

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RUSSELL DAVIS	:	
	:	CIVIL NO.
	:	98-6231
v.	:	
	:	
DAVID LARKIN, et al.	:	

MEMORANDUM

Broderick, J.

April 19, 2000

Petitioner Russell Davis ("Davis") is presently incarcerated at the State Correctional Institution at Dallas, Pennsylvania. Davis filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("§ 2254") on November 27, 1998. Davis alleged violations of his right to a fair trial as well as ineffectiveness of his trial, appellate, and post-conviction counsel. This petition was referred to United States Magistrate Judge Peter B. Scuderi for a report and recommendation pursuant to Local Civil Rule 72.1 and 28 U.S.C. § 636(b)(1)(B). Before a response to Davis's pro se petition was filed, privately-retained counsel entered an appearance on Davis's behalf and sought additional time to file an amended § 2254 petition. Counsel's request was granted by Magistrate Judge Scuderi and an amended petition was filed by Davis's counsel on July 30, 1999. After several extensions were granted, a response to Davis's amended petition was filed on December 20, 1999. Magistrate Judge Scuderi filed a report and recommendation on January 18, 2000 recommending that Davis's amended § 2254 petition be dismissed because the claims raised therein have been procedurally defaulted in state court and, thus, cannot be raised in this Court absent a showing of cause and prejudice or miscarriage of justice which

Davis has not made. Although Davis's counsel has neither sought nor been given permission by this Court to withdrawal as counsel, Davis filed pro se objections to Magistrate Judge Scuderi's report and recommendation on February 2, 2000. In his objections, Davis asks the Court to excuse the lack of exhaustion of his claims under the "futility doctrine" and address the merits of his claims. A response was filed to Davis's objections on February 4, 2000 asserting that Davis's objections set forth no legitimate basis for rejecting Magistrate Judge Scuderi's report and recommendation.

Because Davis has filed timely objections to the Magistrate's Report and Recommendation, the Court has made a de novo review of the record. 28 U.S.C. § 636(b)(1). After having made this review, the Court has determined, for the reasons stated below, that Davis's claims before this Court have been procedurally defaulted and Davis has not made the necessary showing to overcome such default. Therefore, the Court will adopt the Magistrate Judge's Report and Recommendation, overrule Davis's objections, and dismiss Davis's amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court will deny Davis a certificate of appealability in that he has not made a substantial showing of the denial of a constitutional right.

I. FACTS AND PROCEDURAL HISTORY

The following summary of the factual and procedural history of the case is taken from the report and recommendation of Magistrate Judge Scuderi and the submissions of the parties.

On March 15, 1981 Curtis Brown ("Brown") was wounded by shots fired from a vehicle allegedly driven by Davis. Brown died approximately one week later as a result of the head

wound he sustained on March 15, 1981. Davis was arrested on May 10, 1981 on homicide charges stemming from Brown's death. At his preliminary hearing on June 11, 1981, the charges were dismissed. Davis was rearrested on January 14, 1982 on homicide and related charges.

After the trial court denied motions for severance, Davis and his co-defendant Eugene Carney ("Carney") each waived his right to a jury trial. A bench trial commenced before the Honorable Joseph T. Murphy on November 8, 1982. At trial, the Commonwealth presented the testimony of several witnesses who claimed to have been present with Brown at the time he was shot. These witnesses identified Davis as the driver of the car from which Brown was shot and at least one of the witnesses also specifically identified Davis as the man who shot Brown. The credibility of the Commonwealth's eyewitnesses was fiercely attacked by defense counsel on cross-examination. Also presented at trial were statements made to police by Carney in which Carney admitted being present at the time of the shooting but which also implicated Davis as being involved in the shooting. These statements were to have been redacted pursuant to Bruton v. United States, 391 U.S. 123 (1968), to remove any reference to Davis. However, at trial one of the statements was improperly redacted and a portion of Carney's statement was read which identified Davis by name as the man who shot Brown. Immediately after the statement was read, Judge Murphy sustained an objection to the statement and a discussion was held with counsel in chambers concerning the effect of the statement on the proceedings. At that time, Judge Murphy assured the parties that he had not been prejudiced by the statement, which he found to be corroboration of the eyewitness testimony already presented by the Commonwealth. After hearing such assurances from Judge Murphy, Davis's counsel elected not to seek a mistrial. Neither Carney nor Davis elected to put on a defense. On November 9, 1982, Judge Murphy

found Davis and Carney guilty of first-degree murder, criminal conspiracy and possession of an instrument of crime, generally.

Davis, represented by counsel, filed post-verdict motions challenging his conviction and seeking a new trial, raising the following issues: (1) the evidence was insufficient to establish guilt beyond a reasonable doubt, (2) the verdict was contrary to the evidence, (3) the verdict was contrary to the law, (4) the use of Carney's statement violated Bruton v. United States, (5) the reference to him in Carney's improperly redacted statement was prejudicial error requiring a new trial and (6) he was denied effective assistance of counsel at trial because trial counsel failed to move for a mistrial when he was named in Carney's improperly redacted statement. Judge Murphy heard argument on Davis's post-verdict motions before denying them on September 14, 1983. On that date, Judge Murphy sentenced Davis to a term of life imprisonment on the first degree murder count and concurrent sentences of five to ten years for criminal conspiracy and two and one-half to five years for possessing an instrument of crime, generally.

Davis filed a notice of appeal to the Superior Court of Pennsylvania on November 4, 1983. On appeal, Davis alleged the following: (1) that the evidence was insufficient to sustain his convictions, (2) that his rights under Bruton v. United States were violated when he was identified by name in the improperly redacted statement of his non-testifying co-defendant, and (3) that he was denied effective assistance of counsel when trial counsel failed to move for a mistrial after Davis was identified in Carney's improperly redacted statement. On March 14, 1984, Judge Murphy issued his opinion in support of his earlier ruling denying Davis's post-verdict motions. On March 6, 1985, the Superior Court, in a per curiam unreported decision, affirmed Davis's judgment of sentence on the basis of Judge Murphy's opinion. No petition for

allocatur to the Pennsylvania Supreme Court was filed.

On January 19, 1990, Davis filed a pro se petition for a writ of habeas corpus in this Court which was denied on April 17, 1990 for failure to exhaust state remedies. On May 2, 1990, Davis filed a pro se petition for collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 et seq. While this petition was pending, Davis filed a second pro se petition for a writ of habeas corpus before this Court. This petition was dismissed on November 13, 1992 for failure to exhaust state remedies. Counsel was appointed to represent Davis on his PCRA petition. However, appointed counsel, after reviewing the record, concluded that there were no issues of arguable merit on which to base an amended petition and so advised the PCRA court in a letter dated May 28, 1993, pursuant to Commonwealth v. Finley, 550 A.2d 213 (1988). The Honorable Joseph I. Papalini reviewed the record independently, permitted appointed counsel to withdraw, and dismissed Davis's PCRA petition on the basis of the Finley letter. Davis filed a pro se appeal to the Superior Court of Pennsylvania. The appeal was dismissed on December 8, 1993 because Davis failed to file a brief.

Davis then retained private counsel who filed a second PCRA petition on January 11, 1996, alleging ineffective assistance of all prior counsel. This petition was denied by the Honorable Gary S. Glazer on May 7, 1996 as successive. See Commonwealth v. Larson, 549 A.2d 107 (Pa. 1988) (holding that second or successive post conviction petitions will not be entertained absent a prima facie showing of a miscarriage of justice).

Davis filed a pro se appeal to the Superior Court of the denial of his second PCRA petition. In his appeal, Davis alleged that all prior counsel were ineffective for failing to allege the following: (1) trial counsel was ineffective for not moving for a mistrial when Davis was

named in Carney's improperly redacted statement, (2) the trial court abused its discretion in denying the motion for severance prior to trial, (3) Davis's waiver of his right to a jury trial was defective because he was not informed during his colloquy that he faced a mandatory life sentence without parole if convicted of first degree murder, and (4) trial counsel was ineffective for not introducing evidence that no eyewitness identified him the night of the shooting. On August 20, 1997, the Superior Court, in an unreported memorandum decision, affirmed the denial of Davis's second PCRA petition because Davis had not made the necessary strong prima facie showing, as required for a second PCRA petition, that a miscarriage of justice may have occurred. The Superior Court also stated that "even if [Davis] had overcome this initial hurdle, we would reach the same conclusion because all of his assignments of error have either been previously litigated on direct appeal to this court, or waived." Commonwealth v. Davis, 704 A.2d 690 (Pa. Super. 1997) (table). Finally, the Superior Court stated that the issues raised by Davis were without merit. Id. Davis then sought allocatur in the Supreme Court of Pennsylvania on the same issues. Allocatur was denied on February 19, 1998.

On November 27, 1998, Davis filed a pro se petition for a writ of habeas corpus in this Court alleging ineffective assistance of counsel and denial of right to a fair trial based upon the following: (1) he was identified by name in his non-testifying co-defendant's improperly redacted statement, (2) the trial judge improperly denied his motion for severance, resulting in prejudice when he was improperly identified in his co-defendant's improperly redacted statement, (3) his waiver of his right to a jury trial was improper because he was not informed during the colloquy that he was facing a mandatory sentence of life imprisonment without parole if convicted of first degree murder, and (4) trial counsel failed to present testimony of police misconduct which led to

charges being dismissed against him at his first preliminary hearing. On December 8, 1998, Davis also filed a motion for appointment of counsel which was denied by Magistrate Judge Scuderi on May 11, 1999. Before a response to Davis's petition was filed, privately-retained counsel entered an appearance on behalf of Davis and sought additional time in which to file an amended petition for a writ of habeas corpus. Counsel for Davis filed an amended petition on July 30, 1999. In addition to raising an additional ground for relief, this petition expressly incorporated the grounds for relief set forth by Davis in his original petition. After several extensions were granted, Respondents filed their response to the amended petition on December 20, 1999, alleging that the petition should be dismissed because all of the claims have been procedurally defaulted and, thus, are not cognizable in this Court. Magistrate Judge Scuderi filed his report and recommendation on January 18, 2000 recommending that the petition be dismissed in that all the claims contained therein have been procedurally defaulted. Davis filed pro se objections to the report and recommendation on February 2, 2000 and the Respondents filed a response on February 4, 2000.

I. DISCUSSION

In ruling on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, a Federal Court may only consider claims that the petitioner is being held in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Where the merits of the petitioner's claim have already been adjudicated in a State court proceeding, an application for a writ of habeas corpus may not be granted "unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved in unreasonable application of, clearly established

Federal law, as determined by the Supreme Court of the United States;" 28 U.S.C. § 2254(d).

"[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Davis's amended petition, filed by counsel, raises the following claims, as described by Magistrate Judge Scuderi:

- (1) trial counsel was ineffective for not moving for a mistrial when Detective Clark informed the court that co-defendant Carney told him that Davis, from the driver's seat, pointed a gun out the passenger side window;
- (2) trial counsel was ineffective for not requesting under Pennsylvania Rule of Criminal Procedure 1102 that Davis be allowed to withdraw his waiver of jury trial;
- (3) the denial of Davis's motion for severance deprived him of a fair trial;
- (4) trial counsel was ineffective for failing to ensure a valid waiver of the jury trial colloquy because Davis was not informed that a mandatory life sentence without parole would be imposed if he were convicted of first degree murder and all prior counsel were ineffective for failing to raise and preserve the issue on appeal; and
- (5) trial counsel was ineffective for failing to call eyewitness Theresa Rhymer who had failed to identify Davis at the preliminary hearing.

Report and Recommendation of Magistrate Judge Peter B. Scuderi ("R&R") at 4-5. Magistrate Judge Scuderi found that Davis's first claim was exhausted but procedurally defaulted. R&R at 7. As to the second claim, Magistrate Judge Scuderi found that it was either procedurally defaulted in that it hinged on the procedurally defaulted first claim or unexhausted and procedurally defaulted because it had never been presented to the Pennsylvania state courts and Davis is barred under Pennsylvania law from presenting it to those courts. R&R at 11. Finally, Magistrate Judge Scuderi found that claims three, four, and five are also procedurally defaulted

because all three claims were presented to the state courts in his second PCRA petition which both the PCRA court and Superior Court refused to review on state procedural grounds. R&R at 12-13.

Davis, although represented by counsel, filed pro se objections to the report and recommendation arguing that he has demonstrated that exhaustion of his claims would be futile and, thus, this Court should waive exhaustion and address the merits of his claims. Because Davis is evidently proceeding pro se on his objections, the Court will liberally construe Davis's objections pursuant to Haines v. Kerner, 404 U.S. 519, 520 (1972). Magistrate Judge Scuderi's report and recommendation found that Davis's claims were exhausted but procedurally defaulted. Davis does not contest that his claims are procedurally defaulted and, in fact, contends that this procedural default makes exhaustion futile. The Court will construe Davis's objections as challenging Magistrate Scuderi's contention that Davis has not satisfied the standard for overcoming procedural default and address that contention below.

When a habeas petition has been referred to a magistrate judge for a report and recommendation, the District Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made...." 28 U.S.C. § 636(b) (1994). Because the Court construes Davis's objections as being directed to Magistrate Scuderi's conclusion that Davis cannot make a sufficient showing to overcome the procedural default of his claims, the Court has made a de novo review of the entire record.

Generally, a state prisoner is required to exhaust all avenues of state review of his claims before filing a petition for Federal habeas review. 28 U.S.C. § 2254(b)(1). To exhaust his available state court remedies, a petitioner must fairly present to the state courts all the claims

made in his habeas corpus petition. See Henderson v. Frank, 155 F.3d 159, 164 (3d Cir. 1998). The petitioner must have raised each claim in front of the highest available state court, including courts sitting in discretionary appeals. See O'Sullivan v. Boerckel, ___ U.S. ___, 119 S.Ct. 1728, 1734 (1999). An issue that has been raised on direct appeal need not be raised again in a state post-conviction proceeding. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). To satisfy the "fair presentation" requirement, the state court pleadings must demonstrate that the legal theory and supporting facts asserted in the federal habeas petition are "substantially similar" to those presented to the state courts. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996).

A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion where there are no state remedies any longer "available" to him. See Coleman v. Thompson, 501 U.S. 722, 732 (1991). This is the case for Davis's first claim because he failed to raise it on direct appeal to the Pennsylvania Supreme Court. This is also the case for Davis's third, fourth, and fifth grounds for habeas relief because these claims were presented to the PCRA court in his second PCRA petition but were found by the PCRA court and the Pennsylvania Superior Court to be procedurally barred. If state avenues of relief, including post-conviction proceedings, have been exhausted, but the petitioner has failed to raise the alleged grounds for error, the claim is procedurally defaulted and may not be raised in federal court. See Coleman, 501 U.S. at 729-30. This is the case for Davis's second claim because it was never presented to the Pennsylvania courts on direct appeal or in either of his PCRA petitions. Davis cannot now present this claim to the Pennsylvania state courts because any PCRA petition Davis may file at this point would be considered untimely. See 42 Pa. Cons. Stat. Ann. § 9545(b)(1); see generally Holman v. Gillis, 58 F. Supp. 2d 587 (E.D.Pa. 1999). Thus, the Court finds that all

of Davis's claims have been procedurally defaulted based upon the application of state procedural rules.

In a case, such as this one, where

a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750. The issue of cause "ordinarily turn[s] on whether the petitioner can show that some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Davis has not shown "cause" for his default of his claims because he has not presented this Court with any evidence that some objective factor impeded his ability to fairly present any of his claims in state court. Because Davis has not demonstrated cause for the default of his claims, the Court need not address the prejudice requirement. See Engle v. Isaac, 456 U.S. 107, 134 n.43 (1982). Thus, under Coleman this Court will consider Davis's claims only if he can show a fundamental miscarriage of justice.

A fundamental miscarriage of justice occurs when the petitioner has a colorable claim of actual innocence for the crime of which he was convicted. See Schlup v. Delo, 513 U.S. 298, 314-15 (1995). Thus, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id at 327. That is, the petitioner must show by a fair probability that, in light of all the evidence, including evidence which the petitioner claims was wrongly excluded or which became available only after trial, the trier of

fact would have entertained a reasonable doubt of his guilt. See Schlup, 513 U.S. at 317; Sawyer v. Whitley, 505 U.S. 333, 339 n.5 (1992). The Court has reviewed the record and found no evidence to suggest that there is a reasonable probability that Davis was actually innocent of the crimes for which he was convicted. Nor has Davis presented the Court with any additional evidence of his innocence. Therefore, the Court finds that Davis has not demonstrated that a fundamental miscarriage of justice will result if this Court does not review his procedurally defaulted claims.

III. CONCLUSION

Having heretofore found that each of the claims raised by Davis in his counseled amended petition are procedurally defaulted and also having found that Davis has not presented this Court with a sufficient basis to excuse such default and reach the merits of his claims, the Court will adopt Magistrate Judge Scuderi's report and recommendation, overrule Davis's objections, and deny Davis's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court will also deny Davis a certificate of appealability. Under 28 U.S.C. § 2253(c)(1)(A), to appeal a final order in a habeas corpus proceeding where the petitioner is being held in state custody, the petitioner must first obtain a certificate of appealability. This certificate of appealability may be issued by a district court judge. See United States v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997). The certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Davis has not made such a showing and, therefore, will not be granted leave to appeal this decision.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RUSSELL DAVIS	:	CIVIL NO.
	:	98-6231
v.	:	
	:	
DAVID LARKIN, et al.	:	

ORDER

AND NOW, this 19th day of April, 2000; Petitioner Russell Davis ("Davis") having filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254; this petition having been referred to United States Magistrate Judge Peter B. Scuderi for a report and recommendation; Davis then having filed, through counsel, an amended petition; Magistrate Judge Scuderi having filed a report and recommendation suggesting that Davis's amended petition for a writ of habeas corpus be dismissed on the basis of procedural default; Davis, although being represented by counsel before this Court, having filed pro se objections thereto; for the reasons stated in this Court's Memorandum of this same date, the Court having determined, after a de novo review of the entire record, that Davis's petition for a writ of habeas corpus should be dismissed;

IT IS ORDERED that the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi (Doc. No. 25) is approved and adopted;

IT IS FURTHER ORDERED that Davis's Petition for a writ of habeas corpus is **DISMISSED**;

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

RAYMOND J. BRODERICK, J.