

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JASON LAMONTE NICKERSON, :
 Petitioner, :
 :
 v. :
 :
ASHBEL T. WALL, :
 Respondent. :
 :

C.A. No. 15-014ML

REPORT AND RECOMMENDATION

Patricia A. Sullivan, United States Magistrate Judge

Pro se Petitioner Jason Lamonte Nickerson is a state prisoner serving a fifty-year sentence at the Adult Correctional Institutions. On January 13, 2015, he filed a petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody. ECF No. 1. The State of Rhode Island responded with a motion to dismiss (ECF No. 3), which was referred to me for preliminary review, findings and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). On July 7, 2015, I issued a report and recommendation (ECF No. 15) (“July 7 R&R”), which was adopted in its entirety on September 15, 2015 (ECF No. 25). In the Court’s Order of September 15, 2015, Petitioner was ordered to advise the Court whether he would voluntarily dismiss his unexhausted claims. In response, after procuring an extension, Petitioner filed an amended petition based on his intent to “to keep [his claims] viable.” ECF No. 29.

The matter is now before the Court on Petitioner’s amended petition (ECF No. 29), which has been referred to me for a determination whether the amended claims comport with the July 7 R&R. For the following reasons, I find that the amended petition does not cure the deficits identified in my July 7 R&R in that it is still a mixed petition; therefore, I recommend that the entire amended petition be dismissed.

I. ANALYSIS

The July 7 R&R included an extensive recitation of the somewhat complex relevant procedural history and the applicable legal principles, none of which will be repeated here. ECF No. 15 at 3-12. What is pertinent is that the original petition was based on four Grounds, two of which – Grounds One and Three based on prosecutorial misconduct resulting in adverse pretrial publicity – had not been properly exhausted in the state courts. Similarly, a sub-issue of the claim stated as Ground Two was based on the prosecutor’s three “Nos,” and also remained unexhausted. As a result, the entire petition was a “mixed petition” for which there is no basis for a stay, rendering it subject to dismissal pursuant to 28 U.S.C. § 2254(b)(1). The Court’s Order of September 15, 2015, was clear: all such unexhausted claims must be voluntarily dismissed for the petition to proceed.

The amended petition contains four Grounds and still includes these unexhausted claims, coupled with a plainly exhausted claim (Ground Three). Specifically, two of the sub-issues within Ground Two raise both the conduct of the state attorney general’s office resulting in the allegedly prejudicial pretrial article in the Providence Journal and the prosecutor’s three “Nos.” These are precisely the same unexhausted claims that were the basis for the Order of September 15, 2015. This is enough.¹ I recommend that the amended petition be dismissed.

II. CONCLUSION

Based on the foregoing, I recommend that the Court dismiss the entire amended petition as a mixed petition for which there is no basis for a stay because it does not cure the deficits identified in the July 7 R&R, as required by the Court’s Order of September 15, 2015.

¹ The amended petition has a host of new claims that also appear to be unexhausted in that they are not mentioned in the Rhode Island Supreme Court’s decision. State v. Nickerson, 94 A.3d 1116 (R.I. 2014). There is no need for this Court to struggle with making that determination. Whether or not they are exhausted, the amended petition is mixed and must be dismissed.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
January 22, 2016