

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JITENDRA LAKRAM.

Petitioner.

96 CV 2805 (SJ)

-against-

MEMORANDUM
AND ORDER

DANIEL SENKOWSKI.
Superintendent of Clinton
Correctional Facility,

Respondent.

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A P P E A R A N C E S:

JITENDRA LAKRAM,
92-A-2581
Southport Correctional Facility
P.O. Box 2000
Pine City, New York 14871
Petitioner Pro Se

DENNIS VACCO
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120 Broadway
New York, NY 10271
By: Diar Kerr McCullough
Assistant Attorney General
Attorneys for Respondent

JOHNSON, District Judge:

Jitendra Lakram ("Lakram" or "Petitioner"), appearing pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is raising the same claims he

raised in his direct appeal as well as two new claims. For the reasons set forth herein, Petitioner's application for habeas relief is dismissed without prejudice.

BACKGROUND

Petitioner is presently incarcerated a state prison. On March 16, 1992, after a jury trial, Lakram was convicted of robbery in the first degree, attempted robbery in the first degree, criminal possession of a weapon in the second degree, criminal possession of stolen property in the fifth degree, and unauthorized use of a weapon in the third degree. Petitioner was sentenced as a second felony offender to concurrent terms of incarceration of twelve and one-half to twenty-five years on the robbery conviction, seven and one-half to fifteen years on the attempted robbery and weapon possession convictions, and one year each on the remaining convictions.

Petitioner directly appealed from his judgment of conviction claiming that: 1) the complainant's open court identification from a single mug shot deprived him of a fair trial; 2) the show-up identification was prejudicial and lacked exigent circumstances; and 3) the trial court's Sandoval ruling deprived him of a fair trial.

On August 1, 1994, the Appellate Division, Second Department, affirmed Lakram's judgement of conviction. People v. Lakram, 207 A.D.2d 360 (2d Dep't 1994). Petitioner sought leave to appeal to the New York Court of Appeals. He made only two claims in his letter application: 1) the complainant's open court identification from a

single mug shot deprived him of a fair trial; and 2) the show-up identification was prejudicial and lacked exigent circumstances. On January 31, 1995, his application for leave to appeal the decision of the Appellate Division to the Court of Appeals was denied. Petitioner moved for reconsideration in another letter application. That application was denied on June 5, 1995.

On December 4, 1995, Lopez filed a petition with this Court for a writ of habeas corpus claiming five grounds for his immediate release: 1) counsel was not present during the show-up identification; 2) the second identification was unduly suggestive and lacked exigent circumstances; 3) the identification should have been excluded as unreliable and unconstitutional; 4) the in-court showing of the mug shot to the complainant was improper; and 5) the admission of evidence of petitioner's three prior crimes deprived him of a fair trial.

DISCUSSION

Under the exhaustion doctrine, a federal court may not review the merits of a petition for a writ of habeas corpus unless the petitioner has exhausted all the remedies available in the state courts. Picard v. Connor, 404 U.S. 270, 275 (1971); 28 U.S.C. § 2254(b)(1)(A). A claim is deemed to be exhausted when it has been presented "to the highest court of the pertinent state." Bossett v. Walker, 41 F.3d 825, 828 (2d. Cir. 1994), cert. denied, 115 S.Ct. 1436 (1995) (quoting Pesina v. Johnson, 913 F.2d.

53, 54 (2d Cir. 1990)); 28 U.S.C. § 2254(c) (“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.”). The exhaustion doctrine gives the state court a fair opportunity to pass upon all of the federal claims asserted in the petition so that it may correct any constitutional error before the federal habeas court addresses it. Rose v. Lundy, 455 U.S. 509, 518 (1982). At the core of the exhaustion doctrine, is the “respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions.” Jones v. Vacco, 126 F.3d 408 (2d Cir. 1997) (internal quotations omitted).

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) on April 24, 1996, the Supreme Court had adopted a rule of total exhaustion in Rose v. Lundy requiring a federal court to dismiss a habeas petition that contained both exhausted and unexhausted claims (a “mixed petition”). The petitioner then had the option of resubmitting the petition either with the unexhausted claims removed or after exhaustion of all the claims at the state level. See, e.g., Johnson v. Scully, 967 F. Supp. 113, 115 (S.D.N.Y. 1997). However, with the enactment of the AEDPA, a federal court can now deny a mixed petition on the merits. 28 U.S.C. § 2254(b)(2) provides that “[a]n application for a writ of habeas corpus may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.” The statute provides the court with discretion to deny the

mixed petition but not to grant it.

However, in this case, Lakram's petition was filed before the enactment of the AEDPA. This Court can only deny the mixed petition on the merits if it chooses to apply Section 2254(b)(2) retroactively. Yet, this Court declines to do so. In Lindh v. Murphy, 117 S.Ct. 2059, 2068 (1997), the Supreme Court held that the . . . new provisions of chapter 153 generally apply only to cases filed after the [AEDPA] became effective. Because Section 2254(b)(2) is part of chapter 153, this Court will not apply it retroactively and therefore holds that it does not have the discretion to deny Lakram's mixed petition on the merits. See e.g.; Chisolm v. Costello, 1998 WL 167332 (S.D.N.Y.) (holding that § 2254(b)(2) does not apply retroactively).

Lakram's petition for a writ of habeas corpus contains three claims (grounds one, three, and five) that have not been exhausted in the state courts of New York. In grounds one and three, Petitioner is challenging the show-up identification for reasons other than were appealed on to the Appellate Division. Petitioner is now claiming a Sixth Amendment violation and a violation of the "reliability test." Because the state court did not adjudicate these issues, this Court is barred from doing so. As for ground five, which challenges the use of prior convictions admitted at trial, Petitioner failed to exhaust this claim when he neglected to seek leave to appeal to the Court of Appeals on this ground. Because Petitioner has now forfeited this issue for appeal to the Court of Appeals, this Court can only entertain this claim upon a showing of good cause

and prejudice. See Bossett, 41 F.3d at 828. However, Petitioner has not demonstrated good cause and prejudice in his petition. Thus, grounds two and four of Lakram's petition are the only grounds that have met the exhaustion requirement. Petitioner now has two choices. He may either refile his § 2254 petition with this Court dropping the unexhausted claims and demonstrating good cause and prejudice with regard to the fifth ground, or Petitioner may first appeal to the Appellate Division on those grounds that have not been exhausted and after all of his state remedies have been exhausted, timely refile his federal habeas petition.

This Court reminds Petitioner, however, that the recent amendment to the habeas corpus statute imposes a one-year statute of limitations for filing non-capital habeas corpus petitions in federal court. 28 U.S.C. § 2244(d). In most cases, the one-year period will start to run on the date on which the state court judgment became final by the conclusion of direct review, although the statute of limitations is tolled while a properly filed application for state post-conviction or other collateral review is pending. Thus, however Petitioner chooses to proceed, he is cautioned to be aware of the new time limitation for habeas corpus petitions filed after April 24, 1996.

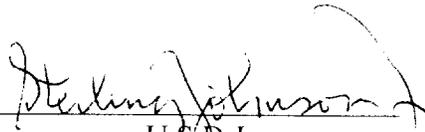
In addition, this Court declines to issue a certificate of appealability, as Petitioner has not presented a "substantial showing of the denial of a constitutional right." See Nelson v. Walker, 121 F.3d 828, 832 n.3 (2d Cir. 1997).

CONCLUSION

Because Petitioner has not exhausted his claims in state court. Lakram's petition is dismissed without prejudice without reaching the merits of his claims.

SO ORDERED.

Dated: June 15, 1998
Brooklyn, New York


U.S.D.J.