

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

Nathaniel N. Belle,	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-5667
Ben Varner et al.,	:	
Respondents.	:	
	:	

Memorandum and Order

YOHN, J.

September 5, 2001

Nathaniel N. Belle pled guilty in the Philadelphia Court of Common Pleas to third degree murder and possession of an unlicensed firearm and was sentenced to consecutive terms of imprisonment of ten to twenty years and two and one-half to five years. Pursuant to 28 U.S.C. § 2254, Belle filed this petition for writ of habeas corpus on the grounds that his guilty plea was involuntary and his trial counsel and first PCRA counsel provided ineffective assistance. For the reasons state below, Belle’s petition will be denied.

BACKGROUND

I. Guilty Plea

On May 14, 1988, Belle was arrested and ultimately charged with murder of the first degree, murder of the second degree, murder of the third degree, voluntary manslaughter, involuntary manslaughter, simple assault, aggravated assault, recklessly endangering another person, and possession of firearm without a license. *See* 11/13/96 Opinion of Court of Common

Pleas (State Record Doc. No. 48), at 1-2. On December 7, 1988, Belle’s jury trial began. *See id.* at 2. However, at the close of the prosecution’s case against him, Belle’s trial counsel¹ and the District Attorney negotiated an open plea of guilty to third degree murder and possession of firearms without a license. *See id.* at 3. Belle signed the Guilty Plea Statement and his initials appear next to a number of statements that indicate that he knowingly and voluntarily entered the guilty plea and that he understood that pleading guilty to a crime had the same effect in criminal law as being convicted of the same crime. *See Guilty Plea Statement* (State Record Doc. No. 17). In particular, Belle initialed a statement indicating that he understood that, “If [he] was on probation or parole at the time the crimes to which [he was] pleading guilty or nolo contendere were committed, [his] plea would mean that [he had] violated [his] probation or parole and [he could] be sentenced to jail for that violation *in addition to any sentences which [he might] receive as a result of these pleas.*” *Id.* at 3 (emphasis added).

The state court then held a guilty plea hearing and the trial judge conducted a plea colloquy with Belle. During the colloquy, the court questioned Belle extensively about his discussions with trial counsel regarding the plea and whether he understood the implications of his plea. *See N.T. 12/8/88* (State Record Doc. No. 27), at 160-62 and 168-73. Following the guilty plea hearing, the court accepted Belle’s guilty plea and ordered a presentence investigation report. *See 11/13/96 Opinion of Court of Common Pleas* (State Record Doc. No. 48) at 3.

¹ During the preliminary hearing and arraignment, Belle was represented by Francis A. Hollorands, Jr [“preliminary hearing counsel”]. During trial, entry of the guilty plea, and sentencing, Belle was represented by Rolfe C. Marsh [“trial counsel”]. During the first PCRA proceedings, Belle was represented by Hugh A. Donaghue [“first PCRA counsel”]. During the second PCRA proceedings and the appeal nunc pro tunc of his first PCRA petition, Belle was represented by Lynorr A. Hiller [“second PCRA counsel”].

On January 26, 1989, Belle was sentenced to a term of imprisonment of ten to twenty years for murder in the third degree and a consecutive term of two and one-half to five years for possession of an unlicensed firearm. *See* Certificate of Imposition of Judgment of Sentence, (State Record Doc. No. 20).

On February 1, 1989, Belle filed a motion asking for reconsideration of sentence based on the defendant's failure to present mitigating evidence, to address the court, or to present testimony from family members prior to the imposition of the sentence. *See* Motion for Reconsideration of Sentence (State Record Doc. No. 21). This motion was denied on February 1, 1989. *See* Order of February 1, 1989 (State Record Doc. No. 21a).

II. First PCRA Petition

Belle did not file a post sentence motion challenging the entry of his guilty plea or a direct appeal from the conviction or the judgment of sentence. However, on March 16, 1989, Belle did file his first PCRA petition. *See* Petition Under Post Conviction Hearing Act (State Record Doc. No. 22).² In his petition, Belle cited four grounds for relief. First, Belle claimed that he had been denied his constitutional right to representation by a competent lawyer. *See id.* at 2. Second, he claimed that his guilty plea had been unlawfully induced. *See id.* Third, he claimed that he was eligible for relief because one of his rights guaranteed by the constitution or laws of Pennsylvania or of the United States had been violated. *See id.* Fourth, Belle claimed that exculpatory evidence was now available that had not been available at the time of his trial and which would

² Although this petition was ostensibly filed under the Post Conviction Hearing Act (PCHA), the PCHA was superceded by the Post Conviction Review Act (PCRA) as of April 13, 1988.

have affected the outcome of the trial had it been. *See id.* In support of his claim that he was eligible for relief, Belle alleged that his trial counsel advised him that “the Judge” had offered him a plea bargain whereby he would receive five to ten years in prison if he pled guilty to third degree murder. *See id.* at 3.³ Belle also alleged that his trial counsel was ineffective because counsel failed to produce available witnesses who could have substantiated Belle’s self-defense claim. *See id.*⁴

On July 22, 1991, Belle filed a pro se “Motion to Amend Motion for Post-Conviction Collateral Relief.” *See* Motion to Amend Motion for Post-Conviction Collateral Relief (State Record Doc. No. 31). In this motion, Belle asked for the right to file a direct appeal, nunc pro tunc, and a new sentencing hearing. *See id.* at 3. In particular, Belle claimed that the court improperly considered four aggravating factors while determining his sentence. *See id.* at 5-9. In addition, Belle claims that “*he did not know all of the consequences of what would follow the entry of that plea,*” and that “no one told him of the fact that his state parole would be violated by so doing.” *Id.* at 18.

³ In particular, Belle claimed:

Trial counsel was ineffective for advising me that “The Judge” offered me a 5 to 10 yrs deal for my plea, of guilty to 3rd. degree murder. Counsel then advised me to enter the guilty plea to 3rd. degree murder. Yet, [he] did nothing to stop [the] proceeding or to help withdraw the guilty plea once the court sentenced me outside the range of “5 to 10 yrs.[”]

I am entitled to a reduction of sentence since, my understanding that I was engaged in a plea bargain where by I would plead to 3rd degree murder in return for a sentence of 5 to 10 yrs.

⁴ In particular, Belle claimed:

I am also entitled to a new trial since, trial counsel was ineffective for failing to produce at trial available witnesses that could have testified that, during the relevant period of the [incident], I was threatened by a crowd and was placed in a situation [where] the crime was done in self defense.

On December 2 and 3, 1992, the trial court held a post-conviction hearing. During this hearing, first PCRA counsel, with Belle's approval, apparently withdrew all but one of the issues set forth in the PCRA petition and the amendment to the PCRA petition. *See* 11/13/96 Opinion of Court of Common Pleas (State Record Doc. No. 48), at 5 (citing N.T. 12/2/92, at 4-9). The sole remaining claim was that the guilty plea was not knowing and voluntary because trial counsel indicated that Belle would not be sentenced to no more than five to ten years. *Id.* During the post-conviction hearing, both Belle and his trial counsel testified about the discussions they had prior to entering the guilty plea. *See* N.T. 12/2/92 at 22-42; N.T. 12/3/92, at 9-62.

On March 17, 1995, Belle's first PCRA petition was denied because the record indicated that Belle knowingly and voluntarily entered into the open plea. *See* 3/17/95 Order of the Court of Common Pleas (State Record Doc. No. 43); 11/13/96 Opinion of Court of Common Pleas (State Record Doc. No. 48), at 5. In particular, the state court noted that, at the plea colloquy, both Belle and his counsel clearly and repeatedly testified that Belle had been informed about the terms and ramifications of the plea agreement and that he was not coerced into accepting them. 11/13/96 Opinion of Court of Common Pleas (State Record Doc. No. 48), at 7-14 (quoting N.T. 12/8/88 at 157-59, 168-73). In addition, the state court noted that Belle had signed the guilty plea statement and initialed various provisions that indicated that he had knowingly and voluntarily entered into the agreement. *See id.* at 15. Despite the fact that counsel had apparently withdrawn Belle's other claims, the state court addressed and rejected the additional claims on the merits

“out of an abundance of caution.” *Id.*⁵

On April 28, 1995, Belle filed a notice of appeal to the Superior Court of Pennsylvania. *See* Notice of Appeal. However, after the first PCRA counsel failed to file a brief, the appeal was dismissed on February 7, 1997. *See* 2/7/97 Order of the Superior Court of Pennsylvania.

III. Second PCRA Petition & Resultant Appeal of First PCRA Petition

On December 22, 1997, Belle filed a “Motion for Post Conviction Collateral Relief” under the Post Conviction Relief Act. *See* Motion for Post Conviction Collateral Relief (State Record Doc. No. 55). This second petition stated that he is entitled to relief because: 1) his preliminary hearing counsel was ineffective because he failed to ensure that testimony by Andre Miller, Jr. that could have exonerated Belle was transcribed; 2) his trial counsel was ineffective for failing to raise the transcription error issue; 3) his first PCRA counsel was ineffective because he failed: a) to raise the transcription error issue, b) to protect Belle’s appeal rights, and c) to pursue all but one of the issues set forth in Belle’s first PCRA petition and the amendment to the PCRA petition; 4) exculpatory evidence was now available that had not been available at the time of his trial and which would have affected the outcome of the trial had it been; and 5)

⁵ According to the court, Belle’s additional claims were as follows:

- 1.) Defendant’s PCRA counsel rendered ineffective assistance for failing to allege trial counsel’s ineffectiveness for failing to call defendant’s character witnesses for trial and at defendant’s evidentiary hearing.
- 2.) Trial Counsel was ineffective for failing to file a Motion to withdraw the plea of guilty on the ground that [Belle] might receive a minimum sentence which exceeding [sic] that recommended by the sentencing guideline [sic].
- 3.) The trial court error [sic] for sentencing the defendant outside the sentencing guidelines.

Belle's guilty plea was not voluntary. *Id.* at 4.

The Commonwealth responded by claiming that the PCRA petition was time-barred. *See* Commonwealth's Answer to Motion for Post-Conviction Collateral Relief (State Record Doc. No. 56), at 7 ¶ 2. However, the Commonwealth also stated that it did not object to "the trial court's appointing new counsel or reappointing PCRA counsel to file an appeal from the Court's order of March 17, 1995, nunc pro tunc." *Id.* at 7 ¶ 4.

As a result, on January 30, 1998, Belle was granted leave to appeal nunc pro tunc the March 17, 1995 denial of his first petition. *See* 1/30/98 Order of the Court of Common Pleas, (State Record Doc. No. 57). On March 20, 1998, Belle filed a notice of appeal raising the following three issues: 1) his guilty plea was unlawfully induced; 2) his first PCRA counsel was ineffective because: a) he waived Belle's claim that he was never advised that his plea would result in the revocation of his parole, b) he waived Belle's claim that his plea was the product of time pressure because the offer was made in the middle of trial, and c) he failed to request a direct appeal nunc pro tunc; and 3) he should be granted a direct appeal because new evidence has been discovered that indicates that trial counsel refused petitioner's request to take a direct appeal even though there were direct appeal issues of arguable merit. *See* 1/5/99 Opinion of the Superior Court of Pennsylvania, at 3-4.⁶

⁶ In its opinion, the superior court quoted the three issues the petitioner raised for its consideration:

- I. Whether a guilty plea was unlawfully induced where the defendant was advised by trial counsel that he would receive a lesser sentence than the one he actually received where counsel's representations caused the defendant to form a reasonable, yet incorrect, belief as to the sentence which would render his guilty plea unknowing, unintelligent and involuntary.
- II. Whether post-conviction counsel was ineffective for waiving

On January 5, 1999, the superior court affirmed the March 17, 1995 denial of Belle's first PCRA petition. *See id.* First, the superior court found that the record clearly supports the trial court's conclusion that Belle knowingly and voluntarily entered his plea. *See id.* at 6-8. Second, the superior court found that there was no merit to Belle's claims that his first PCRA counsel was ineffective. *See id.* at 10-15. In particular, the superior court found that first PCRA counsel was not ineffective for waiving Belle's claim that he was never advised that his plea would result in revocation of his parole because that claim was meritless. *See id.* at 10. Similarly, the superior court found that the record belies Belle's claim that his plea was the product of "time pressures." *See id.* at 11. Next, the superior court found that his first PCRA counsel was not ineffective for failing to request a direct appeal nunc pro tunc because the three arguments Belle claims counsel could have raised on direct appeal were meritless. *See id.* at 12-14. Belle's third claim does not appear to have been directly addressed by the court because, as noted above, it had already concluded that the underlying issues which Belle claimed he could have raised on direct appeal were without merit. *See id.* at 12.

On February 5, 1999, Belle petitioned for allowance of appeal to the Supreme Court of Pennsylvania. *See Answer to § 2254 Petition for Writ of Habeas Corpus, Doc. No. 6, at 3.* On

additional issues which alleged that guilty plea was unlawfully induced including where the defendant was never advised that he would have to serve an additional "backtime" sentence; where trial counsel expressed significant time pressures in making the plea; and where post-conviction counsel failed to request a direct appeal nunc pro tunc to litigate issues relating to trial counsel's ineffectiveness and other issues which should have been raised on direct appeal.

III. Whether the defendant should be granted a direct appeal where new evidence discovered by present counsel indicates that the Defendant requested trial counsel to take a direct appeal but where trial counsel failed to do so, and where there were direct appeal issues with arguable merit.

August 13, 1999, the Supreme Court of Pennsylvania denied Belle's petition for allowance of appeal. *See id.*

IV. First Federal Habeas Petition

On May 1, 1995, after Belle's first PCRA petition was denied by the state court, Belle filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See Belle v. Stepanik*, No. Civ. A. 95-2547, 1996 WL 663872 (E.D. Pa. Nov. 14, 1996). The petition presented three grounds for habeas relief, all of which arose out of an allegedly missing preliminary hearing transcript. As stated in his petition, the grounds were:

“A. Ground one: Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to him. Petitioner appeared for a preliminary hearing wherein a witness for the commonwealth testified that petitioner was not the person committing the alleged homicide, however, prior to petitioner's trial the preliminary hearing notes were not available to the defendant and as a result the jury was foreclosed from hearing that testimony.

B. Ground two: The commonwealth rendered counsel's assistance ineffective by the failure to provide counsel with copies of the preliminary hearing transcripts, which would have enabled counsel to impeach the trial testimony of his commonwealth witnesses.

C. Ground three: Denial of right of appeal. Due to the failure of the commonwealth to provide the preliminary hearing transcripts, counsel was precluded from filing any appeal on behalf of petitioner.”

Id. at *2-3 (quoting Hab. Pet., at 4 ¶ 12)

Belle's petition was referred to Chief Magistrate Judge Richard A. Powers, III, and, on, May 19, 1995, Chief Magistrate Judge Powers recommended that Belle's petition be denied for failure to exhaust state remedies. *See id.* at *1. Belle filed objections to the Chief Magistrate Judge's report and recommendation, but, on June 7, 1995, I denied the objections and adopted

the report and recommendation. *See id.*

After Belle sought a certificate of probable cause to appeal, the Third Circuit remanded the case for further development of the record concerning the availability of state remedies. *See id.* at *1. In its order remanding the case, the Third Circuit characterized Belle's claims as follows:

[1.] Belle claims that, although his trial counsel made a timely request, the Commonwealth failed to provide counsel with a transcript of Belle's preliminary hearing.

[2.] Belle also claims that his trial counsel provided ineffective assistance because counsel allegedly advised Belle to plead guilty without having reviewed the "favorable testimony" elicited at the preliminary hearing.

[3.] Belle also claims that he was denied the right to take a direct appeal from the entry of his guilty plea.

Id. at *3 (quoting *Belle v. Stepanik*, No. 95-1528, 1-2 n. 1 (3d Cir. Oct. 31, 1995)).

As a result, Belle's petition was referred to Chief Magistrate Judge Powers for a second time, and, on January 29, 1996, Chief Magistrate Judge Powers again recommended denying the petition. *See id.* at *1. On November 14, 1996, I adopted Chief Magistrate Judge Powers' recommendation and denied "Belle's petition without prejudice to his right to refile the same should he exhaust all available state court remedies." *Id.* The Third Circuit then denied a certificate of appealability for failure to exhaust state remedies and a petition for a panel rehearing. *See Answer to § 2254 Petition for Writ of Habeas Corpus (Doc. No. 6)*, at 4.

V. Current Federal Habeas Petition

At the beginning of November 1999,⁷ Belle filed a *pro se* petition for writ of habeas

⁷ It is unclear whether Belle's habeas petition was filed on November 1, 1999, November 3, 1999, or November 4, 1999. *See* 2000 WL 274011 at *3 n.2.

corpus pursuant to 28 U.S.C. § 2254. *See Belle v. Varner et al.*, No. Civ. A. 99-5667, 2000 WL 2740411 (E.D. Pa. March 10, 2000). In his petition, Belle alleged the following grounds for relief:

A. Ground one: Whether trial counsel and post-conviction counsel were ineffective for waiving a direct appeal and PCRA issue alleging that the petitioner's guilty plea was unlawfully induced where the petitioner was not advised by trial counsel or by the Trial Court Judge during the guilty plea colloquy that, if the petitioner pled guilty, he would have to serve an additional seven year "backtime" sentence as a result of his parole violation prior to the commencement of his new sentence.

Petitioner believed that his sentence would be 5 to 10 years, and being that he did[,], the plea was involuntary. Petitioner was never advised about the backtime he would have to do. [Or t]hat the backtime would run consecutive and not current. PCRA counsel was ineffective for not requesting a direct appeal on the issues at hand. [] [T]rial counsel was [also] ineffective for not filing a direct appeal upon being requested to do so.

B. Ground two: Trial counsel was ineffective for failure to preserve my constitutional right to a[n] appeal. Trial counsel never protected Petitioner's appeal rights, and by not doing so, violated petitioner's right to appeal.

Hab. Pet. (Doc. No. 1), at 7 ¶ 12.

On January 10, 2000, I referred the case to a magistrate judge for a report and recommendation. *See* 1/10/00 Order (Doc. No. 3). On February 10, 2000, the magistrate judge recommended that Belle's petition be dismissed as untimely because Belle failed to file his petition within the one-year period of limitation of the AEDPA. *See* Rep. & Rec. (Doc. No. 7), at 6.

On March 1, 2000, Belle filed a "Petition to Present State Unexhausted Claims." *See* Petition to Present State Unexhausted Claims (Doc. No. 11). In this petition, Belle claims that, in his last appeal, his second PCRA counsel failed to raise issues that Belle had presented in his pro

se post-conviction petition. *See id.* at 1.

On March 10, 2000, in light of uncertainty over the date on which Belle’s petition was “properly filed” for purposes of the AEDPA, I remanded the matter to the magistrate judge for a report and recommendation. *See* 3/10/00 Order (Doc. No. 11). In addition, I also referred Belle’s “Petition to Present State Unexhausted Claims” to the magistrate judge for consideration. *See id.* On April 14, 2000, after finding that Belle signed the habeas petition on November 3, 1999, the magistrate judge again recommended that the petition be dismissed as untimely filed, and, consequently, that Belle’s “Petition to Present State Unexhausted Claims” should be denied. *See* Rep. & Rec. (Doc. No. 13), at 5.

On April 27, 2000, Belle filed a “Petition for Relief” which I interpreted as an objection to the magistrate judge’s report and recommendation. *See* Petition for Relief (Doc. No. 15). In this petition for relief, Belle claims that his habeas petition was delivered to the officer on the prison cell block on October 30, 1999 and that the date written next to his signature on the petition—November 3, 1999—was a mistake. *See id.* at 3. As evidence that the habeas petition was delivered on October 30, 1999, Belle submitted a copy of a cash slip dated October 30, 1999, that requested the Commonwealth of Pennsylvania Department of Corrections to charge \$5.00 to his account for the habeas petition filing fee. *See id.*, Ex. On July 10, 2000, after considering Belle’s objections, the government’s response, and Belle’s reply, I sustained Belle’s objections and decided to consider the petition as having been timely filed. *See* 7/10/00 Order (Doc. No. 19).

STANDARD OF REVIEW⁸

A federal court may consider a petition for habeas relief only if it has been filed on behalf of a person in custody pursuant to a state court judgment and it is grounded on a violation of federal law. *See* § 2254(a). No application shall be granted “unless it appears that the applicant has exhausted the remedies available” in the state courts. *See* § 2254(b)(1)(A).⁹ The exhaustion requirement demands that petitioner “fairly present” each claim in his petition to each level of the state courts, including the highest state court, empowered to consider it. *See O’Sullivan v. Boerckal*, 526 U.S. 838, 847 (1999); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Lines v. Larkins*, 208 F.3d 153, 159 (3d Cir. 2000). In order for a claim “to have been ‘fairly presented’ to the state courts, . . . it must be the substantial equivalent of that presented to the state courts. In addition the state court must have available to it the same method of legal analysis as that to be

⁸ Because Belle’s petition for writ of habeas corpus was filed after the effective date of the AEDPA, the amended terms of the statute apply to his claims. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997); *Weeks v. Snyder*, 219 F.3d 245 (3d Cir. 2000).

⁹After enactment of the AEDPA, amended § 2254(b) & (c) provide in full:

(b)(1) 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 applicant has exhausted the remedies available in the courts of the State; or
(B)(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(b)-(c) (1994 & Supp. 2000).

employed in federal court.” *Werts*, 228 F.3d at 192 (citation omitted); *see also McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) (stating that in order to “fairly present” a claim, petitioner “must present a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.”); *Lines*, 208 F.3d at 159.

The Third Circuit has delineated ways a petitioner may fairly present a claim to the state courts without expressly asserting it as a federal constitutional claim: “(a) reliance on pertinent federal cases employing a constitutional analysis, (b) reliance on state cases employing a constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.” *McCandless*, 172 F.3d at 261-62 (citation omitted). Finally, petitioner bears the burden of demonstrating that each claim has been exhausted and that no additional state remedies exist for those claims. *See Werts*, 228 F.3d at 192; *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1998).

Nevertheless, the exhaustion requirement may be excused “if requiring exhaustion would be futile, *i.e.*, exhaustion is impossible due to procedural default and state law clearly forecloses review of the unexhausted claim.” *Werts*, 228 F.3d at 192 (citations omitted); *see also Doctor*, 96 F.3d at 683. Applicants are considered to have procedurally defaulted their claims when “the state court refuses to hear the merits of the claim because either (1) the defendant waived a PCRA claim [he] could have raised in an earlier proceeding but failed to do so; or (2) some other procedural bar exists, such as a statute of limitations.” *Lambert*, 134 F.3d at 518 (citation omitted); *see also Werts*, 228 F.3d at 192 n.9 (citation omitted). In other words, the court must ask whether the state procedural rule furnishes an independent and adequate state ground for

denying relief.

“A state rule provides an independent and adequate basis for precluding federal review of a state prisoner’s habeas claims only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner’s claims on the merits; and (3) the state courts’ refusal in this instance is consistent with other decisions.” *Doctor*, 96 F.3d at 683-84; *see also Ford v. Stepanik*, No. 97-2116, 1998 U.S. Dist. Lexis 8436, at *13 (E.D. Pa. June 2, 1998) (holding that state waiver provision which depended on federal law was not independent). *Cf. Hameen v. Delaware*, 212 F.3d 226, 247 (3d Cir. 2000) (explaining that an exhausted but unadjudicated claim would be reviewed where the statutory ground upon which the state court relied in denying relief depended upon a construction of a federal constitutional case). “While the state rule should be applied ‘evenhandedly to all similar claims,’ state courts only need demonstrate that in the ‘vast majority of cases,’ the rule was applied in a ‘consistent and regular’ manner.” *Doctor*, 96 F.3d at 684 (citations omitted); *see also Cabrera*, 175 F.3d at 313.

Although the exhaustion requirement may be excused, federal courts are limited in their ability to review such procedurally defaulted claims. “[C]laims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner ‘establishes “cause and prejudice” or a “fundamental miscarriage of justice” to excuse the default.’” *Werts*, 228 F.3d at 192 (citing *Lines*, 208 F.3d at 160) (additional citations omitted); *see also McCandless*, 172 F.3d at 260; *Doctor*, 96 F.3d at 683. In order to demonstrate “cause” for the procedural default, the petitioner must “show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural

rule.” *Murray*, 477 U.S. 478, 488 (1986); *see also Werts*, 228 F.3d at 192-93. In order to satisfy the prejudice requirement, “the habeas petitioner must prove ‘not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions.’” *Werts*, 222 F.3d at 193 (quoting *Murray v. Carrier*, 477 U.S. at 488) (internal quotations and additional citations omitted). In other words, petitioner must prove that “he was denied ‘fundamental fairness’ at trial.” *Id.* (citation omitted).

If the petitioner cannot demonstrate “cause” and “prejudice,” his claim will not be decided on its merits unless he demonstrates that the failure to do so would constitute a fundamental miscarriage of justice. The Third Circuit has held that this exception to the procedural default rule generally only applies in “extraordinary cases . . . ‘where a constitutional violation has probably resulted in the conviction of one who is actually innocent’” *Werts*, 228 F.3d at 193 (quotation and citations omitted).

A petitioner seeking a writ based on a claim which was both exhausted and adjudicated on the merits in the state courts may have his application granted only if the state court decision: (1) was “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States”; (2) “involved an unreasonable application of” such established federal law; or (3) was the result of “an unreasonable determination of the facts in light of the evidence presented” in state court. *See* § 2254(d).¹⁰

¹⁰After enactment of the AEDPA, amended § 2254(d) provides:

(d) 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—

DISCUSSION

As noted above, Belle alleged the following grounds in his current pro se habeas petition:

A. Ground one: Whether trial counsel and post-conviction counsel were ineffective for waiving a direct appeal and PCRA issue alleging that the petitioner's guilty plea was unlawfully induced where the petitioner was not advised by trial counsel or by the Trial Court Judge during the guilty plea colloquy that, if the petitioner pled guilty, he would have to serve an additional seven year "backtime" sentence as a result of his parole violation prior to the commencement of his new sentence.

Petitioner believed that his sentence would be 5 to 10 years, and being that he did[,] the plea was involuntary. Petitioner was never advised about the backtime he would have to do. [Or t]hat the backtime would run consecutive and not current. PCRA counsel was ineffective for not requesting a direct appeal on the issues at hand. [] [T]rial counsel was [also] ineffective for not filing a direct appeal upon being requested to do so.

B. Ground two: Trial counsel was ineffective for failure to preserve my constitutional right to a[n] appeal. Trial counsel never protected Petitioner's appeal rights, and by not doing so, violated petitioner's right to appeal.

Hab. Pet. (Doc. No. 1), at 7 ¶ 12. As I interpret it, Belle's petition raises three distinct issues for federal habeas review: 1) his plea was involuntary because neither his trial counsel nor the judge advised him that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that it could be consecutive; 2) his first PCRA counsel was ineffective because he: a) failed to request a direct appeal on the issue of the voluntariness of Belle's guilty

(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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d) (1994 & Supp. 2000).

plea, and b) waived the voluntariness of Belle's guilty plea as a PCRA issue; and 3) his trial counsel was ineffective because he failed to: a) advise Belle that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that it could be consecutive, b) file an appeal despite Belle's request that he do so; and c) preserve Belle's right to appeal the voluntariness of his guilty plea.¹¹ A federal court may consider a petition for habeas

¹¹ As noted above, Belle also has filed a "Petition to Present State Unexhausted Claims." Specifically, Belle requests permission to present the issues that were raised in his second pro se PCRA petition but which were not—despite his request—raised in his nunc pro tunc appeal by his second PCRA counsel. As noted above, Belle's second PCRA petition raised the following claims that were ultimately not pursued on his appeal: 1) preliminary hearing counsel was ineffective because he failed to ensure that testimony that could have exonerated Belle was transcribed; 2) trial counsel was ineffective for failing to raise the transcription error issue; 3) first PCRA counsel was ineffective because he failed to raise: a) three issues that Belle wanted to raise, and b) the transcription error issue; 4) exculpatory evidence which would have affected the outcome of the trial is now available that had not been available at the time of his trial; and 5) Belle's guilty plea was not voluntary.

I interpret Belle's "Petition to Present State Unexhausted Claims" as a motion to amend the habeas petition currently before this court. A motion to amend a habeas petition is governed by the Federal Rules of Civil Procedure. *See United States v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999)(citing *Riley v. Taylor*, 62 F.3d 86, 89 (3d Cir. 1995)), *cert. denied*, 528 U.S. 866. Federal Rule of Procedure 15(a) provides that once a responsive pleading is served, a party may amend its pleading only by leave of the court, "and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Although the grant or denial of a request to amend is within the discretion of the district court, "[t]he Supreme Court has indicated that in the absence of evidence of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowing the amendment [or] futility of amendment,' leave should be freely given." *Duffus*, 174 F.3d at 337 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

One instance when an amendment will be considered futile is when the new claim is barred by the applicable statute of limitations. *See, e.g., id.* The statute of limitations, however, will not bar an amendment when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). In that case, the amendment is said to "relate back" to the date of the original pleading. *See id.* Nevertheless, even if the amendment relates back such that it is deemed brought within the statute of limitations, there are other instances where an amendment will be deemed futile. In the habeas context, a proposed amendment will be considered futile if the claim is without merit or unexhausted and subject to the procedural default rule. *See Fama v. Comm'r of Corr. Serv.*, 235 F.3d 804, 817 (2d Cir. 2000)(where

habeas claim is without merit, amendment under Rule 15(c) will not be permitted, even assuming *arguendo* that the proposed amendment relates back to the original petition); *Riley*, 62 F.3d at 91 (permitting amendment where new claims have arguable merit and appeared to have been fully exhausted and not the subject of a procedural default); *Robinson v. Wade*, 686 F.2d 298, 304 (5th Cir. 1982)(affirming district court’s refusal to allow amendment and consider new claims where there was no showing that the claims had been exhausted).

Applying this standard to Belle’s motion to amend his habeas petition, it is clear that AEDPA’s statute of limitations bars Belle from now asserting the claims that he originally set forth in his second PCRA petition. As discussed in a prior opinion of this court, Belle’s one year limitation period ended on November 1, 1999. *See Belle v. Varner*, No. Civ. A. 99-5667, 2000 WL 274011, *1-2 (E.D. Pa. March 10, 2000). Because it was unclear whether the habeas petition that this court is currently considering was filed on, before, or after November 1, 1999, *see id.* at *2, this court ultimately decided to consider Belle’s petition as having been filed within the statute of limitations. *See* Order of July 10, 2000 (Doc. No. 19). However, Belle’s motion to amend was not filed until March 1, 2000. Therefore, unless the claims asserted in the proposed amendments “arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,” the amendment is futile because it is barred by the applicable statute of limitations. *See generally, United States v. Thomas*, 221 F.3d 430, 435 (3d Cir. 2000)(finding that a habeas petition may not be amended after the time limit imposed under AEDPA has passed); *Hull v. Kyler*, 190 F.3d 103, 103-04 (3d Cir. 1999)(same).

The first claim Belle now seeks to pursue is that the preliminary hearing counsel was ineffective because he failed to ensure that testimony that could have exonerated Belle was transcribed. In his original pleading, Belle did not claim that his preliminary hearing counsel was ineffective. As a result, this claim clearly does not relate back to any of the claims set forth in Belle’s timely habeas petition. This claim is, therefore, time-barred. Because this amended claim is time-barred, it is futile.

The second claim Belle now seeks to pursue is that his trial counsel was ineffective for failing to raise the transcription error issue. As noted above, in his original pleading, Belle claimed that trial counsel was ineffective because he failed to: 1) advise Belle that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that it could be consecutive; 2) file an appeal despite being Belle’s request that he do so; and 3) preserve Belle’s right to an appeal the voluntariness of his guilty plea. It is clear that the ineffective conduct alleged in Belle’s amended claim does not arise out of the same set of facts set forth in his original pleading. As a result, Belle’s amended ineffective assistance of counsel claim cannot be deemed timely under the “relation back” provision of Fed. R. Civ. P. 15(c). *See Duffus*, 174 F.3d at 337 (“If the ineffective conduct alleged by [the petitioner] in his first petition cannot be said to have arisen out of the same set of facts as his amended claim, his amendment cannot relate back and his claim must be time-barred since it was filed after the statutory period of limitation.”)(quoting *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999)). This claim is, therefore, time-barred. Because this amended claim is time-barred, it is futile.

The third claim Belle now seeks to pursue is that his first PCRA counsel was ineffective.

relief only if it has been filed on behalf of a person in custody pursuant to a state court judgment and it is grounded on a violation of federal law. *See* § 2254(a). Before addressing the merits of Belle’s claims, I must first determine whether these claims are properly before this court.

I. Belle’s Involuntary Guilty Plea Claim

Belle’s first claim is that his plea was involuntary because neither his trial counsel nor the judge advised him that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that that term could be consecutive. Because Belle was already on parole for a prior offense when he pled guilty, based on that guilty plea, he was subject to a term of imprisonment for a parole violation. However, because Belle’s sentence for

As will be discussed *infra*, because “[t]here is no constitutional right to an attorney in state post-conviction proceedings . . . a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” *Coleman*, 501 U.S. at 752. This claim is, therefore, without merit. Because this amended claim is without merit, it is futile.

The fourth claim Belle now seeks to pursue is that exculpatory evidence which would have affected the outcome of the trial is now available that had not been available at the time of his trial. In his original pleading, Belle did not make any such claim. As a result, this claim clearly does not relate back to any of the claims set forth in Belle’s timely habeas petition. This claim is, therefore, time-barred. Because this amended claim is time-barred, it is futile.

The fifth claim Belle now seeks to pursue is that Belle’s guilty plea was not voluntary, apparently because he was advised by trial counsel that he would receive a sentence of five to ten years. In his original pleading, Belle claimed that his plea was involuntary because neither his trial counsel nor the judge advised him that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that that term of imprisonment could be consecutive. Belle’s claim in his original pleading relates to whether Belle was informed of the fact that, because he was already on parole for a prior offense when he pled guilty, based on his guilty plea, he was subject to a term of imprisonment for a parole violation. Belle’s amended claim relates to whether Belle was informed of the maximum sentence he could receive for the crimes for which he was pleading guilty. As a result, it is clear that his amended claim does not arise out of the same set of facts set forth in his timely habeas petition. This claim is, therefore, time-barred. Because this amended claim is time-barred, it is futile.

Because all of the claims put forth in Belle’s petition to present state unexhausted claims are futile, I will deny Belle’s petition to present state unexhausted claims.

parole violation was merely a collateral consequence, as opposed to a direct consequence, of his guilty plea, even if Belle had not been informed of this potential ramification of his guilty plea, Belle would not be entitled to relief.

To comport with the Fifth Amendment, a defendant's plea of guilty must be voluntary and intelligent. A plea of guilty will not be found to be unknowing and involuntary in the absence of proof that the defendant was not advised of, or did not understand, the *direct consequences* of his plea. A direct consequence is one that has a 'definite, immediate, and largely automatic' effect on the range of the defendant's punishment. [The Third Circuit] ha[s] held that '[t]he only consequences considered direct are the maximum prison term and fine *for the offense charged*.

Due process does not, however, require that a defendant be advised of adverse *collateral consequences* of pleading guilty, even if they are foreseeable.

Parry v. Rosemeyer, 64 F.3d 110, 113-14 (3d Cir. 1995)(emphasis added)(citations omitted), *cert. denied*, 516 U.S. 1058 (1996), *superseded on other grounds by statute as stated in Dickerson v. Vaughn*, 90 F.3d 87 (3d Cir. 1996). For example, the Third Circuit has held that the failure of a judge to inform a defendant that, as a result of his guilty plea, he may be deported, lose his job, or be deprived of his voting rights, does not invalidate a plea. *See id.* at 114. The Third Circuit has also held that, "a term of imprisonment imposed in place of a revoked term of probation would be a direct consequence of violating a condition of probation, but not of pleading guilty." *Id.* at 114-15.

More directly, the Ninth Circuit has held that "revocation of parole is a collateral rather than a direct consequence of a defendant's guilty plea." *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977). In explaining this holding, the Ninth Circuit relied on the fact that "[t]he parole board has authority separate and distinct from that of the sentencing judge and may in its discretion determine whether the remainder of petitioner's preexisting sentence will be

consecutive or concurrent with the new sentence imposed by the trial judge.” *Id.* As a result, Belle’s claim that his plea was involuntary because he was not informed of the collateral consequences of his guilty plea is not based on a violation of federal law. Thus, this court cannot consider this claim for relief.

Moreover, it is clear that Belle was in fact informed of the fact that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that it could be consecutive. As noted above, Belle signed a Guilty Plea Statement, and his initials appear next to a number of statements that indicate that he knowingly and voluntarily entered the guilty plea and that he understood that pleading guilty to a crime had the same effect in criminal law as being convicted of the same crime. *See* Guilty Plea Statement (State Record Doc. No. 17). In particular, Belle initialed a statement indicating that he understood that, “If [he] was on probation or parole at the time the crimes to which [he was] pleading guilty or nolo contendere were committed, [his] plea would mean that [he had] violated [his] probation or parole and [he could] be sentenced to jail for that violation *in addition to any sentences which [he might] receive as a result of these pleas.*” *Id.* at 3 (emphasis added).

II. Belle’s Two Ineffective Assistance of PCRA Counsel Claims

Belle claims that his first PCRA counsel was ineffective because he: 1) failed to request a direct appeal on the issue of the voluntariness of Belle’s guilty plea; and 2) waived the voluntariness of Belle’s guilty plea as a PCRA issue. As noted above, a federal court may only grant writ of habeas corpus to an individual who is in custody pursuant to the judgment of a State court *if the individual is in custody in violation of the Constitution or laws or treaties of the*

United States. See 28 U.S.C. § 2254(a)(emphasis added). Because “[t]here is no constitutional right to an attorney in state post-conviction proceedings. . . . a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” *Coleman*, 501 U.S. at 752; see *Werts*, 228 F.3d at 189 n.4. Therefore, Belle’s claim that he is entitled to relief because his first PCRA counsel was ineffective must be denied.

III. Belle’s Three Ineffective Assistance of Trial Counsel Claims

Belle’s final claim is that his trial counsel was ineffective because he failed to: 1) advise Belle that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that it could be consecutive; 2) file an appeal despite Belle’s request that he do so; and 3) preserve Belle’s right to appeal the voluntariness of his guilty plea. The cause of action for ineffective assistance of counsel flows from the Sixth Amendment right to counsel, which exists “in order to protect the fundamental right to a fair trial.” *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

As noted above, that Belle might have to serve a term of imprisonment for violating his parole, and that that term could be consecutive, were collateral consequences of his guilty plea. It has been widely held that a trial counsel’s failure to advise a defendant of the collateral consequences of a guilty plea does not constitute ineffective assistance of counsel. See, e.g., *United States v. Nino*, 878 F.2d 101 (3d Cir. 1989). Thus, this court cannot consider Belle’s claim that his trial counsel was ineffective because he allegedly failed to inform Belle about the ramifications Belle’s guilty plea might have on his parole status.

However, because Belle’s two remaining ineffective assistance of trial counsel subclaims

assert violations of a federal constitutional right, before addressing them on their merits, I must first determine whether they have been properly exhausted.

A. Exhaustion

As noted above, the exhaustion requirement demands that petitioner “fairly present” each claim in his petition to each level of the state courts, including the highest state court, empowered to consider it. To exhaust a claim, the petitioner “must present a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.” *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999)(citing *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Using the procedural history outlined above, I will determine whether Belle has exhausted his claims that his trial counsel was ineffective.

Belle has failed to exhaust his remaining ineffective assistance of counsel subclaims. Although Belle raised an ineffective assistance of trial counsel claim in his first PCRA petition, he did not raise the factual bases for the subclaims he is currently asserting. *See* Petition Under Post Conviction Hearing Act (State Record Doc. No. 22), at 2; Hab. Pet. (Doc. No. 1) at 5-5A. Instead, as noted above, Belle claimed that his trial counsel was ineffective because: 1) he advised Belle that the maximum prison term he would serve would be five to ten years; 2) he did not withdraw the plea when Belle was sentenced to more than ten years; and 3) he failed to produce available witnesses that would have testified that Belle acted in self-defense. Nor did Belle raise any of the subclaims he is currently pursuing in his motion to amend his PCRA petition. *See* Motion to Amend Motion for Post-Conviction Collateral Relief (State Record Doc. No. 31).

Furthermore, in his second PCRA petition, Belle did not raise any of the factual bases for

the subclaims he is currently asserting. *See* Motion for Post Conviction Collateral Relief (State Record Doc. No. 55); Hab. Pet. (Doc. No. 1) at 6-6A. Instead, as noted above, Belle claimed that his trial counsel was ineffective because he failed to raise the issue that testimony from Belle's preliminary hearing was not transcribed.

Nevertheless, the exhaustion requirement may be excused "if requiring exhaustion would be futile, *i.e.*, exhaustion is impossible due to procedural default and state law clearly forecloses review of the unexhausted claim." *Werts*, 228 F.3d at 192 (citations omitted); *see also Doctor*, 96 F.3d at 683. Applicants are considered to have procedurally defaulted their claims when "the state court refuses to hear the merits of the claim because either: 1) the defendant waived a PCRA claim [he] could have raised in an earlier proceeding but failed to do so; or 2) some other procedural bar exists, such as a statute of limitations." *Lambert*, 134 F.3d at 518 (citation omitted); *see also Werts*, 228 F.3d at 192 n.9 (citation omitted). In other words, the court must ask whether the state procedural rule furnishes an independent and adequate state ground for denying relief.

In this case, it appears clear that Belle has procedurally defaulted these unexhausted claims. If Belle attempted to raise the unexhausted claims in another PCRA petition, the Pennsylvania courts are certain to dismiss his claims as barred by the PCRA's statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 9545(b)(1). The Pennsylvania Supreme Court is now "consistently and regularly" applying the PCRA statute of limitations in all cases, regardless of the penalty involved. *See Holman v. Gillis*, 58 F. Supp. 2d 587, 589 (E.D. Pa. 1999); *see, e.g., Commonwealth v. Yarris*, 731 A.2d 581 (Pa.1999); *Commonwealth v. Cross*, 726 A.2d 333 (Pa. 1999). The PCRA's statute of limitations provides that any PCRA petition "including a second

or subsequent petition, shall be filed within one year of the date of the judgment becomes final.” 42 Pa. Cons. Stat. Ann. § 9545(b)(1). Because more than one year has expired after conclusion of direct review of Belle’s state court conviction, I conclude that Belle is barred from further state post conviction review. Although untimely petitions are permitted under certain circumstances, 42 Pa. Cons. Stat. Ann. § 9545(b)(1)(i-iii), none of these exceptions appear to apply in this case.

Moreover, even if Belle’s unexhausted claims were not barred by the PCRA statute of limitations, Belle would be procedurally barred from returning to state court by the PCRA’s waiver provision. The waiver provision prohibits a petitioner from filing a claim “if the petitioner could have raised it but failed to do so before trial, at trial, . . . on appeal or in a prior state postconviction proceeding.” 42 Pa. Cons. Stat. Ann. § 9544(b). Belle presents no reason why his unexhausted claims could not have been raised in his first PCRA petition. As discussed above, Belle challenged other aspects of his trial and first postconviction counsel’s effectiveness in his first and second PCRA petitions and his failure to raise these unexhausted claims at that point results in their waiver. Therefore, under both the statute of limitations and the waiver provisions of the PCRA, it is clear that Belle’s unexhausted claims are procedurally defaulted.

B. Cause and Prejudice

Although the exhaustion requirement may be excused, federal courts are limited in their ability to review such procedurally defaulted claims. As note above, a procedurally defaulted claim may only be reviewed by a federal habeas court if the petitioner establishes cause for his noncompliance with the state procedural rule and actual prejudice from the alleged violation, or a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 748-49 (1991),

Schlup v. Delo, 513 U.S. 298, 314-15 (1995). Belle alleges neither. Therefore, Belle has failed to overcome the procedural bar, and this court may not address his remaining ineffective assistance of counsel subclaims.

CONCLUSION

Belle filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 asking for relief because: 1) his guilty plea was involuntary because neither his trial counsel nor the judge advised him that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that that term could be consecutive; 2) his first PCRA counsel was ineffective because he: a) failed to request a direct appeal on the issue of the voluntariness of Belle's guilty plea, and b) waived the voluntariness of Belle's guilty plea as a PCRA issue; and 3) his trial counsel was ineffective because he failed to: a) advise Belle that, as a result of his guilty plea, he might have to serve a term of imprisonment for violating his parole and that it could be consecutive, b) file an appeal despite Belle's request that he do so; and c) preserve Belle's right to appeal the voluntariness of his guilty plea.¹² Because Belle's sentence for violation of parole was merely a collateral consequence, as opposed to a direct consequence, of his guilty plea, I will deny Belle's first claim for relief. Because there is no constitutional right to an attorney in state post-conviction proceedings, I will deny Belle's second claim for relief. Because a trial counsel's failure to advise a defendant of the collateral consequences of a guilty plea does not constitute ineffective assistance of counsel, I will deny Belle's first ineffective

¹² Although Belle has sought to amend his petition to add additional claims, I will deny his motion because all of his proposed amendments are futile.

assistance of trial counsel subclaim. Finally, because Belle has failed to allege a cause for his noncompliance with the state procedural rule and actual prejudice from the alleged violation, or a fundamental miscarriage of justice, I must also deny Belle's two remaining ineffective assistance of trial counsel subclaims.

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

Nathaniel N. Belle,	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-5667
Ben Varner et al.,	:	
Respondents.	:	
	:	

Order

And now, this 5th day of September, 2001, upon consideration of Belle’s petition for writ of habeas corpus, the Commonwealth’s response thereto, as well as Belle’s “Petition to Present State Unexhausted Claims,” IT IS HEREBY ORDERED that Belle’s petition for writ of habeas corpus and his “Petition to Present State Unexhausted Claims” are DENIED.

IT IS FURTHER ORDERED that petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability. See 28 U.S.C. §2253(c).

William H. Yohn, Jr., Judge