

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROBERTO BERTA,

97 CV 1968

Petitioner,

MEMORANDUM

AND

-against-

ORDER

GEORGE BARTLETT, Superintendent,
Elmira Correctional Facility,

Respondent.

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STANLEY NEUSTADTER
342 Madison Avenue, suite 1002
New York, New York 12345
for petitioner.

RICHARD BROWN
District Attorney, Queens County
125-01 Queens Boulevard
Kew Gardens, New York 11415
for respondent.

NICKERSON, District Judge:

On April 17, 1998 petitioner filed this proceeding for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This is the second petition for habeas corpus that petitioner has filed in this court. The Court dismissed the first petition without prejudice when

petitioner asked that it be withdrawn. Barta v. Bartlett, 95-CV-4659 (November 13, 1996).

Between December of 1987 and March of 1991, petitioner, a Santoria priest, raped, sodomized, and sexually abused two young girls: eleven-year-old Diana Castro, and ten-year-old Dania Perez. Before raping them, petitioner threatened the girls with physical harm, telling them that evil spirits would hurt them or their families if they did not submit.

After a jury trial, petitioner was convicted in Supreme Court, Queens County, of five counts of Rape in the First Degree, four counts of Sodomy in the First Degree, four counts of Sexual Abuse in the First Degree, two counts of Rape in the Second Degree, four counts of Sexual Abuse in the Second Degree, and two counts of Endangering the Welfare of a Child. On June 19, 1992 petitioner was sentenced to an aggregate term of twenty to sixty years in prison.

In June of 1993 petitioner appealed to the Appellate Division, Second Department, challenging his conviction and sentence. Among other things,

petitioner claimed that the convictions for crimes containing the elements of forcible compulsion---first-degree rape, first-degree sodomy, and first-degree sexual abuse---should be vacated because the evidence at trial failed to establish that he forcibly compelled his victims. His conviction and sentence were affirmed on March 27, 1995.

On April 20, 1995 petitioner sought leave to appeal to the Court of Appeals. That request was denied on May 30, 1995.

Petitioner filed a petition for writ of habeas corpus in this Court on October 24, 1995. The petition was dismissed without prejudice on November 13, 1996.

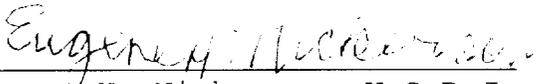
The present application for habeas corpus was filed in this Court on April 8, 1997. It raises one claim presented to the Appellate Division on direct appeal: that the prosecutor presented legally insufficient evidence of "forcible rape" to support the conviction of first-degree rape of Diana Castro in February of 1988.

violated by petitioner's conviction. Petitioner argues that forcible compulsion as defined by N.Y. Penal Law § 130.000(8) does not include spiritual threats. This is a question of state law, and does not raise any federal question cognizable in a petition for habeas corpus.

The petition is denied. A certificate of appealability will not be issued because petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253; see Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996).

So ordered.

Dated: Brooklyn, New York
April 30, 1998


Eugene H. Nickerson, U.S.D.J.