

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

MICHAEL HALES,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	NO. 05-1844
MARILYN BROOKS, et al,	:	
Respondents	:	

MEMORANDUM

Baylson, J.

January 18, 2006

I. Introduction

Petitioner, Michael Hales, filed a pro se Petition for Habeas Corpus on April 21, 2005 (Doc. No. 1) in this Court pursuant to 28 U.S.C. § 2254, collaterally challenging his murder conviction. An Amended Petition was filed on July 29, 2005 (Doc. No. 3). On August 5, 2005, this Court referred the case to Magistrate Judge Thomas J. Rueter (“the Magistrate Judge”). On November 15, 2005 (Doc. No. 10), the Magistrate Judge issued a Report and Recommendation (“R&R”) pursuant to 28 U.S.C. § 636(b)(1)(c) suggesting that this Court deny the habeas petition. On November 23, 2005, Petitioner filed a letter, which this Court construed as Objections to the R&R (Doc. No. 11). Finally, on January 6, 2006, the Respondents, through the Office of the District Attorney of Delaware County, Pennsylvania, filed a Response to Petitioner’s Objections (Doc. No. 13). Upon independent and thorough consideration of the record and all filings in this Court, Petitioner’s objections are overruled and the recommendations by the Magistrate Judge are accepted.

II. Background and Procedural History

Following a trial by jury in the Court of Common Pleas for Delaware County, the Petitioner was convicted of third-degree murder. On March 20, 2000, Petitioner was sentenced to a term of

imprisonment of 162 to 360 months. On direct appeal, the Superior Court of Pennsylvania affirmed the conviction on June 19, 2001 and the Pennsylvania Supreme Court denied allocatur on November 28, 2001. On February 26, 2002, the ninety-day period to seek certiorari from the United States Supreme Court expired, making Petitioner's conviction final under the terms of Pennsylvania's Post Conviction Relief Act's ("PCRA") statute of limitations. 42 Pa. C.S.A. § 9541 et seq.

Petitioner then began the process of seeking collateral relief in state court. On November 15, 2002, Petitioner filed a PCRA petition, which was dismissed in orders dated October 9, 2003 and October 16, 2003. The Superior Court affirmed his decision on August 25, 2004. Finally, on December 30, 2004, the Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal, terminating his ability to seek relief in state court.

Thereafter, on April 21, 2005, Petitioner filed the instant Petition for Writ of Habeas Corpus, which was subsequently amended on July 29, 2005. Petitioner's initial and amended petitions raise seven claims.

III. Summary of Magistrate Judge's Report and Recommendation

The Magistrate Judge recommended in the R&R that Petitioner's habeas corpus petition should be dismissed and a Certificate of Appealability ("COA") denied. First, he concluded that the Petition was timely pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (R&R at 5). Next, he found that claims one, two and three, which were previously considered by the state courts, had not been adjudicated by the Superior Court in a manner that was contrary to or involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Id. at 11-18. Finally, for claims four, five, six and seven, which he determined were new claims not raised in state courts on direct appeal or during the PRCA

proceedings, the Magistrate Judge concluded these claims were procedurally defaulted. Moreover, because Petitioner does not allege cause and prejudice to excuse the procedural default, nor has he shown actual innocence, the Magistrate concluded the Court cannot excuse the procedural default. Id. at 11-19. Accordingly, he recommended denying the habeas petition. Id. at 19.

IV. Petitioner's Objections

In a letter which this Court construes as Objections to the R&R, Petitioner argues that he “tried to have [claims four, five, six and seven] presented by and through all [his] attorneys” in state court and that “a mis-carriage of justice ha[s] occurred.” Objections at 1. Although he provides no further explanation in the letter, Hales attached correspondence with PCRA counsel and a motion filed with, and corresponding order issued by, the Superior Court of Pennsylvania. In sum, Petitioner avers that his initial PCRA petition was filed pro se, and raised “numerous issues,” presumably including those now contained in claims four, five, six and seven. However, appointed PCRA counsel informed Petitioner by letter that some of his claims were meritless and that the “Rules of Professional Conduct did not permit him to proceed on some of the issues.” Although Petitioner wanted to proceed on all issues, appointed PCRA counsel filed an Amended PCRA Petition, which raised only one issue.¹ Petitioner was represented by a second appointed PCRA attorney for his appeal of the lower court’s dismissal of his PCRA petition. That appeal addressed the same single issue raised in his initial PCRA petition. As a result, Petitioner filed the aforementioned motion with the Superior Court of Pennsylvania, requesting that the court order his attorney to file a revised notice of appeal including all the issues he raised in his initial pro se PCRA

¹The issue pressed was whether trial counsel was ineffective for failing to file a request for a bill of particulars, an issue not raised in Petitioner’s federal habeas proceedings. Commonwealth v. Hales, 860 A.2d 1128 (Pa. Super. Ct. 2004).

petition. In an order dated December 18, 2003, the court denied this motion.

V. Discussion

A. Standard of Review

In ruling on objections to the Report and Recommendation of a United States Magistrate Judge, this Court reviews *de novo* only the findings of the R & R that Petitioner specifically objects to. 28 U.S.C. § 636(b)(1). See also F.R. Civ. P. 72.

B. Claims Four through Seven are Procedurally Defaulted

The Magistrate Judge concluded that claims four through seven² had not been raised in the state court proceedings and thus were procedurally defaulted. He noted that it is well-established that a prisoner must “fairly present” all of his claims in state court before a district court may entertain a federal habeas petition. 28 U.S.C. § 2254(b)(1)(A); O’Sullivan v. Boerckel, 526 U.S. 838, 845, 847 (1999); Evans v. Court of Common Pleas, Del. County, Pa., 959 F.2d 1227, 1230 (3d Cir. 1992). This “exhaustion” requirement “ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights.” Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir. 1992). Under

²Hales’ habeas petitions raise the following issues in claims four through seven:

4. Denial of effective assistance of counsel for failing to call expert witness at trial;
5. Denied effective assistance of trial, appellate and PCRA counsel for failing to question police about tampering with evidence and moving evidence at the crime scene while the scene was still being processed;
6. Denied effective assistance of trial counsel for failing to introduce exculpatory evidence in the form of notes from the Medical Examiner; and
7. Denied effective assistance of appellate counsel and PCRA counsel for failing to raise ineffectiveness of other counsel.

(R&R at 6, citing Petition ¶ 12).

controlling Third Circuit case law, “when a claim is not exhausted because it has not been ‘fairly presented’ to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is ‘an absence of available State corrective process.’” McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). When this happens, however, habeas petitioners are considered to have “procedurally defaulted” their claims. Id.

Federal courts may not consider procedurally defaulted claims “unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” Coleman v. Thompson, 501 U.S. 722, 750 (1991); McCandless, 172 F.3d at 260.

Here, claims four through seven were never raised in the state courts, either on direct appeal or during collateral PCRA review. As the Magistrate Judge noted, these claims are therefore unexhausted, and because a subsequent PCRA petition would be barred by the one-year statute of limitations, Hales’ claims are also now procedurally defaulted. (R&R at 19, citing 42 Pa. Cons. Stat. § 9545(b) (PCRA petition must generally be filed “within one year of the date the judgment becomes final.”); Whitney v. Horn, 280 F.3d 240, 251 (3d Cir. 2002) (one-year PCRA statute of limitations is strictly enforced in all cases)). Thus, Petitioner’s claims can only survive if he sufficiently demonstrates cause and prejudice or a “fundamental miscarriage of justice” to excuse the procedural default.

1. Cause and Prejudice

To show cause, a petitioner must demonstrate some objective factor external to the defense that prevented compliance with the state’s procedural requirements. Coleman, 501 U.S. at 753.

Examples of cause include: 1) a showing that the factual or legal basis for a claim was not

reasonably available; 2) a showing that some interference by state officials made compliance with the state procedural rule impracticable; 3) attorney error that constitutes ineffective assistance of counsel. Coleman, 501 U.S. at 753-54. Arguably, Petitioner’s objections suggest that his PCRA counsel were constitutionally ineffective for failing to raise issues four through seven in his Amended PCRA Petition or on appeal from the denial of that Petition and that this constitutes “cause.” In response, Respondents have argued that appointed defense counsel has no constitutional duty to raise every non-frivolous issue requested by the defendant. Resp. to Objections at 2.

The Court agrees with the Respondents. It is well-settled that an indigent defendant has no constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. Jones v. Barnes, 463 U.S. 745, 751 (1983). See also Sistrunk v. Vaughn, 96 F.3d 666 (3d Cir. 1996) (counsel decides which issues to pursue on appeal and has no duty to raise every possible claim); Commonwealth v. Laboy, 333 A.2d 868, 870 (Pa. 1975) (appellate counsel is not constitutionally ineffective if he refuses to present to the Court on appeal issues which the appellant feels are meritorious but which appellate counsel has a rational basis for rejecting). Therefore, even if — as Petitioner asserts in his Objections — his two PCRA lawyers failed to present the issues that now constitute grounds four, five, six and seven of his habeas petition, and he tried to convince them to include those claims because he believed them meritorious, this did not constitute ineffectiveness of counsel. The letter attached by Petitioner from his first PCRA counsel clearly indicates he had just cause to omit the issues presented in Petitioner’s first, pro se, PCRA petition: counsel believed several of the issues were without merit and it would have violated his ethical duties to proceed with

them. Accordingly, Petitioner cannot demonstrate excusable cause for the procedural default.³

2. Fundamental Miscarriage of Justice

In the alternative, Petitioner could seek to establish that his procedural default should be excused to avoid a “fundamental miscarriage of justice.” To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime, McCleskey v. Zant, 499 U.S. 467, 494 (1991), by presenting new evidence of innocence. Schlup v. Delo, 513 U.S. 298, 327 (1995). The Petitioner must show that it is more likely than not that no reasonable juror would have convicted him absent the claimed error. Schlup, 513 U.S. at 327.

Petitioner summarily asserts that “a mis-carriage of justice ha[s] occurred.” Objections at 1. However, neither Hales’ habeas petition nor his Objections state facts or present new evidence supporting a conclusion that he is actually innocent of the crime. Thus, the Magistrate Judge properly concluded that Petitioner has not demonstrated that failure to consider claims four through seven will result in a fundamental miscarriage of justice (R&R at 19).

Accordingly, this Court cannot excuse the procedural default on claims four, five, six and seven because Petitioner Hales has failed to demonstrate cause and prejudice or a fundamental miscarriage of justice.⁴ An appropriate order follows.

³Because our analysis of cause disposes of the issue, we need not address whether prejudice has been demonstrated. However, the Magistrate Judge noted that “to show prejudice, petitioner must present evidence that this factor did more than merely create a possibility of prejudice; it must have worked to [petitioner’s] actual and substantial disadvantage.” (R&R at 8-9, citing Murray v. Carrier, 477 U.S. 478, 494 (1986) (internal quotations omitted)). Petitioner’s Objections make no showing of prejudice whatsoever.

⁴As to claims one, two, and three, to which Petitioner raised no objections, the Court has thoroughly reviewed the record and given full consideration to the legal issues discussed in the R&R. The Court agrees with the well-reasoned opinion of the Magistrate Judge, and approves and adopts his recommendations as to those claims as well.

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MARILYN BROOKS, et al,	:	
Respondents	:	

ORDER

AND NOW, this 18th day of January, 2006, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation of the United States Magistrate Judge Thomas J. Rueter, it is hereby ORDERED as follows:

1. The Report and Recommendation (Doc. No. 10) is APPROVED and ADOPTED;
2. The Petitioner's Objections to the Report and Recommendation (Doc. No. 11) are OVERRULED;
3. The Revised Petition for writ of habeas corpus (Doc. No. 3) is DISMISSED;
4. A certificate of appealability is not granted; and
5. The Clerk of the Court shall mark this case closed.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.