

ADAMS, J.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RICHARD BRADLEY,)	CASE NO. 4:07CV1246
)	
Petitioner,)	
)	JUDGE JOHN R. ADAMS
v.)	
)	<u>MEMORANDUM OF OPINION</u>
DAVID BOBBY, Warden,)	
)	
Respondent.)	

Petitioner *pro se* Richard Bradley filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1), alleging six grounds for relief which challenge the constitutional sufficiency of his conviction for one count of kidnapping, with repeat violent offender specification. The sixth ground for relief is

Bradley was denied a fair trial pursuant to ineffective assistance of Appellate Counsel when Appellate Counsel did not seek available remedy from the Appellate Court to advance Mr. Bradley’s appeal to the Ohio Supreme Court. Appellate Counsel did not assert to actions in the trial court proceedings that are clear violation of Mr. Bradley’s due process rights, in contravention of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Doc. 1 at 13.

On June 20, 2007, the case was referred to Magistrate Judge David S. Perelman for preparation of a report and recommendation pursuant to 28 U.S.C. § 636 and Local Rule 72.2(b)(2). *See* Order (Doc. 3).

On November 8, 2007, the respondent filed a Motion to Dismiss (Doc. 8). Respondent argues that the claim of ineffective assistance of appellate counsel presented in the sixth ground

for relief has not been exhausted in state court pursuant to 28 U.S.C. § 2254(b) and (c), so that the petition must be viewed as a mixed petition.

On February 12, 2008, the Magistrate Judge submitted a Report and Recommended Decision (Doc. 12) recommending that the petitioner be granted the opportunity to amend his petition to delete the unexhausted sixth ground for relief. If the petitioner subsequently failed to amend his petition, the Magistrate Judge recommended that the petition be dismissed without prejudice as unexhausted.

On March 20, 2008, the Court adopted the Report and Recommended Decision of the Magistrate Judge. *See* Memorandum of Opinion and Order (Doc. 13). Petitioner was given the opportunity to amend his petition to withdraw the unexhausted claim of ineffective assistance of appellate counsel. He was also advised that if he failed to amend his petition by deleting the sixth ground for relief, the petition would be dismissed without prejudice as unexhausted.

Rather than advising the Court that he wants to withdraw his unexhausted claim by amending his petition, the petitioner filed a Motion to Amend Judgment and Order (Doc. 14). Petitioner asserts in his motion that he did not receive a copy of the magistrate judge's report before the Court's order adopting the report. He states, however, that he did receive the Court's Memorandum of Opinion and Order (Doc. 13). *See* Doc. 14 at 2.

This Court concludes that Richard Bradley has still not fully exhausted his state court remedies. Petitioner apparently has not filed with the Eleventh District Court of Appeals of Ohio, pursuant to Ohio App. R. 26(B), an application for reopening based on a claim of ineffective assistance of appellate counsel. Accordingly, the Court will dismiss without prejudice the Petition for a Writ of Habeas Corpus. Should the petitioner wish to proceed only

on his remaining exhausted claims (the first, second, third, and fourth grounds for relief) and withdraw his unexhausted sixth ground for relief, he may move to reopen this case and proceed on the exhausted claims within thirty (30) days of the filing date of this order. *See Campbell v. Michigan*, No. 2:06-CV-10609, 2006 WL 474683 (E.D.Mich. Feb. 28, 2006).

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. §2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

September 30, 2008
Date

/s/ John R. Adams
John R. Adams
U.S. District Judge