

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

JAMES M. WEAKLAND	:	CIVIL ACTION
vs.	:	
G.R. WHITE, MR.; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA; and THE DISTRICT ATTORNEY OF CHESTER COUNTY, PENNSYLVANIA	: : :	No. 97-63

MEMORANDUM AND ORDER

AND NOW, to wit, this 24th day of December, 1997, upon consideration of the Revised Petition¹ for Writ of Habeas Corpus, filed *pro se* by Petitioner James M. Weakland, (Document No. 5), and brought pursuant to 28 U.S.C. § 2254, and review of the Report and Recommendation of United States Magistrate Judge M. Faith Angell, dated June 20, 1997 (Document No. 9), and the Objections to Report and Recommendation (Document No. 15), filed by Petitioner, **IT IS ORDERED** that:

The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is **DENIED** and **DISMISSED WITHOUT PREJUDICE** for failure to exhaust state court remedies; and

There is no probable cause to issue a certificate of appealability.

The Court's decision is based on the following:

Background: Petitioner asserted four "grounds" in his Petition for habeas relief: (a) that counsel was ineffective in eight instances, including the failure to inform Petitioner of the "true definition" of a *nolo contendere* plea; (b) that the trial court erred in failing to allow Petitioner to withdraw his guilty plea after Petitioner informed the court that he could not recall "what happened"; (c) that Petitioner's transfer to a more distant prison prior to

¹ Petitioner initially filed his habeas petition on a form supplied by the Western District of Pennsylvania. By Order dated January 22, 1997, the Court required that petitioner file a new petition on a form supplied by the Eastern District of Pennsylvania which conformed to the Local Rules. There were no substantive changes between the initial Petition and the Revised Petition.

sentencing deprived him of his ability to prepare an adequate defense; and (d) that the sentences imposed were “illegal and excessive” for six reasons. Magistrate Judge Angell concluded, and this Court agrees, that most of these claims are new, presented for the first time in this Petition.² As a result, Magistrate Judge Angell determined that Pennsylvania courts will not hear those new claims and that they are procedurally barred. Finding that the record did not establish “cause and prejudice” to excuse this procedural default, Magistrate Judge Angell did not address the procedurally defaulted claims and reached the merits only on the exhausted issues – whether Petitioner’s pleas were knowing and voluntary and whether his sentences were “illegal and excessive.” She found those claims to be meritless and recommended denial of Petitioner’s request for habeas relief on the exhausted claims and dismissal of the Petition with respect to the defaulted claims.

Petitioner has objected to Magistrate Judge Angell’s Report and Recommendation on the grounds: (a) that the crimes to which he pleaded guilty should have merged for sentencing purposes; (b) that he cannot be guilty of first degree murder because that crime requires premeditation and the shooting was not premeditated (he was, he now claims, acting in self defense); and (c) that “[d]efendant must be allowed to withdraw guilty plea as it was not knowingly, intentionally or willing [sic] based on facts [sic] that he did not know nolo-contendere meant was [sic] equal to guilty plea . . .,” Petitioner’s Objections to Report and Recommendation, Document No. 15, and that “[c]ounsel was ineffective because defendant was given definition of Nol Pros, not nolo-contendere.” Id.

Judge Angell’s recommendation to deny and dismiss the Petition was based on her conclusion that the unexhausted claims were procedurally defaulted. Implicit in her

² Only three claims were ultimately addressed by Pennsylvania courts in Petitioner’s Post Conviction Hearing Act [“PCHA”] proceedings (the precursor to the Post Conviction Review Act [“PCRA”]). Those were: (1) petitioner should be allowed to withdraw his guilty pleas because he did not “understand the nature and consequences” of those pleas; (2) trial counsel was ineffective because he failed to move for a mistrial when the prosecutor stated, without evidence, that the petitioner had shot the victim; and (3) several of Petitioner’s convictions should have merged for sentencing purposes. See Commonwealth of Pennsylvania v. Weakland, No. 00108 Philadelphia 1986, 1-4 (Sup.Ct. Pa. 1986).

recommendation is the conclusion that Pennsylvania courts would not waive the procedural default. This Court does not agree with that part of Judge Angell's recommendation. Because this Court cannot be certain whether Pennsylvania courts will waive Petitioner's procedural default, it has dismissed the entire Petition without prejudice so as to give Petitioner an opportunity to file a second Post Conviction Review Act ["PCRA"] petition.

Exhaustion of State Remedies: Petitioner's habeas Petition contains claims which have never been presented before a state tribunal.³ A claim which has not been pursued in state court has not, in the parlance of habeas practice, been exhausted. Exhaustion "serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights." Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986). It is, therefore, well settled that habeas petitions presenting only unexhausted claims may not be granted by federal courts. See, e.g., Picard v. Connor, 404 U.S. 270, 275 (1971); 28 U.S.C. § 2254(b).

That the Petitioner has also included claims which arguably have been exhausted – thus presenting a "mixed" petition, one containing both exhausted and unexhausted claims – does not change this result. Until recently, a district court confronted with a "mixed" petition was required to dismiss the petition without prejudice so as to permit the petitioner to exhaust state remedies. See, e.g., Rose v. Lundy, 455 U.S. 509, 521-22 (1982); Castille v. Peoples, 489 U.S. 346, 349 (1989); Coleman v. Thompson, 501 U.S. 722, 731 (1991). This rule, sometimes referred to as the "total exhaustion" requirement, was modified by amendment of 28 U.S.C. § 2254(b) in 1996. Under that amendment of the habeas statute, a federal court may reach the merits of exhausted claims in order to

³ Unless a claim has been "fairly presented" to the state courts, meaning that the claim heard by the state courts was the "substantial equivalent" of the claim asserted in the habeas petition, see, e.g., Picard v. Connor, 404 U.S. 270, 275, 278 (1971), it will be deemed to be newly presented in the habeas petition.

deny – but not grant – a petition. 28 U.S.C. § 2254(b)(2). Nonetheless, the Court concludes that the new § 2254(b)(2) has not altered the law to this extent: if a court chooses not to exercise jurisdiction under § 2254(b)(2) over exhausted claims in a “mixed” petition, that court must dismiss the entire petition without prejudice unless another, limited, exception applies.

The other principal exception to the “total exhaustion” rule is that of procedural default: although a federal court may not hear a habeas claim where that claim has not been, and could not be, presented in state court, or has been presented and been denied on procedural grounds, *see* 28 U.S.C. § 2254(b)(1), federal courts may retain jurisdiction over exhausted claims in a “mixed” petition if the unexhausted claims are procedurally defaulted. *See Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993).⁴ Petitioner in this case presents both exhausted and unexhausted claims; the only issues which remain, therefore, are whether Petitioner’s unexhausted claims are procedurally defaulted, and if so, whether such default bars him from presenting those claims in state court. If he is barred from proceeding in state court, this Court may retain jurisdiction over his exhausted claims.

Procedural Default: A person may collaterally challenge his or her state conviction under Pennsylvania’s amended Post Conviction Review Act [“PCRA”]. All PCRA petitions, however, including second or subsequent ones, must be filed “within one year of the date the judgment becomes final” 42 Pa.C.S.A. § 9545(b)(1) (West Supp. 1997). A judgment is final, for purposes of the PCRA, “at the conclusion of direct

⁴ The Third Circuit has recently recognized another limited exception to the “total exhaustion” rule: because that rule is enforced as a matter of comity and not as a matter of jurisdiction, it is not an inflexible barrier. *Christy v. Horn*, 115 F.3d 201, 207 (3d Cir. 1997) (citing *Strickland v. Washington*, 466 U.S. 668, 679 (1984)). A court may retain jurisdiction, however, only in those “rare cases [in which] exceptional circumstances of peculiar urgency exist” *Id.* at 206-07. The Court was addressing “exceptional circumstances” in the context of a capital case in which execution was pending. Although *Christy* was decided after the most recent amendments to 28 U.S.C. § 2254, the court cited the 1988 version of the statute; the language relied on, however, was not changed by the 1996 amendments.

review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S.A. § 9545(b)(3).

The Supreme Court of Pennsylvania denied Petitioner *allocatur* review on direct appeal on June 13, 1979. Because more than a year has passed since his judgment became final for purposes of the PCRA, it would appear that Petitioner is now barred from bringing any new claims in state court. This bar, however, may be waived by Pennsylvania courts where a:

strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred. . . . This standard is met only if petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged.

Commonwealth v. Beasley, 678 A.2d 773, 777 (Pa. 1996) (citations omitted).

Under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), a federal court may also reach the merits of a procedurally defaulted habeas claim, but only where a petitioner can show “cause and prejudice” for the procedural default. To demonstrate cause, a petitioner must prove “that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.” Murray v. Carrier, 477 U.S. 478, 488 (1986). “Counsel's error cannot constitute cause for procedural default unless the error was also constitutionally ineffective” Sistrunk v. Vaughn, 96 F.3d 666, 675 (3d Cir. 1996) (citing Murray v. Carrier, 477 U.S. at 492). Actual prejudice must also be proved, requiring that petitioner show that the outcome was “unreliable or fundamentally unfair” as a result of the alleged violation of federal law. Lockhart v. Fretwell, 506 U.S. 364, 366 (1993); see also Coleman v. Thompson, 501 U.S. 722, 750 (1991).

The Court need not engage in a “cause and prejudice” analysis in this case, however, for the Third Circuit teaches that “federal courts should be most cautious before reaching a conclusion dependant upon an intricate analysis of state law that a claim is procedurally barred.” Banks v. Horn, 126 F.3d 20, 213 (1997). In Doctor v. Walters, 96

F.3d 675 (3d Cir. 1996), the Third Circuit explained this need for caution:

Although exhaustion may be excused where return to state courts would be futile, we must be certain that state review is clearly foreclosed It is therefore not for this Court to decide whether the Pennsylvania courts will conclude that the defects in the proceedings surrounding Doctor's conviction rise to the level of a miscarriage of justice as defined by Pennsylvania law.

Id. at 683.

The Court cannot be certain whether the Commonwealth courts will waive Petitioner's procedural default. Accordingly, it has dismissed the Petition without prejudice so that Pennsylvania's courts may have the "first opportunity to 'consider legal error without interference from the federal judiciary.'" Id. (quoting Vasquez v. Hillery, 474 U.S. 254, 257 (1986)). Petitioner may, therefore, attempt to file a second PCRA petition, giving the Commonwealth courts the opportunity to consider his new claims. See, e.g., Pridgen v. Varner, C.A. No. 97-6026, 6 (E.D. Pa. Dec. 10, 1997).

BY THE COURT:

JAN E. DUBOIS