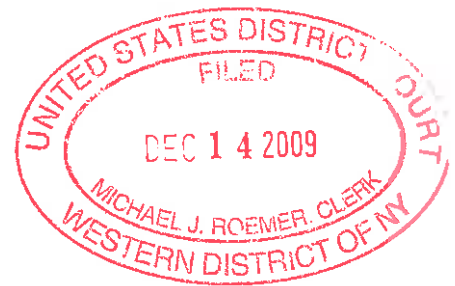


UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LENELL ROBINSON,

Petitioner,



DECISION AND ORDER

05-CV-6199L

v.

DALE ARTUS, Superintendent,

Respondent.

Petitioner, Lenell Robinson (“Robinson”), has filed a petition seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 challenging his 1999 conviction in the New York State Supreme Court (Monroe County) of murder and criminal possession of a weapon. That conviction was unanimously affirmed by the Appellate Division, Fourth Department, of New York State Supreme Court (*People v. Robinson*, 1 A.D. 3d 1022 [2003]) and the New York State Court of Appeals denied leave to appeal in February 2004. *People v. Robinson*, 1 N.Y. 3d 633 (2004). Thereafter, Robinson filed this petition in 2005.

This Court referred the petition to United States Magistrate Judge Victor E. Bianchini pursuant to 28 U.S.C. § 636(b). Magistrate Judge Bianchini has issued a detailed, 17 page Report and Recommendation (Dkt. #26) recommending that the petition be denied and that no certificate of appealability issue.

Robinson was given notice which was attached to the Report and Recommendation of the time within which to file objections to that Report and the consequences for failure to do so. Almost two months have now elapsed since the filing of the Report and Recommendation and no objections have been filed.

Although this Court could adopt the Report and Recommendation simply because no objections were filed, I have reviewed the petition and the respondent's response as well as Magistrate Judge Bianchini's Report and Recommendation. After that review, I accept and adopt the Magistrate Judge's Report and Recommendation without modification and agree with his rulings on the merits.

The Report and Recommendation sets forth in detail and with clarity the procedural background of the case as well as the facts relating to the fatal shooting of the 23 year old victim, Corey Thomas. I note, as did the Magistrate Judge, that it appears that Robinson failed to exhaust the present claims in state court. The clear requirement is that each federal claim must be fairly presented to the state courts. That does not appear to have occurred, but I agree with the Magistrate Judge that, in the interest of judicial economy, the merits of this petition should be considered and that the petition should not be dismissed solely because of the failure to exhaust.

In essence, the three claims raised by Robinson involve pure issues of state law and do not implicate any federal constitutional issue. Robinson claims that the trial court should have given a lesser-included-offense charge on criminally negligent homicide and should have included an instruction on "initial aggressor" in its charge on the state defense of justification. He also claims that there was insufficient evidence to support the jury's verdict. I believe, as did the Magistrate

Judge, that these claims all implicate state law and do not involve any federal constitutional claim. I also agree on the merits, concerning the requirements of state law, that Robinson has no basis to object either. Those claims, to the extent presented to the state courts, were resolved against Robinson, and properly so.

In sum, I agree with Magistrate Judge Bianchini's assessment on all of the claims raised here by Robinson and find that they all involve pure questions of state law and do not implicate any claims suggesting a violation of the Constitution or a violation of federal law. Therefore, I accept and adopt Magistrate Judge Bianchini's Report and Recommendation in its entirety.

CONCLUSION

I accept and adopt the Report and Recommendation of United States Magistrate Judge Victor E. Bianchini (Dkt. #26). The petition of Lenell Robinson for a writ of habeas corpus is in all respects denied, and the petition is dismissed.

I decline to issue a certificate of appealability because Robinson has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c).

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
December 11, 2009.