

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

FITZGERALD LAWRENCE : CIVIL ACTION
:
v. :
:
:
JAMES PRICE, et al. : NO. 98-4220

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

April 16, 1999

Petitioner Fitzgerald Lawrence ("Lawrence") has filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. His petition alleges: 1) ineffective assistance of counsel because his attorney failed to investigate and secure witnesses favorable to the defense; 2) abuse of discovery process because the prosecutor did not notify the defense that a witness would change his testimony at trial; and 3) prosecutorial misconduct because of the failure to disclose evidence favorable to his defense.

On February 9, 1979, Lawrence was convicted in state court of first degree murder, criminal conspiracy, and possession of an instrument of crime in a bench trial, and he was sentenced to life imprisonment for the murder conviction and concurrent terms of imprisonment for the other crimes. Lawrence directly appealed, and his conviction was affirmed by the Pennsylvania Supreme Court.

Lawrence filed four post-conviction relief petitions in state court. The first petition was dismissed without prejudice

because Lawrence was not located in the jurisdiction. The second petition was dismissed after counsel for Lawrence filed a "no-merit" letter. The third petition was dismissed because the issues had been previously litigated; the Superior Court affirmed this decision, and Lawrence did not seek review of the Pennsylvania Supreme Court. The fourth petition, asserting the same three grounds alleged in the current petition, was dismissed for failure to satisfy the standard of review of a successive post-conviction petition under Pennsylvania law; the Superior Court affirmed, and the state Supreme Court denied allocatur.

Lawrence then filed a petition for habeas corpus with this court. The present petition was referred to United States Magistrate Judge Thomas J. Rueter ("Judge Rueter") for a Report and Recommendation. Judge Reuter recommended Lawrence's petition be dismissed for procedural default; the claims he asserts in this petition were exhausted in the state court, but were dismissed as unreviewable because they were asserted in a successive post-conviction petition.

Lawrence, filing objections to the Report and Recommendation, argued that Judge Reuter's Report and Recommendation should not be adopted because he has demonstrated cause and prejudice sufficient to overcome the procedural default; alternatively, he argues he has made a colorable claim of actual innocence.

A claim is procedurally defaulted if the state court refuses to reach the merits of the claim because of defendant's, or petitioner's, procedural errors. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). To avoid procedural default, Lawrence must show cause for his default and prejudice from it, or that failure to consider this claim will result in a fundamental miscarriage of justice. See id. at 750. To establish cause, the prisoner must "show that some objective factor external to the defense impeded [his] effort's to comply with the state's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). This rule necessarily requires the prisoner to show the cause was related to the proceeding in which the procedural error occurred, not events at trial. The prisoner bears the burden of establishing cause and prejudice. See Coleman, 501 U.S. at 749-50.

Ineffective assistance of counsel is justifiable cause for procedural default only if it meets the test of Strickland v. Washington, 466 U.S. 668 (1984). See Coleman, 501 U.S. at 752 (quoting Murray, 477 U.S. at 488). Lawrence, in his objections, argues ineffective assistance of trial counsel, but trial counsel was not the cause of his procedural default. He does not argue that attorneys in any of his four post-conviction petitions were ineffective. Such an argument would have been irrelevant; petitioner does not have a constitutional right to

counsel in post-conviction proceedings. See Coleman, 501 U.S. at 752.

Even if there is no justifiable cause for the procedural default, it may be excused if there would otherwise be a fundamental miscarriage of justice. See id. at 750. Petitioner must establish by clear and convincing evidence a colorable claim of actual innocence. See Sawyer v. Whitley, 505 U.S. 333, 336 (1992); Murray, 477 U.S. at 495-96. In his objections, Lawrence argues he has stated a colorable claim of actual innocence, but fails to suggest sufficient probative evidence supporting that assertion. A review of the state court record, particularly the trial transcript, does not demonstrate clear and convincing evidence of actual innocence.

Judge Reuter correctly determined that Lawrence's claims were procedurally barred, and that Lawrence has not shown cause and prejudice or actual innocence to overcome the default; the Report and Recommendation will be approved and adopted.

An appropriate Order follows.

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ORDER

And now, this 16th day of April, 1999, upon consideration of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter ("Judge Rueter"), petitioner Fitzgerald Lawrence's ("Lawrence") objections, respondent's reply, and de novo review of the record, in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation submitted by Judge Rueter is **APPROVED AND ADOPTED**; Lawrence's objections thereto are **REJECTED**.

2. Lawrence's petition for federal habeas corpus relief under 28 U.S.C. § 2254 is **DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING**.

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

Shapiro, S.J.