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BY ELECTRONIC FILING

Honorable Jeremiah J. McCarthy
United States Magistrate Judge
Western District of New York
424 United States Courthouse
68 Court Street
Buffalo, New York 14202

Re: Jonathan Roberts v. Supt., Attica Correctional Facility
07-CV-0285 (JJM)

Your Honor:

I am an Assistant Attorney General in the office of Andrew M. Cuomo, Attorney General of the State of New York, and I represent respondent in the above referenced matter. I filed my response to the instant petition for a writ of habeas corpus on July 20, 2007. On January 11, 2007, I received petitioner's motion requesting a stay of this petition while he files in state court a motion to vacate the judgment pursuant to New York Criminal Procedure Law § 440.10. Petitioner's motion should be denied for the following reasons.¹

In Rhines v. Weber, 544 U.S. 269 (2005) the Supreme Court emphasized that the one year limitations period contained in AEDPA was intended to reduce delays, "streamlin[e] federal habeas proceedings," and to serve the state's interest in promoting the finality of judgments, and that granting stays, "too frequently" would undermine these goals. 544 U.S. at 276-77. As a result, stays should only be granted where the petitioner can establish "good cause" for his failure to exhaust his claims in state court, and where the claim is not "plainly meritless." 544 U.S. at 277. In addition, the Court stressed that "if a petitioner engages in abusive litigation tactics or intentional delay, the

¹ Respondent do not oppose the Court granting petitioner extension of time to file a reply to respondent's opposition to the petition.

district court should not grant him a stay at all.” 544 U.S. at 278.

Petitioner makes no attempt to establish the requisite “good cause” for his failure to previously present this issue in state court. Instead, petitioner only claims that he wants “to pursue a 440.10 of new evidence.” Petitioner has failed to give any specifics about the issue he will raise in state court if a stay is granted or why he could not have raised it in state court before he filed his habeas petition. Therefore, it is impossible to ascertain if his claim has any potential merit.

Moreover, petitioner’s motion for a stay of proceedings was filed on January 8, 2008, after the statute of limitations had run. Petitioner had until June 20, 2007, to file his petition for habeas relief. Petitioner’s habeas petition, dated February 14, 2007, was filed within the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1). But, filing a habeas petition in federal court does not toll the statute of limitations within the meaning of 28 U.S.C. § 2244(d)(2). Duncan v. Walker, 533 U.S. 167, 181-82 (2001). Thus, petitioner’s motion to stay was filed long after the statute of limitations had expired. Therefore, any new claim petitioner now attempts to raise is likely to be untimely.

For these reasons, respondent requests that the motion for a stay, be denied, and that the petition be decided based upon the papers already submitted. In the alternative, respondent requests that this Court direct petitioner to specify the issue(s) he seeks to raise in state court, and demonstrate good cause for his delay in raising and exhausting the claim, as well as the reasons any new claim is potentially meritorious.

Respectfully submitted,

s/ Ashlyn Dannelly
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