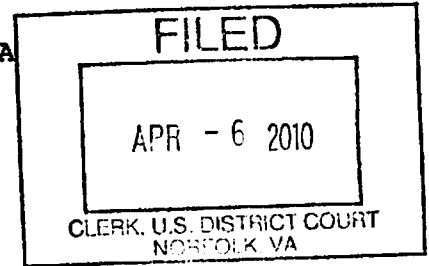


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



RASHAD MONTRELL CHATMAN, #365347,

Petitioner,

v.

ACTION NO. 2:09cv465

DIRECTOR, DEPT. OF CORR.,

Respondent.

O R D E R

The Court has received and filed a petition for writ of habeas corpus submitted pursuant to 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to Petitioner's convictions in the Circuit Court for the City of Virginia Beach for first degree murder, attempted robbery, conspiracy to commit robbery, use of a firearm in the commission of murder, use of a firearm in the commission of attempted robbery, and possession of a firearm by a convicted felon. On November 2, 2006, Petitioner was sentenced to fifty-three years in the Virginia penal system.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The Report and Recommendation filed February 25, 2010, recommends dismissal of the petition. The Report and Recommendation recommends denial of Ground (1)(d) because it was never raised to the Virginia state courts, and Chatman has shown no cause for failing

to present the claim and no prejudice resulting therefrom, which this Court must find before considering the merits of the claim. The Report and Recommendation further recommends denial of Grounds (1)(a), (1)(b), (1)(c) and (2) because they were previously adjudicated by the Supreme Court of Virginia on the merits and none of the statutory exceptions apply that would allow this Court to review the claims on the merits.

Each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On March 5, 2010, the Court received Petitioner's Objections to the Report and Recommendation (Doc. 10). Petitioner objects to the recommendation that Ground 1(d) be dismissed for failure to exhaust. He asserts the ground was raised before the state courts. (Objs. at 1-2.) Petitioner is correct that he did raise Ground 1(d) before the Supreme Court of Virginia. However, he did so in his response to Respondent's motion to dismiss his state habeas petition. (Objs. at 1.) The Supreme Court of Virginia denied petitioner's request to amend the petition to add Ground 1(d).

Id.

An untimely attempt to present a claim during the state habeas process, which is denied by the court, does not constitute "fair presentment" of the claim to the state's highest court sufficient to meet the exhaustion requirement. See Spencer v. Murray, 18 F.3d 237, 240 (4th Cir. 1994) (holding that when the Supreme Court of Virginia denied petitioner leave to file his petition out of

time, the claim raised in the petition was not "presented" to the state court for exhaustion purposes). Further, if a claim is barred from state habeas review on independent and adequate state procedural grounds, then it is not subject to review in a federal district court. See Coleman v. Thompson, 501 U.S. 722, 748 (1991); Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D.Va. 1996). Petitioner is correct that the Report and Recommendation misstates that "Ground 1(d) was never raised to the Virginia state courts." (Report and Recommendation at 6.) However, the recommendation that Ground 1(d) be denied for failure to adequately exhaust in the Supreme Court of Virginia is correct. Therefore, this Court is precluded from addressing Petitioner's Ground 1(d). Petitioner's remaining objections to the Report and Recommendation merely restate arguments made in the petition and response to the Motion to Dismiss.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Report and Recommendation, and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report and Recommendation filed February 25, 2010, with the following revision: Ground (1)(d) is DENIED because it was not exhausted in the Virginia state courts, which this Court must find before considering the merits of the claim. Grounds (1)(a), (1)(b), (1)(c) and (2) are DENIED because they were previously adjudicated by the Supreme Court of Virginia

on the merits and none of the statutory exceptions apply that would allow this Court to review the claims on the merits. It is, therefore, ORDERED that the petition be DENIED and DISMISSED. It is further ORDERED that judgment be entered in favor of Respondent.

Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right," therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

Petitioner is hereby notified that he may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this court United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within 30 days from the date of entry of such judgment.

The Clerk shall mail a copy of this Final Order to Petitioner and counsel of record for Respondent.

/s/
Rebecca Beach Smith
United States District Judge *RRS*

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
April 6, 2010