

UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

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on 8/6/98
MARIA CANDELARIA

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PAUL JOLLY,

Petitioner,

-against-

CV 97-2000 (RJD)

MEMORANDUM & ORDER

JAMES STINSON, Supt.,
Great Meadow Correctional Facility,

Respondent.
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DEARIE, District Judge.

Pro se petitioner Paul Jolly has been a prisoner in state custody since January of 1991, when a jury in New York State Supreme Court, Kings County, convicted him of murder in the second degree and burglary in the first degree. On or around April 15, 1997, he filed a petition for a writ of *habeas corpus* in this Court.

The respondent moved to dismiss the petition on the grounds that it failed to comply with the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which requires a prisoner to file his *habeas* petition within one year of the date his conviction became final. 28 U.S.C. § 2244(d)(1)(a). Petitioner filed a cross-motion to dismiss respondent's motion, asserting that the statute of

limitations had not yet begun to run because his conviction had not become final. Respondent then made a cross-motion to dismiss because Jolly would be barred from petitioning for the writ if he had not yet exhausted his state remedies.

Exhaustion of state remedies

A *habeas* petitioner's failure to exhaust his state remedies is grounds for dismissal of the petition. 28 U.S.C. § 2254(b). See Rose v. Lundy, 455 U.S. 509, 519 (1982) (adopting a "total exhaustion rule" that requires a *habeas* petitioner to first seek all viable remedies in the state court system). A petitioner has exhausted his state remedies when there is no longer any procedure available to him in the state courts under which he could raise the question presented. 28 U.S.C. § 2254(c).

Aided by counsel, Jolly appealed his conviction from a judgment of the Supreme Court of New York, Kings County, to the Appellate Division on July 30, 1992. By order dated May 24, 1993, the Appellate Division modified Jolly's sentence and affirmed his conviction as modified. People v. Jolly, 193 A.D.2d 816, 598 N.Y.S.2d 285 (2d Dep't 1993). On June 20, 1993 petitioner attempted to file a *pro se* application for leave to appeal with the Court of Appeals. However, he did not send a copy of the Appellate Division order from which he was appealing. A complete application for leave to appeal includes a copy of the order to be appealed. N.Y. Ct. Rules § 500.10. Over the next

thirteen months, Jolly was contacted numerous times by Stuart M. Cohen ("Cohen"), the Deputy Clerk at the New York Court of Appeals, who advised him that his application would not be complete until he sent all necessary documents. By letter dated August 5, 1994, Cohen advised Jolly that, as he had still not provided a copy of the order, his file was being closed.

A party who wishes to appeal an order of the Appellate Division to the New York Court of Appeals has thirty days in which to apply for leave to appeal. N.Y.C.P.L. § 460.10(5)(a). Upon expiration of that time, a person who wishes to appeal but who has not yet filed an application for leave may seek a thirty-day extension, as long as no more than one year has passed since the running of the original thirty days. *Id.* at § 460.30. Jolly therefore had until June 24, 1993 (thirty days) to file a timely application for leave to appeal and until June 24, 1994 (one year) to move for an extension.

Petitioner clearly did not complete his application to the Court of Appeals within thirty days. In addition, Jolly did not apply for an extension in the twelve months that followed. The New York Court of Appeals strictly construes the one-year requirement of § 460.30 because "time limits within which appeals must be taken are jurisdictional in nature." People v. Thomas, 47 N.Y.2d 37, 43 (1979). Even if Jolly were to complete his application for leave to appeal today, the Court of Appeals

"lack[s] inherent power to modify or extend [the statutorily defined time limit]" and, therefore, would lack jurisdiction to decide the case. Id.

Jolly need not have taken pointless action in the state courts in order to now prove that he has exhausted his state remedies. See Stubbs v. Smith, 533 F.2d 64, 68 (2d Cir. 1976) (holding that petitioner need not exhaust state remedies when action in state court would be futile). At the time he filed his petition, Jolly had no way of raising his claims in state court; therefore, the exhaustion requirement is satisfied. See id. Respondent's respondent's cross-motion to dismiss is denied.

Statute of limitations

As discussed above, Jolly's conviction became final in 1994 when the time limit for filing an appeal expired. In Ross v. Artuz, No. 97-2789 (2d Cir. 1998) the Second Circuit held that petitioners whose convictions became final before April 24, 1996, the effective date of the AEDPA, are entitled to a one-year grace period in which to file their petitions, starting from the statute's effective date.

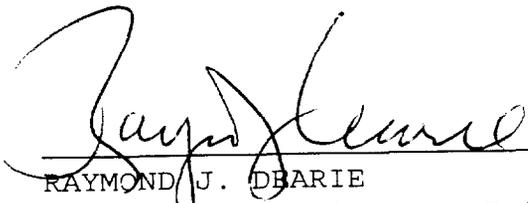
Because a prisoner has limited control over when his petition reaches the court, the petition is deemed filed when the petitioner turns it over to prison officials. See Houston v. Lack, 487 U.S. 266 (1988). Jolly's petition was dated April 15,

1997 and received by the pro se clerk on April 18th. Hence, Jolly filed his petition in the time period between April 15th and April 18, 1997, clearly before the statute of limitations had run on April 24, 1997. Accordingly, respondent's motion to dismiss for failure to comply with the statute of limitations is also denied.

Respondent is directed to file a response to the petition within thirty days.

SO ORDERED.

Dated: Brooklyn, New York
August 5, 1998


RAYMOND J. DEARIE
United States District Judge