

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FELIPE RODRIGUEZ,

97 CV 3563

Petitioner,

-against-

MEMORANDUM
AND
ORDER

CHARLES GREINER, Superintendent,
Sing Sing Correctional Facility,

Respondent.

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FELIPE RODRIGUEZ
No. 90-A-7694
Sing Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562
petitioner pro se.

RICHARD BROWN
District Attorney, Queens County
(Rok n Forshaw, of counsel)
125-01 Queens Boulevard
Kew Gardens, New York 11415
for respondent.

NICKERSON, District Judge:

Petitioner pro se brought this proceeding for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court denied petitioner's motion for appointment of counsel on June 24, 1997 because it could not determine

at the time whether petitioner's claims were likely to be of merit. By letter filed on May 26, 1998 petitioner renews his motion for appointment of counsel, or alternatively asks for an extension of time to prepare his response.

Cooper v. A. Sargenti Co., 877 F.2d 170 (2d Cir. 1989), articulates the factors the court must consider before appointing counsel for an indigent litigant:

(1) whether the indigent's position seems likely to be of substance, (2) the indigent's ability to investigate the crucial facts, (3) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, (4) the indigent's ability to present the case or obtain private counsel, (5) the complexity of the legal issues, (6) the availability of counsel, (7) and special reasons why appointment of counsel would be likely to lead to a more just determination.

In Cooper, the court said that only if, after close scrutiny of the merits of the claim, the court finds it to be of substance should the other criteria

be considered. 877 F.2d at 172, quoting Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986).

Petitioner raises three grounds in his petition:

(1) that the prosecutor withheld an audiotape, (2) prosecutorial misconduct, and (3) admission of a prejudicial statement by petitioner.

The court has reviewed plaintiff's claims and finds that they are not likely to be of substance. The state court held a hearing on petitioner's first claim and made a factual finding that the audiotape had been disclosed to the defense prior to trial. Petitioner's second claim is likely to be precluded by an independent and adequate state procedural ground. The third claim concerns the trial court's decision to admit petitioner's statement that he liked looking at "messed up" bodies, which petitioner claims violated the rule against admission of uncharged crimes. Petitioner is unlikely to prevail on this third claim as the statement was not evidence of an uncharged crime. The court thus does not consider the other factors in Cooper.

The renewed motion for appointment of counsel is denied. Petitioner's request for a sixty-day extension is granted. Petitioner will file his response on or before July 26, 1998.

So ordered.

Dated: Brooklyn, New York
June 24, 1998



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