

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LAWRENCE LEWIS,)	
)	
Petitioner)	
)	
v.)	Docket No. 00-197-P-H
)	
WARDEN, MAINE STATE PRISON,)	
)	
Respondent)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction in the Maine Superior Court (Aroostook County) on charges of gross sexual assault and unlawful sexual contact. The petition alleges twelve grounds for relief based on various constitutional grounds. I recommend that the petition be dismissed.

The petition states that a post-conviction review proceeding is pending in the Maine Superior Court (Aroostook County), Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody (Docket No. 1) at 2, and indeed a petition for post-conviction review was filed in that court on April 23, 1999. Docket Record, *State of Maine v. Lawrence Lewis*, Docket No. CARSC-CR-1999-00104, Maine Superior Court (Aroostook County), at 1. The matter remains pending there. *Id.* at 2.

The statute governing the writ of habeas corpus for those in state custody provides, in relevant part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). An applicant has not exhausted the remedies available in state court “if he has the right under the law of the State to raise, by any available procedure, the question presented.”

28 U.S.C. § 2254(c). To exhaust a federal constitutional claim, like the claims presented by the petitioner here, a petitioner must present its “substance” in state court before seeking a second opinion through habeas corpus proceedings in federal court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). “A habeas petitioner must have presented both the factual and legal underpinnings of his claim to the state courts in order for us to find it exhausted.” *Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) (citations omitted). The habeas petitioner “bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim.” *Adelson v. DiPaola*, 131 F.3d 259, 262 (1st Cir. 1997).

To the extent that the claims presented in this petition before this court are presented in the petitioner’s post-conviction review proceeding presently pending in state court, there can be no exhaustion of those claims until the state courts have had the opportunity to rule on them. *See, e.g., Phoenix v. Matesanz*, 189 F.3d 20, 27 n.5 (1st Cir. 1999) (a claim is not exhausted for habeas purposes until it has been presented to highest available state court so that state had first chance to correct claimed error). To the extent that the claims presented in the petition here have not been presented to the state court at all, there can be no exhaustion.

Because the state of Maine provides post-conviction review, section 2254(b)(1)(B)(i) is not implicated. The petitioner does not appear to claim that this state procedure is ineffective to protect

his rights, which would be the only other means available by which he could avoid the application of the exhaustion requirement. The petitioner does not suggest that he will suffer any prejudice as a result of the requirement that he exhaust his state remedies, nor has he shown that any miscarriage of justice will result if he is required to do so. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Whitten v. Allen*, 727 F. Supp. 28, 30 (D. Me. 1989). Accordingly, his failure to exhaust his remedies in state court means that this action must be dismissed.

I recommend that the petition for a writ of habeas corpus be **DISMISSED** without a hearing.

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.

Date this 13th day of July, 2000.

David M. Cohen
United States Magistrate Judge