

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

LEON JAMES : CIVIL ACTION
 :
 v. :
 :
 SUPERINTENDENT of SCI-HUNTINGDON, :
 DISTRICT ATTORNEY of PHILADELPHIA :
 COUNTY & :
 ATTORNEY GENERAL of the :
 COMMONWEALTH of PENNSYLVANIA : NO. 97-2864

MEMORANDUM and ORDER

Norma L. Shapiro, J.

August 18, 1998

Petitioner Leon James ("James") has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. By Order entered May 5, 1997, the court referred his petition to United States Magistrate Judge Diane M. Welsh ("Judge Welsh") for a Report and Recommendation. Judge Welsh has recommended that the petition be denied as a mixed petition containing both exhausted and unexhausted claims; both James and the Philadelphia County District Attorney ("D.A.") have filed objections to that recommendation. For the reasons stated below, the action will be remanded for further consideration of the § 2254 petition.

BACKGROUND

The Cooper Sporting Goods Store in Philadelphia, Pennsylvania was robbed on May 5, 1971. James was accused of killing Lewis Cooper and wounding Henry Cooper; he was convicted in October, 1972, but on direct appeal, the Supreme Court of Pennsylvania granted a joint motion for remand. James was

granted a new trial.¹ On June 17, 1975, James was convicted of first degree murder, aggravated robbery, burglary and assault and battery. The trial judge denied post-trial motions and on August 5, 1976 sentenced James to a mandatory term of life imprisonment for the murder, concurrent terms of ten to twenty years for the robbery and burglary and three and one-half to seven years for the aggravated assault.

James, raising the following two arguments, appealed directly to the Supreme Court:² 1) the trial court erred in permitting Henry Cooper to testify that James shot his brother, Lewis Cooper; and 2) his confession should have been suppressed as involuntary. See Pennsylvania v. James, 393 A.2d 1199, 1200-01 (Pa. 1978) (per curiam). The Supreme Court affirmed the judgment and sentences.

On December 26, 1980, James filed a pro se petition for collateral relief under the Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 Pa. Con. Stat. Ann. § 9541, et seq. James subsequently filed a second pro se petition. Counsel were appointed, and James filed an amended petition and supplemental amended petition. James raised the following claims: 1) ineffective assistance of counsel when his lawyer allegedly

¹ This first trial is not involved in James' habeas petition.

² All references to the Supreme Court refer to the Supreme Court of Pennsylvania.

disclosed James' prior trial while questioning a witness; 2) ineffective assistance of counsel when his lawyer failed to object to remarks made by the assistant district attorney during closing argument; 3) after-discovered evidence (the marijuana he voluntarily smoked at the time of the killing was laced with PCP) entitled him to a new trial; 4) ineffective assistance of counsel for failing to argue his confession should have been excluded for lack of voluntariness; and 5) ineffective assistance of counsel for failing to request a more complete jury instruction on the issue of identification. After holding an evidentiary hearing, the trial court denied James' petition on August 7, 1987. See Pennsylvania v. James, August Term, 1971, Nos. 276-279 (Phila. County Ct. C.P. Aug. 27, 1987).

James filed a notice of appeal, through his counsel, to the Pennsylvania Superior Court. New counsel was appointed but failed to file a timely brief; the Superior Court dismissed James' appeal. Replacement counsel was appointed, and James, seeking reinstatement of his appellate rights, filed a separate PCHA petition. The trial court granted James' the right to appeal nunc pro tunc from the August, 1987 denial of his PCHA petition.

In his nunc pro tunc appeal, James argued "the same issues which the trial court addressed in its Opinion dated August 27, 1987." Pennsylvania v. James, No. 1765 Philadelphia 1988, at 2

(Pa. Super. Dec. 12, 1988) [James II"]. The Superior Court affirmed the trial court's decision. The Supreme Court denied James' request for allowance of appeal on December 20, 1989. See Pennsylvania v. James, 574 A.2d 68 (Pa. 1989).³

James, raising the following four claims, filed the present § 2254 petition: 1) his confession should have been suppressed as involuntary and counsel were ineffective for failing to preserve the issue or raise it on appeal; 2) counsel were ineffective for eliciting references to James' first trial during testimony in his second trial and for failing to raise the issue on appeal; 3) due process violation caused by improper prosecutorial remarks during closing argument and ineffective assistance of counsel for failing to object or raise the issue on appeal; and 4) due process violation for the Superior Court's misunderstanding of James' claim for a new trial based on newly discovered evidence that the marijuana he voluntarily consumed was laced with PCP without his knowledge.

Judge Welsh analyzed the four claims raised in James' habeas petition as seven distinct claims: 1) improper use of an involuntary confession; 2) ineffective assistance of counsel for failing to preserve this claim and raise it on appeal; 3)

³ James included each of the claims raised before the trial court and the Superior Court in his petition for allowance of appeal to the Supreme Court. (Pet. for Allowance of Appeal, attached as Ex. C to D.A.'s Response).

ineffective assistance of trial counsel in eliciting testimony during the second trial that referred to James' first trial; 4) ineffective assistance of appellate counsel for failing to raise this issue on direct appeal; 5) due process violation by the prosecutor's improper remarks during closing argument; 6) ineffective assistance of counsel for failing to object to the remarks or raise this claim on appeal; and 7) due process violation because the state courts failed to grant James a new trial based on newly discovered evidence of PCP in the marijuana.⁴

Judge Welsh determined the first claim, based on James' allegedly involuntary confession, was procedurally defaulted because, although raised in the trial court, on direct appeal the Supreme Court refused to review the claim because it had not been properly preserved. Judge Welsh did not consider whether there was cause and prejudice or a fundamental miscarriage of justice

⁴ It is impermissible for the court to "misread habeas petitions in order to split single claims and conduct separate exhaustion analyses for each." Henderson v. Frank, -- F.3d --, 1998 WL 456254, at *5 (3d Cir. Aug. 6, 1998); see Brewer v. Williams, 430 U.S. 387, 403 (1977). In this case, Judge Welsh did not improperly split single claims; although labeled as single claims by petitioner, they actually involve separate and distinct legal claims.

Petitioner's habeas claims were not numbered in the same order as presented to the state courts for review; Judge Welsh further renumbered petitioner's claims. For purposes of this Memorandum and Order, the court has adopted Judge Welsh's numbering of petitioner's claims. A chart comparing petitioner's filings is attached as Appendix A.

because the procedural default was not raised before her. However, the petitioner now claims cause and prejudice for the default as to the claim of ineffective assistance of counsel for failure to preserve his claim that his confession should have been suppressed. The D.A. agrees the first claim is procedurally defaulted. James appears to accept the finding that the claim is procedurally defaulted because the Supreme Court's refusal to consider the claim was based on independent state law grounds, but argues the procedural default should be excused. Judge Welsh stated that "if the court could consider the merits of the habeas petition, the procedural default might be avoided." See Report & Recommendation at 4.

Judge Welsh determined the fifth claim, alleging a due process violation based on the prosecutor's remarks during closing argument, was not raised in the state courts on direct appeal or collateral review; therefore, it was not exhausted. Both James and the D.A. object to this determination. James argues the claim was exhausted in the state courts; the D.A. argues the claim was not exhausted, but there are no longer any available state law remedies so the claim has been procedurally defaulted.

Judge Welsh determined the seventh claim, alleging violation of due process for refusing to grant James a new trial based on after-acquired evidence, was not raised in the state courts as a

federal due process claim so it was not exhausted. Both James and the D.A. object to this finding. The D.A. agrees the claim was not exhausted in state court, but argues there are no available state remedies so the claim is procedurally defaulted. James argues Judge Welsh misunderstood his claim; his claim is not that he should have been granted a new trial based on after-acquired evidence, but that the Superior Court based its decision denying his claim for a new trial based on newly acquired evidence on a critical misapprehension of fact, in itself a due process violation. James contends that claim was exhausted when he unsuccessfully sought review of the Superior Court decision by the Supreme Court.

Judge Welsh found the second, third, fourth and sixth claims were exhausted in state court. Neither James nor the D.A. object to those findings. Because Judge Welsh believed several of James' claims were unexhausted, she recommended dismissing James' habeas petition without prejudice as a mixed petition under Rose v. Lundy, 455 U.S. 509 (1982). Both parties, arguing all claims have either been exhausted or are procedurally defaulted, object to this recommendation.

DISCUSSION

I. Standard of Review

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall

not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" 28 U.S.C. § 2254(d). While a federal court need not defer to a state court's legal findings as it must to factual determinations, see Jackson v. Byrd, 105 F.3d 145, 147 (3d Cir.), cert. denied, 117 S. Ct. 2442 (1997), "only when the federal habeas court is convinced that the state court's determination ... constitutes a grave error can the state court's determination be found unreasonable and only then can the federal habeas court upset a judgment of the state court." Berryman v. Morton, 100 F.3d 1089, 1103 (3d Cir. 1996). This standard applies to both questions of law and mixed questions of law and fact.

II. Exhaustion of Claim One

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-- (A) the person has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1). A petitioner has not exhausted his available state remedies as long as "he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). The court is required

to dismiss a habeas petition containing an unexhausted claim, see Rose, 455 U.S. at 522, and the burden rests with the petitioner to establish exhaustion of all available state remedies. See Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993); Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

The constitutional claim must have been fairly presented to the highest state court for review. See Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992), cert. dismissed, 506 U.S. 1089 (1993); Swanger v. Zimmerman, 750 F.2d 291, 295-96 (3d Cir. 1984); Belle v. Stepanik, No. 95-2547, 1996 WL 663872, at *4 (E.D. Pa. Nov. 14, 1996). The state supreme court need not have addressed the claim on the merits, as long as it was given the opportunity to do so. See Mayberry v. Petsock, 821 F.2d 179, 184 n. 2 (3d Cir.), cert. denied, 484 U.S. 946 (1987); Chaussard v. Fulcomer, 816 F.2d 925, 928 (3d Cir.), cert. denied, 484 U.S. 845 (1987).

Judge Welsh concluded James had not exhausted the claim that his confession should have been suppressed as involuntary. James did raise this claim before the trial court during oral argument after trial, but did not raise it in a written post-verdict motion. The Supreme Court refused to consider the claim on its merits because it was not properly preserved for appellate review. See James, 393 A.2d at 1201. Because the Supreme Court based its rejection of the claim on an independent and adequate

state law ground, see Coleman v. Thompson, 501 U.S. 722, 729 (1991), Judge Welsh found the claim was procedurally defaulted. See Report & Recommendation at 4. Because the claim was procedurally defaulted, there is no available state remedy and exhaustion has been satisfied. See 28 U.S.C. § 2254(b)(1)(B)(i); Lambert v. Blackwell, 134 F.3d 506, 518 (3d Cir. 1998), petition for cert. filed, No. 97-8812 (Apr. 23, 1998).

The D.A. does not object to the finding of procedural default. James does not appear to object to a finding of procedural default, but argues the default should be excused. Judge Welsh did not determine whether the procedural default should be excused by cause and prejudice or a fundamental miscarriage of justice because she believed the failure to exhaust required dismissal of the entire petition under Rose. Because the court finds each claim has been exhausted or is procedurally defaulted, the court will remand the case to the magistrate judge to determine whether James' procedural default can be excused.

III. Exhaustion of Claims Two, Three, Four & Six

Judge Welsh determined the second, third, fourth and sixth claims in the habeas petition, all alleging ineffective assistance of trial or appellate counsel, were exhausted in state court. The D.A. does not object to these findings, and in fact has conceded these claims were exhausted. See D.A. Objections at

2. Therefore, the court will consider these claims exhausted.

IV. Exhaustion of Claim Five

Judge Welsh found the fifth claim, alleging denial of due process by improper remarks made by the prosecutor during closing argument, was unexhausted because not identified by the Supreme Court in its Opinion on direct appeal and not raised as a distinct federal constitutional claim in James' state collateral petitions.⁵ See Report & Recommendation at 3 n.2. The D.A. objects to this finding because there are no available state remedies, so the claim has been procedurally defaulted. James, arguing he raised this claim tangentially to his ineffective assistance claim for his lawyers' failure to object to the remarks or raise the issue on appeal, objects to this finding and states the claim has been exhausted.

As an initial matter, James argues the Commonwealth has waived any exhaustion defense. In the response to James' habeas petition, the D.A. stated, "Although petitioner's claims were presented to the state courts on collateral appeal and are thus exhausted for purposes of habeas review ... they are without substantive merit and provide no basis for federal relief." See

⁵ The allegedly improper prosecutorial remarks involved: 1) a statement that the prosecutor believed he tried the case fairly; 2) a reference to the crime as "notorious"; and 3) a statement (not appearing in the transcript) that James' co-defendant, Daniel Cronin, was presently in jail for the same crime. See James II at 3.

D.A. Response at 5.

"A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3); see Lambert, 134 F.3d at 515 (if state failed to raise exhaustion defense at all in district court, it might be waived; if state "aggressively asserted" lack of exhaustion, the defense was not waived). James' habeas petition only listed four claims; the claims based on an involuntary confession and prosecutorial misconduct were not listed as separate claims, but as part of the related ineffective assistance of counsel claims for failing to raise those issues in state court. The D.A. claims it did not realize James was raising the involuntary confession or prosecutorial misconduct as distinct claims; it thought those allegations simply formed the underlying basis for the ineffective assistance of counsel claims. The D.A. did not intend to concede exhaustion of those claims and certainly did not do so explicitly when it was unaware James was raising those allegations as independent claims. Because the D.A. has "aggressively asserted" exhaustion at this stage of litigation, it has not explicitly waived the defense.

James concedes the prosecutorial misconduct claim was not raised on direct appeal. See James' Objections at 4. He claims

it was raised on collateral review when he argued his counsel were ineffective in failing to object to the prosecutor's closing argument at trial or preserve the issue on appeal. James claims the prosecutorial misconduct claim asserts the same "interwoven ground for relief" raised in his ineffective assistance of counsel claim before the state courts, because it is predicated on the same facts.

As part of an ineffective assistance of counsel claim under the Sixth Amendment, a petitioner must establish both that his counsel's performance was deficient and that the deficient performance so prejudiced the defense that the result of the trial is unreliable. See Strickland v. Washington, 466 U.S. 668, 686-90 (1984). The movant must also demonstrate "prejudice," defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 697. James alleged his counsel were deficient in not objecting to or raising on appeal the prosecutor's remarks.

To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was fairly presented to the state courts. Castille v. Peoples, 489 U.S. 346, 350-51 (1989); Picard v. Connor, 404 U.S. 270, 275 (1971). "This requires that the claim brought in federal court be the substantial equivalent of that presented to

the state courts." Lesko v. Owens, 881 F.2d 44, 50 (3d Cir. 1989), cert. denied, 493 U.S. 1036 (1990). "It is not enough for the petitioner to show that he has presented the facts on which the federal claim is based to the state court." Ross v. Petsock, 868 F.2d 639, 641 (3d Cir. 1989); see Santana v. Fenton, 685 F.2d 71, 73 (3d Cir. 1982), cert. denied, 459 U.S. 1115 (1983). Both the legal theory and the facts supporting a federal claim must have been submitted to the state court. See Lesko, 881 F.2d at 50.

The claim was framed solely as an ineffective assistance of counsel claim based on counsels' failure to preserve the issue of the prosecutor's statements. James did not raise the prosecutorial misconduct as an independent claim, and in fact could not do so because it was not preserved and was waived. Because the claim was not raised as a due process violation based on the prosecutor's remarks, that claim has not been exhausted in state court. See Paullet v. Howard, 634 F.2d 117, 119 (3d Cir. 1980) (petitioner's raising claim based on prosecutor's remarks did not exhaust other claims based upon those remarks that were not raised as independent claims).

Because the claim has been waived, it is procedurally defaulted. Judge Welsh stated the court need not raise procedural default sua sponte, Trest v. Cain, 118 S. Ct. 478 (1997); she did not reach whether the procedural default could be

excused by cause and prejudice. See Report & Recommendation at 3 n.3. The Trest court held a court of appeals is not required to raise the issue of procedural default when neither party raised or argued the issue before the district court because procedural default is a defense to be raised by the state. See Trest, 118 S. Ct. at 480. Here, the D.A. did not initially raise the issue of procedural default in its response to the habeas petition, because it did not understand that James was raising this claim separate from the related ineffective assistance claim. The D.A. has clearly raised the issue in its objections to the Report and Recommendation, so the court not only may but must decide the issue. The court will remand to the magistrate judge for that determination.

V. Exhaustion of Claim Seven

Judge Welsh determined the seventh claim, based on the Superior Court's denial of James' request for a new trial based on after-acquired evidence of PCP in the marijuana James was smoking at the time of the murder, was not exhausted. Judge Welsh stated James did raise this factual matter on state collateral review based on state law, not federal due process. Because James "did not even alert [the state courts] that he was relying upon the federal [C]onstitution," the claim was not exhausted. Report & Recommendation at 3 n.2. The D.A. objects to the recommendation that the claim be dismissed for lack of

exhaustion because there are no longer any available state remedies; the claim has been procedurally defaulted. James, arguing the Report and Recommendation "reveals a misunderstanding and mischaracterization of the claim raised in the habeas corpus petition," objects to the finding as erroneous.

James concedes that the claim raised in the state courts was based on a right under state law to a new trial based on after-acquired evidence; he is not attempting to "substitute a due process test for a claim under state law of newly discovered evidence of innocence." James' Objections at 8. Instead, James argues the Superior Court analysis and denial of his state claim for a new trial based on newly discovered evidence was based on a "critical misapprehension of fact." Id. In his state law claim raised before the Superior Court, James argued there was newly discovered evidence of an involuntary administration of PCP into the marijuana that James voluntarily used. There is a question whether, under state law, that involuntary introduction of drugs could have reduced the degree of guilt from first- to third-degree (then called second-degree) murder.

James claims the Superior Court erroneously thought he was arguing there was newly discovered evidence that the marijuana itself was not consumed voluntarily and a decision based on a misapprehension of fact or law violates due process. See United States v. Levy, 865 F.2d 551, 559-60 (3d Cir. 1989) (sentence

based on "misconception" of facts violates due process); United States v. Katzin, 824 F.2d 234, 240 (3d Cir. 1987) (same).

James raised this claim regarding newly-discovered evidence in his petition for allowance of appeal to the Supreme Court. In the petition, James only argued that, under state law, the evidence of involuntary use of PCP could have controverted the specific intent necessary for a first-degree murder conviction; he did not raise the alleged denial of due process. See Pet. for Allowance of Appeal at 13. James' "failure to invoke the talismanic phrase 'due process of law' in the state proceedings" does not necessarily mean the claim was not exhausted. Evans v. Court of Common Pleas, 959 F.2d 1227, 1232 (3d Cir. 1992), cert. dismissed, 506 U.S. 1089 (1993). But petitioner must have raised both the legal theory and supporting facts before the state court. See Lesko, 881 F.2d at 50; Ross, 868 F.2d at 641. Here, James sought allocatur because he was entitled to a new trial based on newly-acquired evidence under state law; he did not argue that the Superior Court violated due process in misconstruing the facts of his claim. James did not raise a substantially similar claim before the Supreme Court, so this claim was not exhausted; it is now procedurally defaulted, because James cannot raise this claim in state court. The magistrate judge will have to determine on remand whether there

is cause and prejudice to excuse the default.⁶

CONCLUSION

The first, fifth and seventh claims are procedurally defaulted; the second, third, fourth and sixth claims have been exhausted. The case will be remanded to the magistrate judge for a Report and Recommendation on: 1) the merits of the exhausted claims (claims two, three, four and six); 2) whether there is cause and prejudice or a fundamental miscarriage of justice permitting a federal court to reach the merits of the procedurally defaulted claims (claims one, five and seven); and if warranted, 3) the merits of the defaulted claims (claims one, five and seven).

An appropriate Order follows.

⁶ The D.A. argues that, even if the involuntary use of PCP would reduce the degree of guilt from first-degree murder, first-degree murder encompassed felony murder at the time James committed the crimes, so there was no prejudice resulting from the unavailability of the after-acquired evidence at trial. James' conviction for robbery would permit a first-degree murder conviction because the necessary intent for first-degree murder could have been inferred from the separate felony. See D.A.'s Response at 17 n.10. On remand, the magistrate judge will have to consider whether this precludes a finding of prejudice.

APPENDIX A

Claim	Magistrate Judge's Report & Recommendation	Federal Habeas Petition	State Post Conviction Petition
Improper use of an involuntary confession	Claim One	Claim One	N/A
Ineffective assistance of counsel for failing to object or raise on appeal the involuntary confession	Claim Two	Claim One	Claim Four
Ineffective assistance of counsel for eliciting testimony of petitioner's first trial	Claim Three	Claim Two	Claim One
Ineffective appellate counsel for failing to raise on appeal trial counsel's improper question	Claim Four	Claim Two	Claim One
Due process violation by prosecutor's closing argument	Claim Five	Claim Three	N/A
Ineffective assistance of counsel for failing to object or raise on appeal prosecutor's remarks	Claim Six	Claim Three	Claim Two
Due process violation for Superior Court's failure to understand after-acquired evidence claim	Claim Seven	Claim Four	N/A

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ORDER

AND NOW, this 18th day of August, 1998, upon de novo review of the record, the Report and Recommendation of United States Magistrate Judge Diane M. Welsh ("Judge Welsh") and the objections thereto of petitioner Leon James ("James") and the Philadelphia County District Attorney ("D.A."), and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

James' petition for habeas corpus under 28 U.S.C. § 2254 is **REMANDED** to Judge Welsh for a Report and Recommendation on: 1) the merits of the exhausted claims (claims two, three, four and six); 2) whether there is cause and prejudice to permit reaching the merits of the procedurally defaulted claims (claims one, five and seven); and if warranted, 3) the merits of the defaulted claims (claims one, five and seven).

Norma L. Shapiro, J.