

E.D.N.Y.-Bklyn
17-cv-2797
Matsumoto, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of December, two thousand eighteen.

Present:

Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Zhordrack Bloodywone,

Petitioner-Appellant,

v.

18-1250

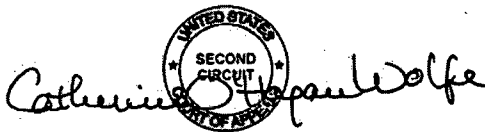
Marcy Correctional Facility, Superintendent, New York
State Department of Corrections and Community Supervision,

Respondents-Appellees.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, appointment of counsel, bail, and restitution. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not shown that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling,” as to Appellant’s failure to exhaust his state court remedies. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

A circular seal of the United States Court of Appeals for the Second Circuit is stamped over the signature. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

FILED
IN CLERK'S OFFICE
US DISTRICT COURT E.D.N.Y.

★ APR 04, 2018 ★

BROOKLYN OFFICE

*Received
4/4/18
(Signature)*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
ZHORDRACK BLOODYWONE,

Petitioner,

JUDGMENT
17-CV-2797 (KAM)

MARCY CORRECTIONAL FACILITY,

Respondent.
----- X

An Order of Honorable Kiyo A. Matsumoto, United States District Judge, having been filed on April 4, 2018, dismissing the petition for a writ of habeas corpus pursuant to Section 2254 without prejudice; denying the issuance of a certificate of appealability; certifying pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith; and denying *in forma pauperis* status for the purpose of any appeal, *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962); it is

ORDERED and ADJUDGED that the petition for a writ of habeas corpus pursuant to Section 2254 is dismissed without prejudice; that no certificate of appealability shall issue; that pursuant to 28 U.S.C. § 1915(a)(3), any appeal would not be taken in good faith; and that *in forma pauperis* status is denied for the purpose of any appeal, *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

Dated: Brooklyn, NY
April 4, 2018

Douglas C. Palmer
Clerk of Court

By: /s/Jalitzia Poveda
Deputy Clerk

am

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
ZHORDRACK BLOODYWONE,

Petitioner,

-against-

MARCY CORRECTIONAL FACILITY,

Respondent.
-----X

FILED
IN CLERK'S OFFICE
US DISTRICT COURT E.D.N.Y.
★ APR 04 2018 ★
BROOKLYN OFFICE

ORDER

17-CV-2797 (KAM)

On April 6, 2017, Zhordrack Bloodywone,¹ currently incarcerated at Great Meadow Correctional Facility pursuant to 2016 Queens County convictions for rape and burglary, submitted to the United States District Court for the Southern District of New York ("S.D.N.Y."), a collection of documents style alternately as a "Notice of Appeal," an "Order to Show Cause," and a "Petition for a Writ of Habeas Corpus," meant for the "U.S. District Court of Appeals." (ECF No. 1 at 4-5 ("Initial Submission").) By Order dated January 22, 2018, this court provided an "Adams" notice to Mr. Bloodywone, advising him that pursuit of a Title 28, United States Code Section 2254 ("Section 2254") habeas proceeding may constitute the only chance he has to seek relief under Section 2254 and allowing him the opportunity to withdraw this action to protect that opportunity.

¹ Plaintiff also spells his last name "Blodywon." See *People v. Blodywon*, 2017 Slip Op. 64442(U) (N.Y. App. Div. February 16, 2017) (denying application for a writ of habeas corpus).

See *Adams v. United States*, 155 F.3d 582, 584 (2d Cir. 1998).

The Order granted Petitioner thirty days to withdraw the submission or to file a petition for a writ of habeas corpus pursuant to Section 2254. On February 26, 2018, Petitioner filed a petition for a writ of habeas corpus pursuant to Section 2254 challenging his 2016 Queens County convictions for burglary and rape. (Petition, ECF No. 15.) In accordance with Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court has reviewed the Petition and determined that the Petitioner is not entitled to relief in this Court. See 28 U.S.C. foll. § 2254; 28 U.S.C. § 2254(b). The Petition is dismissed without prejudice. Petitioner's motion for leave to proceed *in forma pauperis* is granted for the purposes of this order.

DISCUSSION

A. The Habeas Petition Is Premature

Mr. Bloodywone was convicted on May 3, 2016 of robbery and rape in Queens County Supreme Court, sentenced to twelve years in prison. (See Petition at 1.)² Although the instant

² Although Petitioner provides the date of judgment of conviction as October 15, 2014 and his sentencing as May 3, 2017, (Petition at 1), a search of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department's ("Second Department") records confirms that two judgments of the Supreme Court, Queens County challenged by this Petition were rendered against Petitioner on May 3, 2016 (Queens Index Nos. 2284/14, 2034/14). See *People v. Blodywon*, 2016-06925, 2016-06926,

petition does not mention it, from the Initial Submission, other filings by Petitioner, and a search of the records of the Second Department, it appears that petitioner's direct appeal of his conviction is still pending before the Second Department. If the Second Department denies petitioner's appeal, petitioner may then appeal his conviction to the New York Court of Appeals before the state court decision is considered final.³

Before a federal court may entertain a habeas corpus petition on behalf of a state prisoner, the petitioner must first exhaust her or his available state remedies. See 28 U.S.C. § 2254(b) and (c); *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2386-87 (2006) (explaining that "[a] state prisoner is generally barred from obtaining federal habeas relief unless the prisoner has properly presented his or her claims through one complete round of the State's established appellate review process") (citation and internal quotation marks omitted); *Jimenez v. Walker*, 458 F.3d 130, 48-49 (2d Cir. 2006); *Jones v. Vacco*, 126 F.3d 408, 413 (2d Cir. 1997); *Daye v. Attorney*

Second Department, Orders dated September 1, 2016 and December 9, 2016.

³ The fact that Petitioner filed a petition for a writ of habeas corpus in the Second Department, (Petition at 3), does not change the path that he must follow in order to exhaust his state remedies. See *People v. Blodywon*, 2017 Slip Op. 64442(U) (N.Y. App. Div. February 16, 2017). In order to exhaust his state remedies, Petitioner must pursue his claims through the state appellate process.

General of New York, 696 F.2d 186, 190 (2d Cir. 1982) (*en banc*). The exhaustion doctrine assures the "respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions," *Daye*, 696 F.2d at 191, and "increas[es] the likelihood that the factual allegations necessary to a resolution of the claim will have been fully developed in state court, making federal habeas review more expeditious." *Id.* Although both federal and state courts are charged with securing a state criminal defendant's federal rights, the state courts must be given the opportunity to consider and correct any violations of federal law. *Jones*, 126 F.3d at 413.

Here, Petitioner has not exhausted his state court remedies. Accordingly, the instant petition is premature and is dismissed without prejudice. See 28 U.S.C. § 2254 (b)(1)(A), (c); *Henry v. Davis*, No. 10-CV-5172, 2011 WL 319935, at *1 (E.D.N.Y. Jan.26, 2011) (citing *Haynes v. Fiorella*, No. 10-CV-0843, 2010 WL 4365832, at * 1 (W.D.N.Y. Nov.3, 2010) (dismissing without prejudice petitioner's § 2254 petition where there was no indication that petitioner had been convicted or had exhausted her state court remedies) and *Williams v. Horn*, No. 06-CV-3068, 2006 WL 2333874, at *1 (E.D.N.Y. Aug.9, 2006) ("[B]ecause the criminal proceedings are ongoing, there has been no judgment or adjudication on the merits of petitioner's claims

and therefore, this § 2254 petition is premature.")); see also, *Holmes v. DeMarco*, No. 13-CV-401, 2013 WL 2154882, at *1-2 (E.D.N.Y. May 14, 2013).

B. Status of Petitioner's Criminal Case

Throughout the submissions before the Court, Petitioner appears confused about the status of his criminal case. (See e.g. Petition, ECF No. 15 at 2 (stating that the S.D.N.Y. dismissed the charges in 17-CV-2557) and Letter, ECF No. 12 at 1 (requesting release pursuant to an order in this case).) The court clarifies and advises Mr. Bloodywone that there is no order in this case, Civil Docket Number 1:17-CV-2797, authorizing Mr. Bloodywone's release. Nor is there any order in this case when it was before the S.D.N.Y., Civil Docket Number 17-CV-2557, that dismissed the charges against petitioner. Mr. Bloodywone presented any state court decision that resulted in, nor has the Court's review of state court records revealed, any alteration to the convictions at issue in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus pursuant to Section 2254 is dismissed without prejudice for the reasons set forth above.⁴ As petitioner has

⁴A petition dismissed for failure to exhaust state court remedies does not necessarily render future petitions "second or

not made a substantial showing of the denial of constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253. The Court certifies pursuant to Title 28, United States Code Section 1915(a)(3) that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal. *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962). The Clerk of Court is respectfully directed to serve a copy of this order and the docket on *pro se* petitioner, note service on the docket, and close this case.

SO ORDERED.

/s/

Kiyo A. Matsumoto
United States District Judge

Dated: Brooklyn, New York
April 3, 2018

successive." See *Murray v. Greiner*, 394 F.3d 78, 80-81 (2d Cir. 2005) (noting that, for purposes of § 2254 petitions, dismissal of a petition for "correctable error" including "failure to exhaust state remedies" is not an "adjudication on the merits" that would render a subsequent petition "second or successive."); *Camarano v. Irvin*, 98 F.3d 44, 46 (2d Cir. 1996) (no "second or successive" petition within the meaning of 28 U.S.C. § 2244 where earlier petition dismissed without prejudice for failing to exhaust state remedies).