

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL C. SAWYER,)	
)	
<i>Petitioner</i>)	
v.)	Civil No. 99-291-B
)	
STATE OF MAINE,)	
)	
<i>Respondent</i>)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The *pro se* petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction, following a jury trial in Maine Superior Court (Hancock County), for tampering with a witness, harassment by telephone and disorderly conduct. The judgment of conviction was entered on September 4, 1998. Petition under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody (“Petition”) (Docket No. 1) at 1. The petitioner asserts that his due process rights to a fair trial were violated because: (i) the state court denied his request that the State turn over certain discovery evidence; and (ii) the prosecutor made prejudicial statements during his trial. The petitioner further asserts that the prosecutor committed misconduct by willfully refusing to turn over the aforementioned discovery materials, and that there was insufficient evidence to convict him of the offenses charged in the indictment. The respondent has moved to dismiss the petition. I recommend that the motion be granted, without prejudice, because the petitioner has failed to exhaust one of his federal claims.

I. Background

On August 26, 1998 the petitioner was convicted of two counts of tampering with a witness in violation of 17-A M.R.S.A. §§ 454(1)(A)(2) (Count I) and 454(1)(B)(1) (Count II), one count of

harassment by telephone in violation of 17-A M.R.S.A. § 506(1)(A) (Count III) and one count of disorderly conduct in violation of 17-A M.R.S.A. § 501(2). Indictment and Docket Record, *State of Maine v. Michael C. Sawyer*, Docket No. CR-97-119, Maine Superior Court (Hancock County), contained within Superior Court Clerk's Record ("Clerk's Record"), Items 1 and 24 at 3. For sentencing purposes the state court merged Counts I and II into a single count and then imposed the following sentences: (i) two years' imprisonment, with all but nine months suspended, on the merged tampering with a witness count; (ii) six months' imprisonment on the harassment-by-telephone count; and (iii) six months' imprisonment on the disorderly conduct count. Judgment and Commitment, *State of Maine v. Michael C. Sawyer*, Docket No. CR-97-119, Maine Superior Court (Hancock County), contained within Clerk's Record, Item 11 at 1. All sentences were to run concurrently. *Id.*

On September 14, 1998 the petitioner filed with the Maine Supreme Judicial Court, sitting as the Law Court, a leave to appeal his sentence and a notice of appeal from his judgment of conviction. Defendant's Application to the Law Court to Allow an Appeal of Sentence, *State of Maine v. Michael C. Sawyer*, Docket No. CR-97-119, Maine Superior Court (Hancock County), contained within Clerk's Record, Item 19; Defendant's Notice of Appeal to the Law Court, *State of Maine v. Michael C. Sawyer*, Docket No. CR-97-119, Maine Superior Court (Hancock County), contained within Clerk's Record, Item 20. On October 26, 1999 the Law Court affirmed the petitioner's judgment of conviction. *See State v. Sawyer*, No. 99-126 (Me. October 26, 1999) (mem.), submitted with Response to Petition, etc. ("Response") (Docket No. 5). This petition followed.

II. Discussion

The petitioner has asserted four grounds in support of his petition for habeas relief. Petition at 5-6. Of particular concern here is the petitioner's fourth ground for relief. Although the precise basis on which the petitioner seeks habeas relief on this ground is not perfectly clear, it appears that he is asserting that the state court erred in denying his motion for acquittal or a new trial because: (i) there was insufficient evidence that he tampered with a "witness" within the meaning of 17-A M.R.S.A. § 454, and (ii) there was insufficient evidence that he committed the other offenses charged in the indictment. *Id.* at 6.

It is well settled that "a federal court will not entertain an application for habeas relief unless the petitioner first has fully exhausted his state remedies in respect to each and every claim contained within the application." *Adelson v. DiPaola*, 131 F.3d 259, 261 (1st Cir. 1997). A habeas petitioner therefore must demonstrate that he tendered each claim to the state's highest tribunal "in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question." *Id.* at 262 (citation omitted). The determination of whether the petitioner here has fairly presented his federal claims to the Law Court is made by examining "the four corners" of his state application for appellate review. *Id.* at 263 (citation omitted).

In his appeal to the Law Court, the petitioner argued that the state court erred in denying his motion for acquittal or a new trial because the State's evidence could not support his convictions for tampering with a witness inasmuch as it was not established that he tampered with a "witness" within the meaning of 17-A M.R.S.A. § 451. Brief of Appellant, *State of Maine v. Michael C. Sawyer*, Law Docket No. HAN-98-452 ("Appellant's Brief") at 30-34. The petitioner further argued to the Law Court that there was insufficient evidence to convict him of the other offenses charged

in the indictment. *Id.*

The problem here is that the petitioner never argued to the Law Court that the state court's actions violated any of the petitioner's federal constitutional rights. *Id.* Instead, in this direct appeal to the Law Court the petitioner relied entirely upon state grounds. *Id.* Specifically, the petitioner neither premised his Law Court arguments on federal constitutional grounds nor provided any indications that federal due process protections required reversal of his convictions. *Id.* Furthermore, the petitioner cited no federal cases, made no mention of the Fourteenth Amendment, and made only a single, glancing reference to the concept of due process. *Id.* at 30.

Moreover, even though the petitioner may have set forth the factual underpinnings for his present fourth-ground claims in his brief to the Law Court, the First Circuit has stated that "a habeas petitioner must also elucidate the legal foundation of his federal claim[s]." *Adelson*, 131 F.3d at 262. Here, the petitioner relies exclusively upon the language of 17-A M.R.S.A. § 452 as well as Maine case law in support of his arguments, and he discussed the state court's error only in state-law terms. Under these circumstances, it cannot be said "that the petitioner exhausted his due process claim." *Id.* at 263.

Consequently, because the petitioner's habeas petition contains both exhausted and unexhausted claims it must be dismissed, without prejudice, in its entirety. "[A] district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

III. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be

DENIED, without prejudice, for want of exhaustion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 15th day of March, 2000.

David M. Cohen

United States Magistrate Judge

SAWYER v. MAINE, STATE OF Filed: 12/20/99 Assigned to: JUDGE MORTON A. BRODY Demand: \$0,000 Nature of Suit: 530 Lead Docket: None Jurisdiction: Federal Question Dkt# in other court: None Cause: 28:2254 Petition for Writ of Habeas Corpus (State) MICHAEL C SAWYER MICHAEL C SAWYER plaintiff [COR LD NTC] [PRO SE] HANCOCK COUNTY JAIL 60 STATE STREET ELLSWORTH, ME 04605 v. MAINE, STATE OF CHARLES K. LEADBETTER defendant 289-3661 [COR LD NTC] ASSISTANT ATTORNEY GENERAL STATE HOUSE STATION 6 AUGUSTA, ME 04333 626-8800