

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JESSE FRIEDMAN,

Petitioner,

-against-

MEMORANDUM & ORDER
06-CV-3136(JS)

JOE REHAL, Parole Officer, and
ROBERT DENNISON, Chairman of the
New York State Division of Parole,

Respondents, and

THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK,

Additional
Respondent.

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APPEARANCES:

For Petitioner: David Pressman, Esq.
Ronald Kuby, Esq.
Kuby & Perez, LLP
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New York, New York 10011

For Respondents: Judith R. Sternberg, Esq.
District Attorney
Nassau County District Attorney's Office
262 Old Country Road
Mineola, New York 11501

SEYBERT, District Judge:

INTRODUCTION

Petitioner, Jesse Friedman, ("Petitioner") seeks a writ of habeas corpus with regard to his guilty plea on seventeen counts of Sodomy in the First Degree, one count of Use of a Child in a Sexual Performance, four counts of Sexual Abuse in the First Degree, one count of Attempted Sexual Abuse in the First Degree, and two counts of Endangering the Welfare of a Minor. Respondents,

Joe Rehal, Parole Officer, Robert Dennison, Chairman of the New York State Division of Parole, and the Attorney General of the State of New York ("Respondents"), move to dismiss the Petition as untimely. For the reasons below, Respondents' motion to dismiss is GRANTED in part and DENIED in part. Pursuant to 28 U.S.C. § 2244 (d)(1)(D), the Court dismisses as untimely Petitioner's claims based on the prosecution's failure to disclose eyewitnesses' denial of any wrongdoing by the Petitioner and the police's aggressive interrogation methods of child witnesses. Petitioner's third claim, however - based upon failure to disclose the use of hypnosis on at least one accuser - is timely. The Court GRANTS Petitioner's request for an evidentiary hearing on this third claim.

BACKGROUND

In 1987 and 1988, three indictments were filed in Nassau County charging Petitioner, Petitioner's father, Arnold Friedman ("Friedman"), and a third individual, Ross Goldstein ("Goldstein"), with multiple acts of sodomy, sexual abuse, and other crimes against children who were enrolled in computer classes taught by Friedman. (See Pet., Exs. 1-3.) Petitioner assisted Friedman in teaching computer classes to children in Friedman's home. (Pet'r's Aff. ¶ 4.) The charges against Petitioner included sexual abuse of children and taking photographs of children while others sexually abused them. (Pet., Ex. 2, Pet'r's Aff. ¶ 22.)

Prior to November 7, 1988, the day the third indictment

charging Petitioner was handed down, either Petitioner or Friedman informed Peter Panaro, Petitioner's attorney ("Panaro"), about a secretly videotaped police interview of Gary Meyers ("Meyers"), one of Friedman's former computer students. (Panaro Aff. ¶ 8.) Panaro viewed and transcribed the videotape. (Id.) The videotape exposed the detectives' "hostile techniques" when interrogating eyewitnesses (Pet'r's Mem. 22), including the use of "suggestive and harassing questioning." (Panaro Aff. ¶ 18.) After viewing the videotape, Panaro informed Assistant District Attorney Joe Onorato ("ADA Onorato") about the tape and requested that ADA Onorato provide any evidence of hostile techniques employed by detectives during eyewitness interrogations. (Id.)

Throughout the videotaped transcript, Meyers denied that Friedman ever touched him and said that he never saw any pornographic magazines while at Petitioner's home. (Pet., Ex. 28, Taped Interview of Gary Meyers, 1-2.) Meyers also stated that "nothing happened" when he was taken into Petitioner's bedroom. (Id. at 2.) The detectives claimed that Friedman admitted sodomizing many children, pressured Meyers to admit that he was sexually abused while attending Friedman's computer classes, and discussed the impact of sexual abuse on one's sexual orientation. (Id. at 1-2.) After Meyers refused to admit to any sexual abuse, Detective Hatch said that he "didn't like" Meyers' answers and referred to Meyers as a "wise guy." (Id. at 2.)

Friedman pleaded guilty to multiple counts of sodomy and related charges. On May 13, 1988, the County Court of Nassau County sentenced Friedman to a ten-to-thirty-year term of imprisonment. (Resp'ts' Mot. Dismiss 2, ¶ 4.)

Goldstein agreed to cooperate with the prosecution and pleaded guilty to three counts of Sodomy in the First Degree and one count of Use of a Child in a Sexual Performance. (Id. at 2-3, ¶ 5.) He was sentenced to four concurrent terms of imprisonment of two to six years. (Id.) The Supreme Court of the State of New York, Appellate Division, Second Department, reduced Goldstein's sentence to a term of six months of incarceration followed by five years of probation. (Id. at 3, ¶ 5.)

Petitioner pleaded guilty in the County Court of Nassau County on December 20, 1998 to seventeen counts of Sodomy in the First Degree, one count of Use of a Child in a Sexual Performance, four counts of Sexual Abuse in the First Degree, one count of Sexual Abuse in the First Degree, and two counts of Endangering the Welfare of a Minor. (Id., ¶ 6.) The court sentenced Petitioner to multiple concurrent terms, the longest term being six to eighteen years. Petitioner did not appeal. (Pet'r's Mem. 2.)

In 1990, Friedman and Petitioner wrote and signed a letter. (Resp'ts' Mot. to Dismiss, Ex. 1, "Open Letter.") In the Open Letter, Petitioner and Friedman wrote of an eyewitness that "fully denie[d] that anything ever happened." (Id. at 3.) The Open

Letter described the detectives' interrogation techniques on eyewitnesses, that the detectives had lied to children and parents, and noted that children were "victimized" by "being coerced and encouraged to lie" so that the police could "build a case . . . by creating multiple charges." (Id. at 3-4, 14.)

After pleading guilty, Petitioner ultimately served thirteen years in jail. (Pet. 5.) He was paroled on December 7, 2001 and was later classified a level three, violent sexual predator. (Id.)

In 2000, documentary filmmaker Andrew Jarecki ("Jarecki") embarked on a three year investigation of Petitioner for a possible film. (Jarecki Aff. ¶¶ 2-3.) Jarecki interviewed many of Friedman's computer students as well as detectives, attorneys, and others that were connected to the original criminal investigation. (Id. at ¶ 4.) Petitioner viewed the full film for the first time on January 10, 2003. (Id. at ¶ 5; Pet'r's Aff. ¶ 56;)

Petitioner claims that his viewing of the film brought to light three new pieces of evidence: (1) eyewitnesses who had initially denied that Petitioner sexually abused them; (2) detectives' interrogation methods used on the accusers that were known for eliciting false accusations; and (3) the hypnosis of at least one accuser before he made any accusations. (Pet. 6.)

On January 7, 2004, Petitioner sought an order to vacate the judgment of December 20, 1988 from the County Court, Nassau

County, pursuant to New York Criminal Procedure Law § 440.10(1)(h). Petitioner's motion was based on the evidence he claims to have first discovered on January 10, 2003 - after watching the documentary. On January 6, 2006, the County Court, Nassau County, denied Petitioner's motion. Petitioner then applied to appeal the court's order before the New York Supreme Court, Appellate Division, Second Department. This application was dismissed on March 10, 2006. Petitioner next applied for appeal to the New York Court of Appeals, but that court also dismissed the application. See People v. Friedman, 850 N.E.2d 676 (N.Y. 2006).

On June 23, 2006, Petitioner filed the instant writ of habeas corpus in the Eastern District of New York on grounds that newly discovered exculpatory evidence was discovered by Petitioner that had violated his right to due process. The Respondents moved to dismiss the Petition as untimely pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Petitioner replied to Respondents' motion.

DISCUSSION

I. The AEDPA Statute of Limitations

The AEDPA requires individuals in custody through a state court judgment to file a petition for a writ of habeas corpus within one year of the date that the judgment became final. See 28 U.S.C. § 2244(d)(1)(A). A judgment is final either at the end of direct review of the judgment or when the period for requesting

such review expires. See id.

Petitioner pleaded guilty before the County Court, Nassau County, on December 20, 1988, and was sentenced on January 24, 1989. (Resp'ts' Mot. 3-4.) New York requires that a party who wishes to appeal a sentence file a written notice within thirty days after the sentence is imposed. See N.Y. CRIM. PROC. LAW § 460.10(1)(a). Petitioner filed no such notice. (Pet. ¶ 4.) Thus, the period to initiate a direct review concluded on February 24, 1989. If this Court was permitted to retroactively apply AEDPA's statute of limitations, Petitioner's right to file a writ of habeas corpus petition would have expired on February 24, 1990.

Finding it "impermissible for a newly enacted or shortened statute of limitations to extinguish existing claims immediately upon the statute's enactment," the Second Circuit provides a one-year grace period for those individuals whose judgments became final prior to April 24, 1996 - the date Congress enacted AEDPA. Ross v. Artuz, 150 F.3d 97, 100 (1998). Thus, Petitioner's claims became time-barred on April 24, 1997. See id. at 103.

The AEDPA does, however, provide several exceptions to the one year from finality of judgment limit. The exceptions do not toll the limitations period; rather, they "reset the limitations period's beginning date, moving it from the time when the conviction became final . . . to the later date on which the

particular claim accrued." Wims v. United States, 225 F.3d 186, 190 (2d Cir. 2000). One such exception restarts the statute of limitations period from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

Petitioner invokes this factual predicate exception, claiming that he did not learn of the factual predicates surrounding the claims in his Petition until January 10, 2003. (Pet'r's Aff. ¶ 56; Pet. 6.) If true, the statute of limitations period began to run on January 10, 2003, and was tolled while a "properly filed application for State post-conviction or other collateral review with respect to the pertinent . . . claim . . . [was] pending" 28 U.S.C. § 2244(d)(2).

Assuming that Petitioner met AEDPA's factual predicate exception and his state court appeals were properly filed, the issue is whether the factual predicate exception tolled the statute of limitations period until January 10, 2003. In other words, was this evidence - upon which he bases this Petition - newly discovered on January 10, 2003?

II. The Factual Predicate Exception

The factual predicate exception resets the start date of the one year limitations period on the day that the "factual predicate of the claim or claims presented could have been discovered by the exercise of due diligence." 28 U.S.C. §

2244(d)(1)(D). “[T]he date on which the limitations clock began to tick is a fact-specific issue the resolution of which depends” on many questions that are “appropriately answered by the district court.” Wims, 225 F.3d at 190-91. If it “plainly appears from the face of . . . [the] petition and supporting papers” that a petitioner unreasonably delayed in filing the petition, then the Court may bar the petition. Id. at 191.

A duly diligent person need only exercise reasonable diligence and not the “maximum feasible diligence” to discover the new evidence that substantiates a habeas claim. Id. (citing Armstrong v. McAlpin, 699 F.2d 79, 88-89 (1983)). A petitioner need not possess all the evidence supporting the habeas petition; rather, the factual predicate exception expires and the limitation clock begins to tick when a petitioner is “on notice of the facts, which would support a claim.” Hector v. Greiner, No. 99-CV-7863, 2000 U.S. Dist. LEXIS 12679, at *3 (E.D.N.Y. Aug. 29, 2000) (quoting Ludicore v. N.Y. State Div. of Parole, No. 99-CV-2936, 1999 WL 566362, at *5 (S.D.N.Y. Aug. 3, 1999)). Once a petitioner is on notice of evidence that may serve as part of the basis of a habeas petition, the one year statute of limitations period begins. See id.

“Newly discovered evidence” that restarts the limitations period “is . . . incapable of discovery through counsel’s due diligence before or during trial.” Id. (citing United States v.

Middlemiss, 217 F.3d 112, 122 (2d Cir. 2000)). On the other hand, if a petitioner knows of or could have known of the facts supporting a claim, then this type of evidence cannot restart the clock. See Castillo v. Artuz, No. 99-CV-5801, 2000 WL 307373, at *5 (E.D.N.Y. Feb. 15, 2000). Furthermore, evidence that existed earlier and was available to a petitioner and evidence that "could have been discovered by counsel's due diligence" do not constitute new evidence for purposes of the factual predicate exception. Hector, 2000 WL 1240010 at *2.

III. Petitioner's First Two Claims Are Untimely.

Petitioner first claims that the prosecution failed to disclose that some eyewitnesses denied any wrongdoing by the Petitioner. Petitioner next claims that the prosecution failed to disclose the police's aggressively suggestive and coercive interrogation techniques upon the children. Petitioner contends that such evidence is exculpatory and should have been disclosed. See Brady v. Maryland, 373 U.S. 83, 87, 835 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

Both Petitioner's first and second claims are untimely. Petitioner was on notice of facts that support his first habeas claim. In a 1990 letter entitled "Open Letter," Petitioner and

Friedman wrote to the Great Neck community that eyewitnesses had denied "that anything ever happened." (Resp'ts' Ex. 1 at 3.)¹ While the Open Letter does not discuss all evidence upon which this Petition rests, it shows that Petitioner had notice that several eyewitnesses denied that Petitioner abused them. Petitioner did not pursue an appeal even though he knew of these denials.

Petitioner's Open Letter establishes that he had notice of the factual predicate upon which Petitioner's first habeas claim rests - years before the statute of limitations period expired.

As for the second habeas claim, the record does not indicate that Petitioner knew - prior to pleading guilty - of a videotaped interrogation of Meyers, a former computer student. The record does show, however, that someone informed Panaro, Petitioner's defense attorney, of the videotape, prior to Petitioner's guilty plea. (Panaro Aff. ¶ 8.) After receiving this information, Panaro viewed and transcribed the videotape. (Id.)

According to the transcript, Detectives Hatch ("Hatch") and Jones ("Jones") questioned Meyers, one of the children who had taken Friedman's computer classes. (Pet., Ex. 28.) Meyers denied that Friedman touched him and denied ever looking at sexually explicit magazines while at Petitioner's home. (Id. at 1-2.) Meyers further stated that "nothing happened" when he was taken

¹ The Court notes that the letter is written as if only Friedman wrote and signed the letter. However, Petitioner signed the letter, and the Court assumes Petitioner knew of its content.

into Petitioner's bedroom. (Id. at 2.) Meyers continued to deny any wrongdoing even after the detective told Meyers that other computer students had said he was a victim. (Id. at 1.)

Panaro informed ADA Onorato about the videotape and requested "any evidence" of "suggestive and harassing" tactics used by the police when interviewing eyewitnesses. (Panaro Aff. ¶ 18.) The record does not indicate that Panaro further pursued the matter. Such an investigation may have led to other eyewitnesses who initially denied any wrongdoing by Petitioner. Panaro's request that ADA Onorato turn over to the defense any evidence of suggestive and harassing police interrogation techniques coupled with years of silence does not constitute due diligence. While Panaro was "bothered" by the prosecution's alleged failure to disclose evidence favorable to Petitioner, he did nothing. (Id.) Put simply, Panaro sat idle as Petitioner's time to seek relief was ticking to an end.

But regardless of whether Panaro exercised due diligence, the record clearly indicates that Panaro was on notice of facts, albeit not all, that gave rise to Petitioner's first and second habeas claims well before the statute of limitations period expired. Indeed, Panaro may not have possessed the "extensive body of impeachment evidence" set forth by Petitioner in the instant Petition. (Panaro Aff. ¶ 19.) However, Panaro need not possess all the evidence; he must only be on notice of the presence of such

evidence. See Ludicore, 1999 WL 566362, at *5 (holding that the AEDPA limitations period begins to run the date a petitioner is on notice of the facts supporting a habeas claim, not when the petitioner is in possession of all the facts).

Furthermore, the 1990 letter signed by Petitioner and Friedman indicates that Petitioner, like Panaro, was on notice of the facts supporting his second habeas claim years before the April 24, 1997 expiration of the statute of limitations period set in Ross, 150 F.3d at 103. In fact, the interrogation techniques allegedly used by police are described in detail:

Imagine a young child being held alone in a room for six hours-questioned repeatedly by police officers, pressured to help a former teacher he loves, until finally he agrees to do what is asked of him, if only to stop the grilling. Once the police got one boy to say what they wanted him to say, the others were easy.

(Resp'ts' Ex. 1 at 3.) Throughout the Open Letter, Petitioner and Friedman allege that detectives grilled, coerced, pressured, lied to, and victimized children to encourage them to falsely accuse Petitioner and Friedman of wrongdoing. (Resp'ts' Ex. 1.)

Panaro's knowledge that police used "suggestive and harassing questioning" on at least one eyewitness (Panaro Aff. ¶ 18) and the Open Letter establish that both Petitioner and his counsel had notice of the factual predicate upon which Petitioner's second habeas claim rests years before the statute of limitations period expired. Accordingly, the Court GRANTS Respondents' motion

to dismiss the first and second claims stated in the Petition.

IV. The Record Prohibits This Court From Deciding Whether Petitioner's Third Claim Is Timely.

Petitioner next argues that the prosecution failed to disclose that at least one accuser was hypnotized before accusing Petitioner of wrongdoing. (Pet'r's Mem. 24.) Petitioner claims that this evidence is exculpatory and should have been disclosed. The record does not indicate that Petitioner or his counsel had notice of any of the facts regarding children being hypnotized before they informed police that they were sexually abused. Further, Respondents do not address this claim that they withheld evidence regarding the hypnosis of some of the child accusers. And lastly, the Court cannot say - based on the record presented - that Petitioner or Petitioner's counsel would have discovered this evidence had they exercised due diligence.

Accordingly, the Court orders the parties to appear for an oral argument and/or evidentiary hearing as to Petitioner's third claim regarding hypnosis. At such appearance, the parties should be prepared to discuss the following: (1) why due diligence would or would not have led to the discovery of the hypnosis of the children, and (2) how such failure to disclose such evidence did or did not violate Petitioner's Constitutional rights.

V. The AEDPA Statute Of Limitations Is Claim Based.

Petitioner lastly argues that AEDPA provides that the statute of limitations restarts for all claims asserted in a habeas

petition on the date of the latest claim. While the Second Circuit has not addressed this issue, at least one district court in this Circuit has adopted Petitioner's AEDPA interpretation. See Shuckra v. Armstrong, 02-CV-583, 2003 WL 1562097, at *4 (D. Conn., Mar. 24, 2003) (holding that AEDPA gives a petitioner until the end of the latest of the claims' limitation periods to file a petition).

New York courts, however, have rejected such an interpretation and adopted a claim-by-claim approach. See Khan v. United States, 414 F. Supp. 2d 210, 216 (E.D.N.Y. 2006) (holding that an untimely habeas claim should not be considered simply because it is paired with one that is timely); Yekimoff v. N.Y. State Div. of Parole, 02-CV-8710, 2004 U.S. Dist. LEXIS, at *6 (S.D.N.Y. Oct. 4, 2004) (holding that a claim-by-claim approach serves the purpose of the AEDPA statute).

The Third Circuit rationalized the claim-by-claim approach for habeas corpus petitions. See Fielder v. Varner, 379 F.3d 113 (2004). The Third Circuit first noted that limitations statutes are normally based on individual claims. See id. at 118. In both civil and criminal matters where there are multiple claims or counts, "a court determines the date on which the statute began to run for each of the claims or counts at issue, not just the latest date on which the statute began to run for any of the claims or counts." Id. The Fielder court held that Congress did not intend to radically depart from the norm when enacting AEDPA. See

id. at 119-20. Interpreting the statute the way Petitioner insists would "have a strange effect of permitting a late-accruing federal habeas claim to open the door for the assertion of other claims that had become time-barred years earlier." Id. at 120.

This Court agrees with the Third Circuit's rationale and holds that AEDPA does not permit a court to consider an untimely claim merely because a petitioner has also brought a timely claim. Rather, the statute of limitations in a multi-claim habeas petition must be reviewed with respect to each individual claim. Accordingly, the Court cannot agree with Petitioner and thus finds this argument without merit.

CONCLUSION

This Court GRANTS Respondents' motion to dismiss the Petition based on Petitioner's first two claims. The Court cannot reach a decision based on the record before the Court as to the timeliness of Petitioner's third claim - failure to disclose hypnosis of some of the child eyewitnesses. The Court thus orders the parties to appear on August 9, 2007, at 10:00 a.m. for an oral argument and/or evidentiary hearing on the hypnosis claim. The parties should be prepared to discuss the issues stated in this Order.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
July 20, 2007