a district court lacks jurisdiction to consider a successive habeas petition. *Torres v. Senkowski,* 316 F.3d 147, 149 (2d Cir.2003) (stating that "the authorization requirement [for second or successive habeas petitions] is jurisdictional and therefore cannot be waived").

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Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Anselmo SOTO, Jr., Petitioner,
v.
Hans WALKER, Superintendent, Respondent.

No. 900CV0197TJMDEP.
|
Sept. 15, 2005.

Attorneys and Law Firms

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G. Lawrence Dillon, Assistant Attorney General, of counsel.

DECISION and ORDER

MCAVOY, Senior J.

I. *BACKGROUND*

***1** Petitioner Anselmo Soto, Jr., a New York State prison inmate as a result of a 1987 Oneida County Court conviction for second degree conspiracy, commenced this proceeding seeking federal habeas relief pursuant to 28 U.S.C. § 2254 on January 21, 2000. *See* Petition (Dkt. No. 1) at p. 7. Respondent thereafter filed a memorandum of law in which he opposed the granting of the petition based in part upon his claim that this action was not timely commenced by Soto within the one-year statute of limitations applicable to federal habeas corpus petitions in light of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* Dkt. No. 8.

In his Report-Recommendation dated July 12, 2002, Magistrate Judge David E. Peebles determined that, excluding the time during which the statute of limitations was tolled, Soto had commenced this action 982 days after the enactment of the AEDPA and therefore Soto's habeas petition was untimely by 617 days. *See* Report-Recommendation of Magistrate Judge Peebles (Dkt. No. 39) at p. 9. Petitioner thereafter filed objections to that Report-Recommendation, Dkt. No. 44, however by order filed September 18, 2002, this Court adopted Magistrate Judge Peebles' Report-Recommendation in full and denied and dismissed Soto's petition as untimely filed. Dkt. No. 46. The Second Circuit Court of Appeals thereafter denied Soto's request for a Certificate of Appealability and dismissed his appeal on June 23, 2004. Dkt. No. 58.

Following the dismissal of his appeal by the Second Circuit, Soto filed the following applications in this District, all of which are currently before this Court for review: i) a motion for reconsideration of this Court's September 18, 2002 order pursuant to Rules 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure, together with supporting papers (Dkt.Nos.59-61); [1] ii) an application for appointment of counsel (Dkt. No. 62); and iii) an in forma pauperis application (Dkt. No. 63).

II. *DISCUSSION*

A. *Motion for Reconsideration*

In support of his application which seeks the reconsideration of this Court's September 18, 2002 order dismissing his habeas petition, Soto argues that he has established his actual innocence of the crime challenged by his petition and that therefore the order dismissing his petition must be vacated because the judgment is "void" under Fed.R.Civ.P. 60(b)(4). *See* Supporting Memorandum (Dkt. No. 59) ("Supporting Mem.") at pp. 1-2. [2]

Subsequent to this Court's September, 2002 order which adopted the recommendation of Magistrate Judge Peebles that Soto's petition be dismissed as time-barred, the Second Circuit decided the case of *Whitley v. Senkowski,* 317 F.3d 223 (2d Cir.2003). In *Whitley,* the Second Circuit acknowledged that the "question remains open" as to whether the United States Constitution requires that an "actual innocence" ' exception be engrafted onto the AEDPA's statute of limitations. *Whitley,* 317 F.3d at 225. However, the *Whitley* court nevertheless determined that before dismissing a habeas petition as untimely filed, district courts are required to consider whether a petitioner has asserted a credible claim

that he is actually innocent of the crime challenged in the petition. *Whitley,* 317 F.3d at 225; *see also* *Doe v. Menefee,* 391 F.3d 147, 161 (2d Cir.2004) (citing *Whitley*); *Austin v. Duncan,* No. 02-CV-0732, 2005 WL 2030742, at *4 (W.D.N.Y. Aug. 23, 2005) (citations omitted). Since the issue of petitioner's actual innocence has never been addressed in this action, this Court now considers whether Soto is entitled to reconsideration of the September, 2002 dismissal order based upon his claim that he is actually innocent of his crime for which he is presently incarcerated.

***2** Petitioner's claim of actual innocence is based upon his argument that the indictment returned by the grand jury was invalid and the product of prosecutorial misconduct. Specifically, Soto argues that his rights "not to be tried at all" and "not to be haled into court" were violated by the state courts because the accusatory instrument on which his criminal trial was based was fatally defective. Supporting Mem. at p. 15. In support of this claim, Soto argues that the prosecution engaged in misconduct during its presentation before the grand jury, *id.* at p. 18, including its wrongful suggestion to that body that Soto was involved in an international drug conspiracy. *Id.* at p. 20. Soto claims that:

> Said impermissible conduct not only nullified the deliberations and actions of the Grand Jury, but it rendered the indictment voted upon said defective proceedings inadequate to confer (subject matter & in personam) jurisdiction upon the trial court, thereby raising a question of "actual legal innocence" by implication.

Supporting Mem. at pp. 19-20.

In considering a claim of actual innocence under the AEDPA, the Second Circuit has determined that district courts are to examine the following questions sequentially:

> (1) Did [petitioner] pursue his actual innocence claim with reasonable diligence? (2) If [petitioner] did not pursue the claim with reasonable diligence, must an actual innocence claim be pursued with reasonable diligence in order to raise the issue of whether the United States Constitution requires an "actual innocence" exception to the AEDPA statute of limitations? (3) If [petitioner] did pursue the claim with reasonable diligence or if reasonable diligence is unnecessary, does [petitioner] make a credible claim of actual innocence? (4) If [petitioner] does make a credible claim of actual innocence, does the United States Constitution require an "actual innocence" exception to the AEDPA statute of limitations on federal habeas petitions?

Whitley, 317 F.3d at 225-26.

The record reflects that in April, 1997, Soto filed a motion to vacate his judgment of conviction pursuant to Section 440.10 of New York's Criminal Procedure Law. *See* Dkt. No. 65, Appendices "A" and "B." In that application, Soto asserted the same arguments he now claims demonstrate his actual innocence of the crime of which he stands convicted. *See, e.g.,* Dkt. No. 65, Appendix "A" at pp. 1-30. This Court therefore finds that Soto pursued his actual innocence claim with reasonable diligence in the state courts. Accordingly, the Court next considers whether he has made "a credible claim of actual innocence" in this action. *Whitley,* 317 F.3d at 225.

For a petitioner to establish that he is actually innocent of a crime, he must "demonstrate that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Dixon v. Miller,* 293 F.3d 74, 81 (2d Cir.2002) (internal quotation and citation omitted); *see also Boddie v. Edwards,* 2005 WL 914381, at *4 (S.D.N.Y. Apr. 20, 2005) (citing *Dixon*); *Thomas v. Walsh,* 2004 WL 2153928, at *2 (S.D.N.Y. Sept. 24, 2004), *adopted,* 2005 WL 1621341 (S.D.N.Y. July 12, 2005). Claims of actual innocence in this context must be supported by " 'new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." ' *Menefee,* 391 F.3d at 161 (quoting *Schlup v. Delo,* 513 U.S. 298, 324 (1995)).

***3** Soto has not submitted any evidence, in the form of eyewitness accounts, alibi witnesses or physical or scientific evidence, which establishes his innocence of the criminal conspiracy charge. In fact, it does not appear to this Court as though Soto claims that he did not engage in the acts that formed the basis of his conviction. Rather, petitioner's claim that he is actually innocent is premised upon his contention that his conviction and subsequent sentence are void due to the fact that the indictment on which his criminal trial was based was purportedly defective and therefore failed to provide the county court with jurisdiction over petitioner. *See* Supporting Mem. at pp. 15-30. However, this claim appears to overlook the settled precedent in this Circuit which notes that "because 'defects in an indictment do not deprive a court of its power to adjudicate a case,' such defects are not jurisdictional errors." *United States v. LaSpina,* 299 F.3d 165, 178 n. 4 (2d Cir.2002) (quoting *United States v. Cotton,* 535 U.S. 625, 630 (2002)). Furthermore, for an indictment to comport with the Sixth Amendment's requirement that defendants be given "fair notice" of the nature and cause of the accusation against him, the accusatory instrument must charge a crime with adequate precision so that a defendant is aware of the charges he must defend against and enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense. *See* *Hamling v. United States,* 418 U.S. 87, 117 (1974) (citing *Hagner v. United States,* 285 U.S. 427, 431 (1932)) (other citation omitted); *see also* *United States v. Alfonso,* 143 F.3d 772, 776 (2d Cir.1998) (citing *United States v. Stavroulakis,* 952 F.2d 686, 693 (2d Cir.1992)). In the underlying criminal matter, the indictment charging Soto with criminal conspiracy (*see* Dkt. No. 65, Appendix D) clearly met the relatively modest constitutional threshold applicable to indictments.

Soto has not presented any evidence in this action which suggests that, in light of all the evidence adduced at trial, it is more likely than not that no reasonable juror would have convicted him of the conspiracy charge. This Court therefore finds that Soto's patently late filing of his habeas petition cannot be excused upon a finding that petitioner has made a credible claim of actual innocence. Accordingly, his motion for reconsideration of this Court's September, 2002 order denying and dismissing his habeas petition as barred by the AEDPA's statute of limitations is denied.

B. *Motion for Appointment of Counsel*

Soto has also filed an application in which he seeks appointment of counsel. *See* Dkt. No. 62. In support of this request, Soto claims that assigned counsel could:

> review the pleadings and form of the papers filed in this Court to determine their accuracy, and if they effectively convey the legal proposition petitioner presents to the Court ... to ensure the effective representation of petitioner's jurisdictional challenge upon his state conviction, as well as his claim of "actual innocence" upon this proceeding.

***4** *See* Dkt. No. 62 at ¶ 3.

There is no constitutional right to representation by counsel in habeas corpus proceedings. *Renis v. Thomas,* 2003 WL 22358799, at *3 (S.D.N.Y. Oct. 16, 2003) (citing *Green v. Abrams,* 984 F.2d 41, 47 (2d Cir.1993)) (other citation omitted); *see also Carpenter v. Greiner,* 2000 WL 1051876, at *1 (S.D.N.Y. July 31, 2000) (citations omitted). However, a federal court may, in its discretion, appoint counsel where "the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). In determining whether to exercise such discretion, a court should consider the petitioner's likelihood of success on the merits of his petition, the complexity of legal issues raised by such application and the petitioner's ability to investigate and present his case to the federal habeas court. *See Coita v. Leonardo,* 1998 WL 187416, at *1 (N.D.N.Y. Apr. 14, 1998) (Pooler, D.J.) (citation omitted). Appointment of counsel in habeas cases is only appropriate where either it appears that the claims asserted by the petitioner "have merit," *see Vargas v. City of New York,* 1999 WL 486926, at *2 (S.D.N.Y. July 9, 1999), or where the petitioner "appears to have some chance of success...." *See* *Hodge v. Police Officers,* 802 F.2d 58, 60-61 (2d Cir.1986).

In this case, this Court has denied and dismissed Soto's petition. *See* Dkt. No. 46. The Second Circuit subsequently dismissed Soto's appeal of that order. Dkt. No. 58. Since Soto's application for reconsideration of the dismissal order is without substance, petitioner has no chance of succeeding on the merits of his habeas application. Therefore, this Court denies Soto's motion for appointment of counsel.

C. *In Forma Pauperis Application*

On January 13, 2005, Soto executed an application to proceed with this matter in forma pauperis. *See* Dkt. No. 63.

However, on January 21, 2000, Soto filed a completed in forma pauperis application with this Court in conjunction with his habeas petition. Dkt. No. 2. The then-assigned Magistrate Judge to this action, the Hon. Ralph W. Smith, Jr., reviewed Soto's in forma pauperis application and determined that petitioner could "properly proceed with this matter in forma pauperis." Dkt. No. 3 at p. 3. Since Soto has been continuously incarcerated since that date, there is no basis for this Court to conclude that his financial situation has changed since Magistrate Judge Smith granted Soto's initial in forma pauperis application. Therefore, his current in forma pauperis application is denied as unnecessary. *E.g. Fitzgerald v. McKenna,* 1996 WL 715531, at *2 (S.D.N.Y. Dec. 11, 1996).

WHEREFORE, based upon the foregoing, it is hereby

ORDERED, that Soto's motion for reconsideration (Dkt. No. 59) is DENIED, and it is further

ORDERED, that petitioner's motion for appointment of counsel (Dkt. No. 62) is DENIED, and it is further

ORDERED, that Soto's motion to proceed with this matter in forma pauperis (Dkt. No. 63) is DENIED as unnecessary, and it is further

***5** ORDERED, that the Clerk of the Court serve a copy of this order upon the parties by regular or electronic mail.

All Citations

Not Reported in F.Supp.2d, 2005 WL 2260340

Footnotes

1 Fed.R.Civ.P. 60, which permits relief from a district court's judgment or order, provides, in relevant part:
(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
(4) the judgment is void;
(6) any other reason justifying relief from the operation of the judgment.

2 Soto additionally asserts that reconsideration of the September, 2002 order is warranted under Fed.R.Civ.P. 60(b)(6) "in the interests of justice." *See* Supporting Mem. at p. 1.

2011 WL 2532907
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Charles SPELLS, pro se, Petitioner,
v.
William LEE, Respondent.

No. 11–CV–1680 (KAM).
|
June 23, 2011.

Attorneys and Law Firms

Charles Spells, Stormville, NY, pro se.

Victor Barall, Brooklyn, NY, Kings County District Attorneys Office, New York State Attorney Generals Office, for Respondent.

ORDER

MATSUMOTO, District Judge.

***1** *Pro se* petitioner Charles Spells (the "petitioner") requests that his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be stayed so that he may exhaust an additional claim in state court. (ECF No. 6, Stay Motion ("Stay Mot.").) Respondent William Lee (the "respondent") does not oppose petitioner's motion for a stay. (ECF No. 3, Memorandum of Law ("Resp.Mem.") at 1–3.)

DISCUSSION

On March 24, 2011, petitioner timely filed his habeas petition pursuant to 28 U.S.C. § 2254 (the "petition"), alleging that the prosecution "failed to disprove appellant's justification defense beyond a reasonable doubt, and the verdict was against the weight of the evidence." (ECF No. 1, Petition at 2.) Based on the information available in the petition, petitioner appears to have previously raised, and exhausted, this claim in state court. (*Id.*)

On June 8, 2011, petitioner moved to stay his petition (the "stay motion") during the pendency of his motion for a writ of error coram nobis regarding an ineffective assistance of counsel claim in state court. (Stay Mot.) Respondent does not oppose petitioner's motion for a stay of the petition. (ECF No. 3, Resp. Mem. at 1–3.)

Because petitioner did not raise the ineffective assistance of counsel claim in his petition filed on March 24, 2011, his petition contains only exhausted claims and is therefore not a "mixed petition" under *Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), subject to the standards of *Rhines v. Weber,* 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), governing the grant of a stay in the habeas context. Therefore, petitioner's stay motion is premature. *See Bethea v. Walsh,* No. 09–cv–5037, 2010 WL 2265207, at *1 (E.D.N.Y. June 2, 2010) (finding premature petitioner's motion to stay his habeas petition pending the filing of a N.Y.C.P.L. § 440.10 motion where petitioner had not raised the anticipated claims in his habeas petition and the petition was therefore not "mixed"). Accordingly, before the court can address petitioner's stay motion, petitioner must first move to amend his current petition pursuant to Federal Rule of Civil Procedure 15(a) to add the new, unexhausted claim for ineffective assistance of counsel. (*Id.*)

Furthermore, a petition for a writ of habeas corpus filed by a person in state custody is governed by, *inter alia,* the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA imposes a one-year statute of limitations for seeking federal habeas relief from a state court judgment. 28 U.S.C. § 2244(d)(1); *see Lawrence v. Florida,* 549 U.S. 327, 331, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007); *Saunders v. Senkowski,* 587 F.3d 543, 546 (2d Cir.2009); *Clark v. Artus,* No. 09–CV–3577, 2010 WL 1269797, at *3 (E.D.N.Y. Apr.1, 2010). Pursuant to the AEDPA, the limitation period runs

> 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 of 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; or (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** 28 U.S.C. § 2244(d)(1). The one-year statute of limitations also applies to any amendments petitioner makes to his petition, unless the new claims in the amendment relate back to the original petition. Fed.R.Civ.P. 15(c) ("An amendment to a pleading relates back to the date of the original pleading when ... the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading"); *see also* *Gibson v. Artus,* 407 F. App'x 517, 519 (2d Cir.2010).

Here, on December 28, 2009, the New York Court of Appeals denied petitioner leave to file an appeal of the Appellate Division's denial of his direct appeal. (Pet. at 2.) Petitioner's conviction thus became final ninety days later, on March 28, 2010. Petitioner then filed the petition for a writ of habeas corpus on March 24, 2011 (Pet. at 14), with four days to spare under the AEDPA statute of limitations. The statute of limitations has since expired. Accordingly, petitioner may only amend his petition if his proposed new claim for ineffective assistance of counsel relates back to his original claims pursuant to Fed.R.Civ.P. 15. If petitioner can demonstrate that his proposed new claim relates back to the claims in his petition filed on March 24, 2011, prior to the expiration of the AEDPA statute of limitations, the court will then consider the merits of petitioner's motion to amend his petition. If leave to amend is granted, only then will the court consider petitioner's motion to stay.

CONCLUSION

Petitioner's motion to stay his petition is denied without prejudice. If petitioner wishes to add a new ineffective assistance of counsel claim to the instant petition, he must address whether, given that the proposed amendment is not timely, the amendment relates back to his original petition. In addition, petitioner must attach to his motion to amend: (1) a proposed amended petition that includes the claims raised in his current petition and the new claim he has yet to exhaust; (2) copies of the writ of error coram nobis motion briefs and any state court decision on that motion, if available; and (3) copies of any other state court motions filed by petitioner, seeking post-conviction or collateral review.

If petitioner chooses to file a motion to amend and can establish that his new claim relates back to the claims in his original petition, he shall concurrently file a motion to amend and a motion to stay his habeas petition by July 8, 2011. Petitioner should be aware that under *Rhines,* this court can grant requests to stay only when: (1) there is good cause for the petitioner's failure to exhaust the unexhausted claims in state court before bringing a federal habeas petition; and (2) the unexhausted claims are not "plainly meritless." *Rhines,* 544 U.S. at 277. In his submission, petitioner should state when he discovered the factual basis for his new claims.

Respondent is directed to respond to petitioner's motion to amend by July 15, 2011. The respondent shall serve a copy of this Order upon petitioner and file a certificate of service by June 24, 2011.

***3 SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2011 WL 2532907

2011 WL 2670023
Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Aaron VOYMAS, Petitioner,
v.
David UNGER, Superintendent, Respondent.

No. 10–CV–6045(MAT).
|
July 7, 2011.

Attorneys and Law Firms

Aaron Voymas, Attica, NY, pro se.

Paul B. Lyons, Office of New York State Attorney General, New York, NY, for Respondent.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** Petitioner, Aaron Voymas ("Voymas" or "Petitioner"), has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner's state custody arises from his conviction on charges of first degree rape and third degree sexual abuse in connection with his repeated acts of incest against his younger sister.

II. Factual Background

The victim, M.V., was born on March 19, 1985. T.148–49 (Numbers preceded by "T." refer to pages from the transcript of Petitioner's trial.). When M.V. was four or five years old, her parents, John Voymas and Deirdre Voymas (now Dye), divorced, and M.V. went to live with her father in Michigan for "a year or two." T.148–51. Subsequently, her mother regained custody of M.V., remarried, and the family, including M.V., her two older brothers, her mother, and her stepfather, moved from Michigan to Tonawanda, New York in Erie County. T.151. They later moved to four different locations in Canandaigua, New York.

M.V.'s two brothers, Petitioner and Adam Voymas, are approximately two and a half and five years older than M.V., respectively. When M.V. was around five years old, her brothers began to touch her inappropriately. T.149, 153–54. When she was about seven, both of her brothers "start[ed] being very forcible," "aggressive[ly]" abusing her. T.154–55. Her brothers would "[t]ake [her] pants off and [her] panties," "grab at [her] genitals," and "force their penises into [her] vagina." T.154–56. At first, M.V. "tried to fight it, fight it off ... [b]y trying to hold them back or push them off and kick them." (T.155–56). However, she was never able to prevent their assaults because both brothers were bigger than she was. T.155–56.

The abuse continued at the various locations to which M.V.'s family moved. T.155. M.V. recalled one incident in particular that occurred at their home on West Lake Road in Canandaigua when she was thirteen-years-old. T.156–57, 164, 190–91, 200. Her parents were not at home, and she was sitting on a bed playing a video game. Petitioner came up from behind her, pushed her down on her stomach, pulled her pants and panties down, and raped her from behind as he held her down. T.157–60, 191–92. M.V. pleaded with him to stop, but he ignored her and continued to penetrate her until he ejaculated. T.157–62, 192. She did not try to escape "because he was bigger than [M.V.] and ... it happened all the time, so [physical resistance] was pointless." T.160.

M.V. testified this rape took place in May of 1998, when she was in eighth grade. T.185–86. She was able to determine that the rape occurred between March 19, 1998, and late June 1998, when she was thirteen and Petitioner was fifteen, because she specifically remembered that it took place in the springtime, after her 13th birthday (i.e., March 19th), on the same day that her brother, Adam, had also molested her, and shortly before Adam graduated from high school in June. T.162–64. M.V. also remembered that it took place at the house on West Lake Road, from which the family moved in July 1998. T.144–48, 164.

***2** M.V. described another incident which occurred at the family's Parrish Street house in Canandaigua. T.165. Petitioner, who was then sixteen, grabbed M.V.'s breasts and fondled her vagina over her pants for a "few minutes." T.165–67, 200–02, 212. M.V. was thirteen or fourteen at the time. She remembered the event because it was the last time that Petitioner sexually abused her. T.165–68. M.V. did not physically resist because resistance "was pointless," as Petitioner "always did it and got away with it and he was bigger than [M.V.]." T.167. However, because M.V. "was standing there rigid and still ... [Petitioner] knew that it wasn't

consensual." She surmised "he felt guilty about it because ... he just stopped" and said "something like ... 'I know this has been wrong and I'm not going to do it anymore.' " T.167–68.

In May 1998, M.V. was being treated with medication for depression, and the doctors "were always switching medications because nothing was working." T.187–88. M.V. acknowledged that she was "a disciplinary problem in school" beginning in the eighth grade. T.188. She would often deliberately misbehave at school in order to receive after-school detention, because the extra hour at school "would lessen the likelihood [that she] would be raped and molested" by her brothers. T.213–14.

Soon after she turned eighteen, M.V. got married and moved to Texas with her husband. T.168–70. While in counseling, she eventually revealed details regarding the repeated sexual abuse by her brothers. T.171. As a result of those conversations, she contacted the authorities in Texas and later in Canandaigua. T.171–72.

It was suggested that M.V. separately call both Petitioner and her brother Adam and record their conversations. T.172–73, 198–99. On January 11, 2005, M.V. telephoned Petitioner, who was stationed at an army base in Kentucky, and recorded the call using equipment supplied by the Abilene Police Department. T.172–74. M.V. was not able to record the entire call, because "the tape ran out and [she] didn't know how to flip it over," but only a minute or two at the end of the conversation went unrecorded. T.175, 199–200. The audiotape was played in court, and the jury was provided with a transcript of the recording. The trial court instructed the jury that the transcript was "not evidence" and was only provided to "assist [the jury] in listening to the actual tape recording." T.180–82.

During the recorded conversation, Petitioner admitted that he first started "having sex" with M.V. when they lived in Tonawanda, New York (i.e., the town where the family first lived after moving from Michigan when M.V. was six or seven years old). He stated that he realized that what he did to M.V. was wrong and pointed out that he was no longer abusing M.V. He apologized for what he had done but advised her to "[a]ccept that you got raped" and "that your perception of your brothers is always going to be that they're scum ....." Court Exhibit B at 2–4, 9, 10. Petitioner acknowledged that, during the time he was raping M.V., he was, in fact, "scum." *Id.*

***3** On February 10, 2005, detectives from the Canandaigua Police Department traveled to the Kentucky Army base where Petitioner was stationed. T.219–21, 241. Petitioner waived his rights and gave a written statement confessing to having had "sexual intercourse" with his sister "between six and eight times" at several locations beginning when she was about seven years old. T.234–38. In the first incident, when M.V. was approximately seven and Petitioner was approximately nine, both Petitioner and his brother had "sexual intercourse" with M.V. T.234–35. Petitioner also acknowledged one particular incident in which he had "[s]exual intercourse" with M.V. at the family's West Lake Road house, during which M.V. "[m]ost likely" asked petitioner to stop. T.236–37. Petitioner further stated that his "sexual relationship" with M.V. ended when Petitioner was approximately sixteen. T.236.

Petitioner, 210 pounds and 5′11″-tall at the time of trial, took the stand and denied having had a sexual relationship with M.V. He also denied knowing whether his brother Adam had molested her. T.267, 323, 346. He recalled the January 11, 2005 telephone conversation with M.V. that she had recorded. T.268, 270. He claimed, however, that he had been "groggy" during the conversation because he had been roused from sleep to answer the call. T.270, 326, 333, 337, 347. Petitioner also claimed, among other things, that M.V. had earlier told him that in 2004 she had been raped in Abilene, Texas, so in the recorded conversation he had "tr[ied] to help her with" that incident. T.272, 347, 357–58. Petitioner claimed that he had apologized to M.V. during the call not because he had actually done anything wrong, but because it was his "understanding that she thought [he] had wronged her." T.275, 345.

Petitioner insisted that he did not remember making various statements recorded on the audiotape. T.274–79. He claimed that during the call, he had "gotten wrapped up in [M.V.'s] wording and did not pay attention to it." T.281–82, 349–50, 356, 359–61. He also claimed that his sister "tricked" him into making certain admissions. T.361–62.

When Petitioner finally realized that M.V. was accusing him of having had "sexual experiences" with her, he thought she was "delusional" and fabricating these allegations. T.352–53. Petitioner explained that he did not deny her accusations because his "only understanding of delusional people is you can't reason logic with them ...." T.353. Petitioner stated that he was just "playing along," trying to "placate" her. T.353–54, 357.

With regard to his written statement to the police, Petitioner testified that he had slept "[o]nly a little bit" on the night before his interview, and that his rights had not been read to him until after the statement was written. T.283–84, 289, 363–64. According to the detectives, Petitioner "did not appear tired" or "drowsy" at the time of the interview, and did not "complain about ... lack of sleep." T.250, 261. Moreover, Petitioner had brought his own food to the interview, and he conceded that the interviewers never touched him. T.371–72.

***4** Petitioner claimed that he signed the confession because he "became weary after being questioned" for "[o]ver an hour," and "just wanted to give [the police] the answers they were asking for." T.289–90, 292–94, 368, 371–75. He claimed that the police refused to "believe [him] when [he] told them the truth," so he gave them the answers that "[t]hey wanted." T.295–96, 298–311. He also claimed that he was "confused" and "rattled" during the interview. T.299–300, 374–77.

The jury disbelieved Petitioner's version of events and returned a verdict convicting him of all counts: first-degree rape, incest, and third-degree sexual abuse.

The court sentenced Petitioner, as a Juvenile Offender, to a term of three to nine years imprisonment on the rape count. The court dismissed the incest count. [1] Because Petitioner committed the sexual abuse crime while he was an adult (i.e., sixteen-year-old), the trial court determined that he should be sentenced as an adult, although, being less than eighteen, he was eligible for Youthful Offender status.

On appeal, the Appellate Division found that the trial court erred in failing to grant that part of Petitioner's omnibus motion seeking to dismiss the third count of the indictment, charging him with sexual abuse in the third degree, on the ground that it was facially defective in that it failed to set forth a time interval that reasonably served the function of protecting defendant's constitutional right to be informed of the nature and cause of the accusation. *People v. Aaron V.,* 48 A.D.3d 1200, 1201, 850 N.Y.S.2d 790, (App.Div. 4th Dept.2008) (citations omitted). The Appellate Division held that the 12–month period was unreasonable in view of the fact that the victim was thirteen- or fourteen-years-old during that time period and thus was capable of discerning, if not exact dates, at least seasons, school holidays, birthdays, or other events which could establish a frame of reference to assist her in narrowing the time spans alleged. *Id.* (citations omitted). The remaining convictions were affirmed. *Id.*

III. Discussion of the Petition

A. Defective Indictment

Petitioner argues that the indictment under which he was charged was not specific enough to meet the Sixth Amendment guarantee that a defendant be "informed of the nature and cause of the accusation" against him. In particular, Petitioner alleges that the indictment was defective in that it contained a bare recitation of the language of the statute; alleged a time frame of 4½ months on the rape charges and one year on the sexual abuse charge; and did not specify which alleged acts in the rape charge satisfied the elements of "forcible compulsion."

"An indictment need only provide sufficient detail to assure against double jeopardy and state the elements of the offense charged, thereby apprising the defendant of what he must be prepared to meet." *United States v. Tramunti,* 513 F.2d 1087, 1113 (2d Cir.1975) (citation omitted). To accomplish this, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime[.]" *Id.* (citations omitted). Challenges to state indictments will merit habeas corpus relief only in the exceptional case where the indictment fails to satisfy the basic due process requirements: notice of the time, place, and essential elements of the crime. *Scott v. Sup., Mid–Orange Corr. Facility,* No. 03 Civ. 6383(RJD)(LB), 2006 WL 3095760, at *6 (E.D.N.Y. Oct. 31, 2006) (citing *Carroll v. Hoke,* 695 F.Supp. 1435, 1438 (E.D.N.Y.1988)).

***5** Petitioner's specific complaint about the rape count's time-frame is meritless as a matter of Federal Constitutional law and New York law. Although the indictment specified a period of time-rather than a specific date-in which Petitioner committed the rape, the indictment met the constitutional standards referred to above. *Accord, e.g., Rodriguez v. Hynes,* CV–94–2010 (CPS), 1995 WL 116290, at *4 (E.D.N.Y. Feb. 27, 1995) ("[W]here time is not an essential element, it suffices to state the time in approximate terms, as long as such a statement is reasonable.") (citing *United States v. Bagaric,* 706 F.2d 42, 61 (2d Cir.1983), *cert. denied,* 464 U.S. 840 (1983)). The 4½-month time-period on the rape charge was not unreasonable especially where, as here, the complaining victim was a child. *See Rodriguez,* 1995 WL 116290, at *4 (dismissing habeas claim alleging indictment insufficient due to lack of specific date; "[c]onsidering the

fact that young victims often do not remember the exact date of when an alleged offense occurred, the time spans in the indictment [charging sexual abuse of a minor] are not unreasonable"); *see also* *Valentine v. Konteh,* 395 F.3d 626, 632 (6th Cir.2005) ("This Court and numerous others have found that fairly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements.") (collecting cases); *Fawcett v. Bablitch,* 962 F.2d 617, 619 (7th Cir.1992) (rejecting a due process challenge to an indictment that set forth a six-month period of time during which the defendant allegedly sexually abused a minor child, and finding that the indictment "afforded [the defendant] notice sufficient to permit him to defend against the charge").

Furthermore, there is no requirement that the statutory definition of "forcible compulsion be set forth in the indictment. New York Penal Law § 130.00 defines the phrase and thus puts the parties on notice as to what constitutes "forcible compulsion" under the law when it is alleged in an indictment. "Forcible compulsion" is not an element of the crime which must be set forth in the indictment. *Best v. Kelly,* CV–88–0530, 1998 WL 76621, at *2 (E.D.N.Y. July 7, 1988) (dismissing habeas claim that indictment failed to specify two allegedly essential elements, that the sexual intercourse was without consent, and that the lack of consent resulted from forcible compulsion).

B. Erroneous Admission of Uncharged Crimes

Petitioner asserts that his due process rights and Sixth Amendment right to present a defense were violated because (1) M.V., the victim, testified to the grand jury that Petitioner's brother committed acts similar to those Petitioner committed, although M.V. stated that Petitioner was not aware of his brother's acts; (2) in pretrial proceedings and at trial, the prosecution referred to, and the court admitted, uncharged acts by both Petitioner and his brother "that allegedly occurred prior, and unconnected to, the charges of the indictment"; and (3) the court failed to determine whether the prejudicial effect of such evidence outweighed its probative value.

***6** Petitioner's claim regarding evidence heard by the grand jury is not cognizable on federal habeas review. *See, e.g., Lopez v. Riley,* 865 F.2d 30, 32–33 (2d Cir.1989) (holding that "[i]f federal grand jury rights are not cognizable on direct appeal where rendered harmless by a petit jury, similar claims concerning a state grand jury proceeding are a *fortiori* foreclosed in a collateral attack brought in a federal court").

Although prior uncharged acts by Petitioner and his brother were occasionally referred to during certain pre-trial proceedings, including at a joint suppression hearing, Petitioner has failed to explain how such references could have violated his constitutional rights at trial or unfairly prejudiced his case.

Here, Petitioner cites no Supreme Court case, and the Court is aware of none, holding that the admission of evidence of uncharged crimes violates the Due Process Clause of the Fourteenth Amendment. *Accord Parker v. Woughter,* 09 Civ. 3843(GEL), 2009 WL 1616000, at *2 (S.D.N.Y. June 9, 2009). To the extent that it can be assumed that in some circumstances the admission of such evidence can be so significant as to deny a defendant a fair trial, that cannot be the case here. The Appellate Division held that evidence of his prior sexual misconduct with the victim, his sister, was properly admitted because that evidence was relevant in establishing that 'defendant's sexual act [was] perpetrated against the victim by forcible compulsion.' " *People v. Aaron V.,* 48 A.D.3d at 1201, 850 N.Y.S.2d 790 (citations omitted). New York case law is well-settled that "evidence of a defendant's prior abusive behavior toward a complainant may be admissible to prove the element of forcible compulsion in a rape case," *People v. Cook,* 93 N.Y.2d 840, 841, 688 N.Y.S.2d 89, 710 N.E.2d 654 (N.Y.1999) (citations omitted), to establish intent, *People v. Roman,* 43 A.D.3d 1282, 1282, 842 N.Y.S.2d 640 (App.Div. 4th Dept.2007), and to explain the victim's failure to make a prompt complaint, *People v. Chase,* 277 A.D.2d 1045, 1045, 716 N.Y.S.2d 486 (App.Div. 4th Dept.2000).

Finally, Petitioner claims that the court erred by not determining, on the record, whether the prejudicial effect of the prior-conduct evidence outweighed its probative value. During its *Molineux*[2] ruling, the court observed that, the previous day, it had concluded Petitioner's brother's trial, in which it had made the same *Molineux* determination involving the similar facts. The court viewed that ruling as precedential since it was based on review of the same case law and very similar facts, and also involved the same rationale for admissibility. Notably, Petitioner did not object when the court did not repeat its entire *Molineux* ruling.

In any event, "in a habeas petition, the petitioner has the burden of proof and cannot rely on the mere absence

of evidence to the contrary of his claim. The petitioner must show evidence that the judge abused (or refused to exercise) his discretion. This [petitioner] has not done, and the argument that the court did not properly determine the admissibility of petitioner's prior bad acts therefore fails." *Smith v. Riley,* 09–CV–3094, 1995 WL 1079778, at *10 (E.D.N.Y. Jan.26, 1995).

C. Erroneous Denial of a Continuance

***7** Petitioner claims that the court improperly denied defense counsel's request for a postponement of trial to prepare a defense. When a denial of a continuance forms the basis for a habeas claim, the petitioner must show not only that the trial court abused its discretion, but also that the denial was so arbitrary and fundamentally unfair that it violated constitutional principles of due process. *See* *Morris v. Slappy,* 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) ("[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel.") (citation omitted).

As Respondent argues, Petitioner's allegations are contradicted by the record. The only mention of a trial date at either of the hearings cited by Petitioner occurred during the January 30, 2006, hearing, at which the trial court stated that it was "planning on commencing the trial" on February 1, 2006 (the date trial ultimately commenced), and defense counsel acquiesced by stating, "[v]ery good." Thus, it does appear that there was any request for a continuance, much less a showing by Petitioner that one was necessary.

D. Denial of the Equal Protection of the Laws

Petitioner claims that his equal protection rights were violated by (1) the trial court's denial of his motion to adjudicate him as a Youthful Offender on the rape count; and (2) the refusal of the Appellate Division and Court of Appeals to address the issue.

This claim is not cognizable on Federal habeas review. Under New York law, "[t]he decision whether to grant youthful offender status to an eligible youth generally 'lies within the sound discretion of the sentencing court.' " *People v. Victor J.,* 283 A.D.2d 205, 206, 724 N.Y.S.2d 162 (App.Div. 1st Dept.2001) (citation omitted). "Denial of youthful offender adjudication does not provide a basis for habeas relief, because 'it is well established that the United States Constitution grants no independent due process right either to youthful offender treatment or to any particular procedure for denying it, so long as the trial judge imposed a sentence that was lawful under state law.' " *Murphy v. Artus,* 07 Civ. 9468, 2009 WL 855892, at *7 (S.D.N.Y. Apr.1, 2009) (quoting *Auyeung v. David,* 00 Civ. 1353, 2000 WL 1877036, at *3 (S.D.N.Y. Dec.26, 2000)). Here, because "it is undisputed that [the trial court] considered youthful offender adjudication," Petitioner's claim is not cognizable on federal habeas review. *Murphy,* 2009 WL 855892, at *7.

E. Legal Insufficiency of the Evidence

Petitioner claims that his conviction was based on legally insufficient evidence because the prosecution failed to prove beyond a reasonable doubt (a) that the rape was committed by "forcible compulsion," i.e., by physical force or the threat of immediate death or injury; (b) that Petitioner committed the acts in the time frames alleged in the indictment; and (c) that "specific acts or situations [were] attributable to" Petitioner, rather than "allegations of prior uncharged, unconnected conduct."

***8** As Respondent argues, the claim is procedurally barred because the Appellate Division relied on adequate and independent state law grounds to dismiss it-namely, that Petitioner presented only a "general motion to dismiss" at the close of the People's case; and Petitioner failed to renew his motion after presenting evidence. *See* *Harris v. Reed,* 489 U.S. 255, 260–61, 264 n. 10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (Federal habeas corpus review of a state conviction is prohibited if a state court judgment is based on an "adequate and independent state ground," such when the state court "explicitly invokes a state procedural bar rule as a separate basis for decision."). It is well-settled under New York law that a defendant must alert the trial court to the specific basis for his dismissal motion in order to preserve an appellate claim for insufficiency of the evidence. *E.g.,* *People v. Gray,* 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919 (N.Y.1995).

Although only a "firmly established and regularly followed state practice," *James v. Kentucky,* 466 U.S. 341, 348–49, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), may be deemed adequate to prevent subsequent review by a federal court, the New York contemporaneous objection rule applied by the Appellate Division in Petitioner's case-that a motion to

dismiss must alert the trial court to the specific deficiency alleged, and that any such motion must be renewed at the close of defendant's case-has been recognized as just such a firmly established and regularly followed rule. *E.g., Mills v. Poole,* 06 Civ. 00842, 2008 WL 2699394, at *10–12 (W.D.N.Y. June 30, 2008).

Procedural default will "bar federal habeas review of the federal claim, unless the ... petitioner can show 'cause' for the default and 'prejudice attributable thereto,' " or demonstrate that "failure to consider the federal claim will result in a 'fundamental miscarriage of justice.' " *Coleman v. Thompson,* 501 U.S. 722, 749–50, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (citations omitted). Petitioner has offered no "cause" for the failure to preserve his insufficiency claim, as he has not asserted an ineffective trial counsel claim in state court or in the instant petition. There is also no prejudice shown, because Petitioner's insufficiency-of-the-evidence claim is meritless. Although the Appellate Division found the sufficiency of the evidence claim unpreserved, the court did find that the verdict was not against the weight of the evidence. *People v. Aaron V.,* 48 A.D.3d at 1201, 850 N.Y.S.2d 790. "The appellate court found that the weight of the evidence supported [petitioner's] conviction so, *a fortiori,* his conviction was supported by legally sufficient evidence." *Horne v. Perlman,* 433 F.Supp.2d 292, 300 (W.D.N.Y. May 23, 2006); *see also People v. Danielson,* 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 (N.Y.2007) ("Necessarily, in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt.").

***9** In his Traverse (Docket No. 19), Petitioner has attempted to demonstrate that he is actually innocent so as to satisfy the "fundamental miscarriage of justice" exception and establish a "gateway" through which his procedurally defaulted claim may pass. *See Schlup v. Delo,* 513 U.S. 298, 325, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). The *Schlup* court has circumscribed the type of evidence on which an actual innocence claim may be based and articulated a demanding standard that petitioners must meet in order to take advantage of the gateway. *E.g., Doe v. Menefee,* 391 F.3d 147, 161 (2d Cir.2004). The petitioner must support his claim "with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial [,]" *Schlup,* 513 U.S. at 324. In light of *Schlup* 's explicit requirement of reliability, "the habeas court must determine whether the new evidence is trustworthy by considering it both on its own merits and, where appropriate, in light of the pre-existing evidence in the record." *Doe v. Menefee,* 391 F.3d at 161 (citing *Schlup,* 513 U.S. at 327–28). If the district court determines that the new evidence is reliable, the next step is for the court to consider the petitioner's claim of actual innocence "in light of the evidence in the record as a whole, including evidence that might have been inadmissible at trial." *Id.* The standard articulated in *Schlup* "allows the reviewing tribunal also to consider the probative force of relevant evidence that was excluded or unavailable ...." 513 U.S. at 327 (citation omitted).

The evidence proffered here fails to satisfy the demanding *Schlup* criteria. Petitioner and his mother, Deirdre Dye, contend that certain child support records demonstrate that he left New York State on June 7, 1998, and could not have committed the rape as charged. The Court agrees with Respondent that the victim's testimony is not inconsistent with Petitioner's alleged departure from New York on June 7, 1998, and the brother's graduation in late June 1998. The victim testified that the rape took place in May 1998, after her thirteenth birthday (i.e., March 19, 1998). She also said that the rape by Petitioner it occurred in the springtime, on the same day that her other brother had molested her, and shortly before the other brother graduated from high school in June 1998.

It bears emphasizing that Petitioner's alleged alibi evidence does not refute Petitioner's signed, voluntary confession, or the evidence of the tape-recorded telephone call between Petitioner and the victim in which Petitioner explicitly admitted to raping her.

Petitioner's mother also states in her affidavit that she took her daughter to a gynecologist for a suspected yeast infection in November 1998, some months after the last alleged incident of abuse. The doctor's office advised her to schedule annual exams when her daughter became sexually active. Petitioner contends that if M.V. in fact had been raped (i.e., was sexually active), then the office would not have made this comment and would have had the mother begin scheduling annual exams. Assuming that doctor's office made this comment, it hardly proves that the repeated acts of rape and molestation

did not occur. Tellingly, Petitioner has not submitted any of the victim's medical records to substantiate his claims.

***10** In sum, the new evidence offered by Voymas does not convince this Court that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup,* 513 U.S. at 327. Therefore, he cannot satisfy the *Schlup* actual innocence standard so as to demonstrate that "fundamental miscarriage of justice" will occur should the Court decline to consider the procedurally defaulted claim.

E. Denial of Equal Access to the Courts

Petitioner claims that he was denied "access to the courts" because (1) after petitioner's conviction was affirmed on direct appeal, the New York Court of Appeals ignored Petitioner's letters of inquiry regarding his leave application; (2) he was refused leave to appeal the denial of his C.P.L. § 440.20 motion; and (3) he was not granted a hearing in his state collateral proceedings.

Petitioner has failed to establish that he was prejudiced in any way by the Court of Appeals' delay in responding to his letters, assuming such a delay actually took place.

Turning next to the denial of leave to appeal his C.P.L. § 440.20 motion, Petitioner has not shown that further review by the Appellate Division was warranted. Petitioner's motion alleged that because the was sentenced as a Youthful Offender on the misdemeanor conviction of third degree sexual abuse, he was also required to be sentenced as a Youthful Offender rather than a Juvenile Offender on the top count, rape in the first degree. There were several unassailable grounds for denial of this motion by the trial court. First, although characterized as a C.P.L. § 440.20 motion to set aside his sentence, it was seeking an order pursuant to C.P.L. § 440.10 setting aside the judgment on the count of rape in the first degree, and replacing it with a Youthful Offender adjudication. Accordingly, the trial court found that because the issue could have been raised on Petitioner's direct appeal, the motion was required to be summarily denied pursuant to C.P.L. § 440.10(2)(c).

Moreover, the trial court found, because the conviction on the misdemeanor count of the indictment (third degree sexual abuse) was reversed on appeal, it was no longer a part of the disposition of and therefore the question was moot. Finally, the trial court found that, even if the Youthful Offender adjudication was still viable, it would have the inherent power to correct errors made at the time of sentencing, such as by striking the Youthful Offender determination.

Petitioner's third contention, that his due process rights were violated by the failure to hold a hearing on his C.P.L. § 440.20 motion and *coram nobis* application, is without merit. All of the courts in this Circuit have held that Federal habeas relief is not available to redress alleged procedural errors in State post-conviction proceedings. *Jones v. Duncan,* 162 F.Supp.2d 204, 218–19 (S.D.N.Y.2001); *Diaz v. Greiner,* 110 F.Supp.2d 225, 235 (S.D.N.Y.2000).

F. Ineffective Assistance of Appellate Counsel

***11** The Supreme Court set forth the test for such ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which requires a demonstration(1) that counsel's performance was deficient, and (2) "that the deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687. This standard applies in the context of appellate counsel's ineffectiveness. *E.g., Hemstreet v. Greiner,* 491 F.3d 84, 89 (2d Cir.2007).

1. Appellate Counsel's Omission of Allegedly Meritorious Issues

In order to satisfy the first prong of *Strickland,* it is not enough for a petitioner to show that appellate counsel omitted a colorable argument. Counsel need not raise every nonfrivolous claim, but rather may winnow out weaker arguments on appeal and focus key issues in order to maximize the likelihood of success. *Smith v. Robbins,* 528 U.S. 259, 288 756, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (citing *Jones v. Barnes,* 463 U.S. 745, 751–53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). A petitioner instead must demonstrate that appellate counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Clark v. Stinson,* 214 F.3d 315, 322 (2d Cir.2000) (citing *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.1994)).

Construing the *pro se* petition liberally, Petitioner's allegations do not demonstrate that he was deprived of constitutionally effective assistance on direct appeal.

In particular, given that Petitioner raised insufficient-indictment claim in his *pro se* supplemental brief on direct appeal, he cannot claim prejudice on grounds that appellate counsel did not raise the same claim. *See Abdurrahman v. Henderson,* 897 F.2d 71, 75 (2d Cir.1990) ("Abdurrahman recognizes that the motion to suppress the weapon was denied after a full and fair hearing and ultimately was affirmed by the appellate division after he raised the issue in a pro se supplemental brief ... [E]ven if these claims had been raised by an attorney instead of by Abdurrahman in his *pro se* supplemental brief, the outcome of the state appeal would not have been affected.") (citing *Strickland,* 466 U.S. at 694).

Furthermore, contrary to Petitioner's contention, appellate counsel did raise a *Molineux* claim in his appellate brief, arguing that the trial court erroneously admitted "propensity evidence" consisting of prior uncharged conduct of Petitioner and his brother.

Petitioner's appellate counsel submitted a 40–page brief on direct appeal to the Appellate Division asserting colorable grounds for reversal. Although appellate counsel overlooked a meritorious issue (i.e., the insufficiency of the indictment claim), Petitioner cannot demonstrate that he was prejudiced because the Appellate Division granted relief on the claim as presented in his *pro se* brief. The remaining arguments that Petitioner claims that appellate counsel should have made are uniformly without merit.

2. Failure to Advise Petitioner

***12** Petitioner argues that appellate counsel did not discuss with him strategies for the appeal or assist him drafting a *pro se* supplemental brief. This argument is meritless.

"An appellate attorney's failure to communicate with his or her client, by itself, does not constitute per se ineffective assistance of counsel." *McIntyre v. Duncan,* 03–CV–0523, 2005 WL 3018698, at *3 (E.D.N.Y. Nov.8, 2005) (citing *Buitrago v. Scully,* 705 F.Supp. 952, 955 (S.D.N.Y.1989)); *accord Campbell v. Greene,* 440 F.Supp.2d 125, 152 (N.D.N.Y.2006). "Although it may be desirable and productive, the Constitutional right to effective assistance of counsel does not encompass the requirement that an attorney consult with his client to discuss the alleged trial errors that his client wishes to pursue." *McIntyre,* 2005 WL 3018698, at *3 (citing *Smith v. Cox,* 435 F.2d 453, 458 (4th Cir.1970), *vacated on other grounds by Slayton v. Smith,* 404 U.S. 53, 92 S.Ct. 174, 30 L.Ed.2d 209 (1971)). "[T]he Supreme Court has made clear that it is appellate counsel exercising discretion, after a professional evaluation of the trial record, who controls the preparation of the appellate brief." *Warren v. Napoli,* 05 Civ. 8438, 2009 WL 2447757, at *18 (S.D.N.Y. Aug.10, 2009) (citing *Jones v. Barnes,* 463 U.S. at 751). Therefore, Voymas' assertions that his appellate counsel failed to consult with him prior to filing the appellate brief and obtain his consent about which claims to raise, or failed to incorporate the arguments asserted by Petitioner in his *pro se* brief, do not, without more, establish that Voymas received ineffective assistance. *Accord, e.g., Campbell,* 440 F.Supp.2d at 152. Moreover, the Court has been unable to find any support for Petitioner's claim that counsel was required to assist him in drafting his supplemental *pro se* brief. To the contrary, given that appellate counsel was not required to consult with Petitioner regarding the claims to be submitted in the principal brief, appellate counsel *a fortiori* was not required to confer with Petitioner regarding his *pro se* submission.

III. Petitioner's Motion to Appoint Counsel (Docket No. 17)

The Supreme Court has clearly held that prisoners have no constitutional right to counsel when bringing collateral attacks upon their convictions. *Pennsylvania v. Finley,* 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *accord Green v. Abrams,* 984 F.2d 41, 47 (2d Cir.1993). Rather, the appointment of counsel is a matter of discretion. *Wright v. West,* 505 U.S. 277, 293, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992).

In determining when a district court may appoint counsel under 28 U.S.C. § 1915(d) for indigents in civil cases, such as petitions for a writ of habeas corpus under 28 U.S.C. § 2254, the court first should "determine whether the indigent's position seems likely to be of substance." *Hendricks v. Coughlin,* 114 F.3d 390, 392 (2d Cir.1997). Once it is determined that the claim meets the threshold merits requirement, the Court should consider a number of other factors, including (1) the nature of the factual issues the claim presents, and petitioner's ability to conduct an investigation of the facts; (2) whether conflicting evidence implicating the need for cross-examination will be the major proof presented

to the fact finder; (3) petitioner's apparent ability to present the case; (4) whether the legal issues involved are complex; (5) whether appointment of counsel would lead to a quicker and more just determination of the case; and (6) petitioner's efforts to obtain counsel. *Hodge v. Police Officers,* 802 F.2d 58, 61–62 (2d Cir.1986).

***13** Petitioner states that he requires legal assistance because he is a layman and unschooled in the law. However, he has not shown himself to be unable to present the facts relevant to disposition of his habeas petition or to understand his legal position. Similarly, he has not demonstrated that the legal issues in his case are so complicated as to require the assistance of an attorney, or that appointment of counsel would lead to a more just determination.

The Court finds that the interests of justice do not necessitate the appointment of counsel in this case, and Petitioner's motion for the appointment of counsel (Docket No. 17) is denied. The denial is with prejudice, given the Court's concomitant dismissal of his habeas petition on the merits.

IV. Respondent's Motion to Strike Portions of Petitioner's Traverse and to Seal the Traverse (Docket No. 20)

A. Motion to Strike Portions of the Traverse

Respondent has filed a motion to strike (Docket No. 2) portions of Petitioner's traverse, filed June 17, 2010, which attaches and relies upon certain exhibits that, as Respondent points out, were never presented to the state courts. Specifically, petitioner has included the affidavit of his and the victim's mother, Deirdre Dye, dated June 11, 2010; Petitioner's affirmation dated June 15, 2010, and certain other documents which Petitioner contends demonstrate his "actual innocence" of first degree rape.

The Court has considered Voymas' allegations of "actual innocence" in the Traverse insofar as they relate to his attempt to overcome the procedural default of certain habeas claims. However, the Court declines to consider any new "stand-alone" or "freestanding" claims of actual innocence or ineffective assistance of appellate counsel in his Traverse. Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts provides, in part, that "[t]he petition must ... specify all grounds for relief available to the petitioner." Rule 2(c)(1) of the Rules Governing Section 2254 Cases in the United States District Courts. "In light of this Rule, it has been recognized that a traverse is not the proper pleading in which to raise additional grounds for habeas relief." *Parker v. Duncan,* 03–CV–0759 (LEK/RFT), 2007 WL 2071745, at *6 (N.D.N.Y. July 17, 2007) (citations omitted); *accord, e.g., Cacoperdo v. Demosthenes,* 37 F.3d 504, 507 (9th Cir.1994)); *Jones v. Artus,* 615 F.Supp.2d 77, 85 (W.D.N.Y.2009). District courts have held that habeas claims raised for the first time in a reply memorandum or traverse are not properly considered. *Parker,* 2007 WL 2071745, at *6 (citing *Haupt,* 2005 WL 1518265, at *2 n. 3) *Simpson v. United States,* 5:03–CV–691, 2005 WL 3159657 (N.D.N.Y. Nov.25, 2005) (declining to consider habeas claims "raised for the first time in [Petitioner's] Traverse").

In any event, a freestanding claim of innocence based on newly discovered evidence has never been a basis for federal habeas relief absent an independent constitutional violation occurring in the state trial. *Herrera v. Collins,* 506 U.S. 390, 398–99, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The *Herrera* court assumed for the sake of argument "that in a *capital* case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417 (emphasis supplied); *see also id.* at 427 (O'Connor, J., concurring).

***14** In *House v. Bell,* 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), a capital habeas case, the Supreme Court explained its precedent as implying at the least that *Herrera* requires more convincing proof of innocence than *Schlup* 's "gateway" actual innocence standard. *House,* 547 U.S. at 555. The Supreme Court declined to answer the question left open in *Herrera* of whether a habeas petitioner may bring a freestanding claim of actual innocence. Rather, the Supreme Court concluded, as in *Herrera,* that "whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it[,]" although he had satisfied the *Schlup* gateway standard.

Even assuming for the sake of argument that a freestanding actual innocence claim, without an underlying constitutional trial violation, is amenable to Federal habeas review in a non-capital case, the allegedly new evidence proffered in this case simply cannot satisfy the "extraordinarily high," 506 U.S. at 417, hypothetical *Herrera* standard. Because, as discussed above, Petitioner's new evidence falls short of the *Schlup*

standard, it necessarily fails the more stringent *Herrera* test. *See* *House,* 547 U.S. at 555.

B. Motion to Seal the Traverse

Respondent has also moved (Docket No. 20) to seal Petitioner's Traverse dated June 17, 2010 (Docket No. 19) in accordance with N.Y. Civil Rights Law § 50–b for the protection of the victim's identity.

In an Order dated May 11, 2010, this Court placed under seal the state court records, including the trial transcripts, submitted by Respondent previously in this case. In accordance with this Order, Respondent's motion to seal (Docket No. 20) is granted.

V. Conclusion

For the reasons stated above, Aaron Voymas' Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied, and the Petition is dismissed. Voymas' Motion to Appoint Counsel Stay (Docket No. 17) is denied with prejudice. Respondent's Motion to Strike Portions of the Traverse and Seal the Traverse (Docket No. 20) is granted in part. Specifically, the Court declines to consider new, unexhausted claims raised for the first time in this responsive pleading, and the entire Traverse is placed under seal. The motion is denied to the extent that the Court has considered Petitioner's claims of actual innocence insofar as they relate to the procedural default of his insufficiency-of-the-evidence claim.

Because Petitioner has failed to make a substantial showing of a denial of a constitutional right, the Court declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2). The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal *in forma pauperis.*

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2670023

Footnotes

1 Because the crime of incest was not one that would qualify for “juvenile offender” treatment, i.e., treatment as an adult, the incest count was required to be dismissed under New York Criminal Procedure Law (“C.P.L.”) § 310.85

2 *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286 (1901) (evidence of prior crimes or bad acts is admissible to prove a specific crime if it tends to establish motive, intent, absence of mistake or accident, a common scheme or plan between the commission of two or more crimes, or the identity of the person charged with the commission of the crime).