

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 24th day of October, two thousand and seventeen,

Present: Rosemary S. Pooler,
Peter W. Hall,
Susan L. Carney,

Circuit Judges.

Michael Alexander,

Petitioner - Appellant,

v.

Christopher Miller,

Respondent - Appellee.

ORDER

Docket No. 16-4055

Michael Alexander filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe


Appendix C

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 27th day of July, two thousand seventeen.

Present:

Rosemary S. Pooler,
Peter W. Hall,
Susan L. Carney,
Circuit Judges.

Michael Alexander,

Petitioner-Appellant,

v.

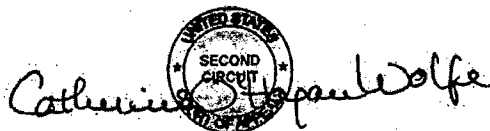
16-4055

Christopher Miller,

Respondent-Appellee.

Appellant, pro se, moves for in forma pauperis ("IFP") status and a certificate of appealability ("COA"). Upon due consideration, it is hereby ORDERED that the IFP motion is DENIED as unnecessary because the district court granted IFP status on appeal. It is further ORDERED that the COA 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 the untimeliness of Appellant's 28 U.S.C. § 2254 petition. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

A circular official seal of the United States Court of Appeals for the Second Circuit is stamped over the signature. The seal contains the text "UNITED STATES COURT OF APPEALS" around the perimeter and "SECOND CIRCUIT" in the center. The signature "Catherine O'Hagan Wolfe" is written in cursive across the seal.

(Appendix A)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
MICHAEL ALEXANDER,

Petitioner,

v.

CHRISTOPHER MILLER,

Respondent.
-----X

:
:
:
: **MEMORANDUM AND ORDER**
: **16-CV-3415 (WFK)(LB)**
:
:
:
:

WILLIAM F. KUNTZ, II, United States District Judge:

On June 20, 2016, Michael Alexander (“Petitioner”) filed a petition for writ of *habeas corpus*. On September 16, 2016, the District Attorney in Queens County (“Respondent”) moved to dismiss the petition for writ of *habeas corpus* as time barred. The Court finds the one-year statute of limitations has expired and grants Respondent’s motion to dismiss.

BACKGROUND

On June 26, 2006, Petitioner attacked the mother of his infant son with a baseball bat while she held their son in her arms. Aff. ¶ 3, ECF No. 9. Petitioner then proceeded to the apartment next door and repeatedly battered Rudolph Campbell over the head and face, causing severe head injuries that resulted in Campbell’s death. *Id.* Petitioner moved on to Charles Wynter’s apartment downstairs, but Wynter managed to wrestle the baseball bat away. *Id.* Petitioner fled. *Id.* When Petitioner returned home later that night, Campbell’s son, Dwight Campbell, attempted to restrain Petitioner. *Id.* Petitioner slashed Dwight Campbell’s face, causing a wound that required sixty stitches and surgery. *Id.* Petitioner fled and was apprehended approximately eleven months later. *Id.*

On December 30, 2008, a jury in New York State Supreme Court, Queens County, convicted Petitioner of two counts of Murder in the Second Degree, three counts of Burglary in

the First Degree, two counts of Assault in the Second Degree, Attempted Assault in the Second Degree, four counts of Criminal Possession of a Weapon in the Fourth Degree, and Endangering the Welfare of a Child. *Id.* ¶ 4; Pet. ¶ 5, ECF No. 1. Petitioner received concurrent prison terms of twenty-five years to life for each count of murder, ten years for each count of burglary, five years for each count of second-degree assault, one to three years for attempted assault, one year for each count of possession of a weapon, and one year for endangering the welfare of a child. Aff. ¶ 4; Pet. ¶ 3.

Petitioner appealed to the Appellate Division, Second Department, which dismissed the appeal on November 7, 2012. *People v. Alexander*, 100 A.D.3d 649 (2d Dept. 2012). Petitioner appealed this dismissal to the New York Court of Appeals, which denied his appeal on June 17, 2013. *People v. Alexander*, 21 N.Y.3d 1001 (2013). Petitioner then filed a motion for reconsideration on July 11, 2013, which the Court of Appeals denied on March 11, 2014. *People v. Alexander*, 22 N.Y.3d 1154 (2014).

On April 16, 2015, Petitioner filed a petition for writ of *coram nobis*. Aff., Ex. A. The Second Department denied this petition on November 25, 2015. *People v. Alexander*, 133 A.D.3d 868 (2d Dept. 2015). Petitioner appealed the denial to the New York Court of Appeals on December 18, 2015. *See* Aff., Ex. B. On December 31, 2015, the New York Court of Appeals notified Petitioner that his application was incomplete. *Id.* Ex. C. On April 4, 2016, the Court of Appeals dismissed Petitioner's appeal. *People v. Alexander*, 27 N.Y.3d 990 (2016).

On June 20, 2016, Petitioner filed a petition for writ of *habeas corpus* under 28 U.S.C. § 2254. Pet. ¶ 12, ECF No. 1 (asserting seven grounds for *habeas corpus* relief). Respondent filed a motion to dismiss the petition for writ of *habeas corpus* as time barred under 28 U.S.C. §

2244(d). Mot., ECF No. 8. For the reasons provided below, the Court grants Respondent's motion to dismiss.

DISCUSSION

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") sets a one-year limitations period for petitions for writ of *habeas corpus* based on law existing at the time of the conviction. 28 U.S.C. § 2244(d)(1)(A) (beginning from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"); *Williams v. Artuz*, 237 F.3d 147, 148 (2d Cir. 2001). In the Second Circuit, "the AEDPA limitations period specified in Section 2244(d)(1)(A) does not begin to run until the completion of direct appellate review in the state court system and either the completion of certiorari proceedings in the United States Supreme Court, or-if the prisoner elects not to file a petition for certiorari-the time to seek direct review via certiorari has expired." *Williams*, 237 F.3d at 151.

Here, the New York Court of Appeals denied Petitioner's motion for reconsideration on March 11, 2014. *People v. Alexander*, 22 N.Y.3d 1154 (2014). Petitioner did not seek direct review by the Supreme Court of this denial. Thus, the one-year limitations period imposed by the AEDPA began running, at the latest, ninety days after the denial of Petitioner's motion for reconsideration by the New York Court of Appeals: June 9, 2014. *See Williams*, 237 F.3d at 151; U.S. Sup. Ct. R. 13(1) (providing ninety days after entry of judgment to file a petition for writ of certiorari).

The one-year statute of limitations period under the AEDPA ran for 311 days before Petitioner filed a petition for writ of *coram nobis*, tolling the one-year clock. *See Aff., Ex. A* (dating petitioner's *coram nobis* motion to April 16, 2015). The New York Court of Appeals

denied this state collateral challenge on April 4, 2016, *People v. Alexander*, 27 N.Y.3d 990

(2016), which restarted the one-year limitations period. In the Second Circuit:

the AEDPA limitations period is not tolled during the time in which a petition for a writ of certiorari to the United States Supreme Court could have been filed with respect to a state collateral motion, *Smaldone* [*v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001)], even though the limitations period is tolled during the time in which a defendant could file a petition for certiorari seeking direct review of the state court conviction, *Williams*, 237 F.3d at 151. This is because the timing-related language of 28 U.S.C. § 2244(d)(1)(A) expressly provides that the limitations period begins to run on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review,” whereas § 2244(d)(2) provides for tolling only during the time in which “a properly filed application for State post-conviction or other collateral review with respect to a pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(1-2) (emphasis added).

Saunders v. Senkowski, 587 F.3d 543, 548–49 (2d Cir. 2009). Accordingly, the seventy-three days between the denial of the writ for *coram nobis* and the filing of the instant *habeas corpus* petition caused the one-year statute of limitations period to expire. By June 16, 2016, at least 384 days had run. Petitioner’s *habeas corpus* petition is thus time-barred. Accordingly, the Court dismisses the petition.

CONCLUSION

The Court GRANTS Respondent's motion to dismiss and DISMISSES Petitioner's petition for writ of *habeas corpus*. The Clerk of Court is respectfully directed to send a copy of this Memorandum and Order to Petitioner and to close this case. Petitioner's motion for *in forma pauperis* is granted, ECF No. 4, but the Court certifies pursuant to 28 U.S.C. § 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*, 269 U.S. 438, 444–45 (1962).

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
United States District Judge

Dated: November 17, 2016
Brooklyn, New York

**Additional material
from this filing is
available in the
Clerk's Office.**