

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SHERMAN WALKER,

Petitioner,

97 CV 3397 (SJ)

- against -

MEMORANDUM AND
ORDER

CHRISTOPHER ARTUZ, Superintendent
of Green Haven Correctional Facility,

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

SHERMAN WALKER
I.D.# 92-A-7141
Green Haven Correctional Facility
Route # 216, Drawer B
Stormville, NY 12582
Petitioner, Pro Se

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of the State of New York
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New York, NY 10271
By: Efrem Z. Fischer, Esq.
Assistant Attorney General
Attorneys for Respondent

JOHNSON, District Judge:

Sherman Walker (“Petitioner” or “Walker”) has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner believes his state court conviction should be reversed because (1) the prosecution failed to provide *Rosario* materials and (2) Petitioner was denied his constitutional right to counsel at the lineup

when police deliberately failed to contact his counsel. Respondent moves to dismiss the petition as time-barred. For the reasons stated below, the petition is dismissed.¹

BACKGROUND

On June 16, 1992, after pleading guilty, Petitioner was convicted of Robbery in the First Degree (N.Y. Penal Law § 120.10[1]) and sentenced to a prison term of 7 to 14 years. Petitioner appealed his conviction to the New York Supreme Court, Appellate Division, Second Department (“Appellate Division”). On June 12, 1995, the Appellate Division affirmed Petitioner’s judgment of conviction. People v. Walker, 216 A.D.2d 425 (2d Dept. 1995). On January 5, 1996, the New York State Court of Appeals denied Petitioner further leave to appeal. People v. Walker, 87 N.Y. 926 (1996).

Petitioner filed his first habeas corpus petition in June of 1996 in conjunction with a claim pursuant to 42 U.S.C. § 1983. On July 9, 1996, this Court dismissed the petition without prejudice pursuant to 28 U.S.C. § 1915(d) because it was not apparent that Walker had exhausted all of his state remedies. Walker v. Legal Aid et al., 96 CV 2946 (E.D.N.Y. June 9, 1996). On May 20, 1997, Petitioner filed the instant petition.

¹ Rule 4 of the Rules Governing Section 2254 Cases for the United States District Courts permits a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),² which became effective on April 24, 1996, significantly amended 28 U.S.C. §§ 2244, 2253, 2254 and 2255. As a result, 28 U.S.C § 2244(d)(1) now provides that federal habeas petitions challenging a judgment of a state court are subject to a one-year statute of limitations.³ The limitation period, with certain exceptions, begins to run either after the completion of direct review of the judgment by the state courts or upon the

² Pub. L. No. 104-132, 110 Stat. 1214 (1996).

³ 28 U.S.C. § 2244(d)(1) states:

(1) a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1). However, Congress did not provide specific guidelines regarding the retroactivity of this provision, thereby leaving the resolution of that issue to the courts. The Court of Appeals of the Second Circuit has held that in cases where, as here, the judgment of conviction became final before the effective date of the AEDPA, the habeas petition may be filed outside the one-year period but within a “reasonable time” after April 24, 1996. See Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997). Yet, it declined to set forth a precise definition of “reasonable time.”

In Peterson, the court held that the petitioner’s filing of his petition seventy-two days after the effective date of the AEDPA was timely. Id. at 93. However, the court stated that “where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition,” it saw no need to accord a full year after the effective date of the AEDPA. Id. at 93. Further, the court cautioned that the reasonable time alternative should not be applied with undue rigor. Id.

In order to analyze the effect of the AEDPA on the instant case, it is necessary to reiterate the dates of the relevant events. As set forth above, Petitioner’s state court conviction became final on January 15, 1996, when Petitioner failed to file an appeal ten days after the New York Court of Appeals decision. Petitioner did not file any

collateral motions. Walker's second habeas petition is dated May 20, 1997⁴ ---over one year and four months after the completion of his direct appeal, over one year after the effective date of the AEDPA, and almost one full year after his first habeas petition was dismissed. Even after being notified that his first habeas petition failed to state a claim, Walker waited almost one year to file his second habeas petition. Thus, the Court finds that Walker's current petition was not filed within a reasonable time as contemplated in Peterson. Accordingly, the Court hereby dismisses the petition as time-barred. See Clark v. Greiner, 97 CV 2483 (E.D.N.Y. July 10, 1997) (habeas petition dismissed as untimely where it was filed over one and one-half years after conviction became final and eleven months and two and one-half weeks after enactment of the AEDPA); Smith v. Stinson, 97 CV 1935 (E.D.N.Y. June 30, 1997) (finding untimely a petition filed more than two years after conviction became final and eleven months and three weeks after enactment of the AEDPA); Calderon v. Artuz, 97 CV 1965 (E.D.N.Y. June 25, 1997) (dismissing petition filed eleven months and three weeks after the effective date of the AEDPA and over four and one-half years after the state court judgment as untimely); DeChirico v. Walker, 97 CV 1456 (E.D.N.Y. June 12, 1997) (finding petition filed almost eleven months after the effective date of the AEDPA, and over four years after his judgment of conviction became final was untimely); Oppenheimer v.

⁴ Where a prisoner is proceeding pro se, he is deemed to have filed his application when it is delivered to prison officials. Houston v. Lack, 487 U.S. 266, 273 (1988).

Kelly, 1997 WL 362216 (S.D.N.Y. 1997) (stating that filing 350 days after the effective date of the AEDPA is unreasonable); Zebrowski v. Keane, 1997 WL 436820 (N.D.N.Y. 1997) (concluding that petition filed more than three years after judgment of conviction became final and more than one year after the effective date of the AEDPA was not timely); Berger v. Stinson, 1997 WL 535227 (W.D.N.Y. 1997) (dismissing petition filed eight days short of a full year after the AEDPA became effective and where the underlying conviction occurred more than a decade ago as time-barred). But see Rivalta v. Artuz, 1997 WL 401819 (S.D.N.Y. 1997) (finding a petition filed six months after the effective date of the AEDPA was timely).

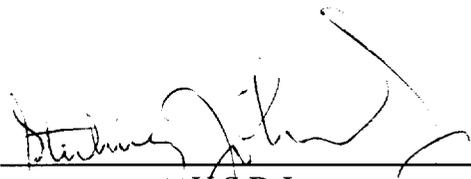
Given that the petition is time-barred, the merits of Petitioner's claims shall not be addressed. In addition, this Court declines to issue a certificate of appealability, as Petitioner has not presented a "substantial showing of the denial of a constitutional right." See Nelson v. Walker, 121 F.3d 828, 832 n.3 (2d Cir. 1997).

CONCLUSION

For the reasons set forth above, Walker's petition for a writ of habeas corpus is dismissed.

SO ORDERED.

Dated: May 6, 1998
Brooklyn, New York



U.S.D.J.