

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

LOUIS A. ROCHE,	:	NO. 06-cv-736
Petitioner	:	
	:	
VS.	:	
	:	
DAVID DIGUGLIELMO,	:	
AND	:	
THE DISTRICT ATTORNEY OF	:	
THE COUNTY OF MONTGOMERY,	:	
AND	:	
THE ATTORNEY GENERAL OF	:	
THE STATE OF PENNSYLVANIA,	:	
Respondents	:	

MEMORANDUM AND ORDER

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

Currently pending before the Court is a *pro se* Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. § 2254, by a prisoner who is currently incarcerated at the State Correctional Institution at Graterford, Pennsylvania. For the reasons which follow, the Court rejects the respondent's exhaustion/procedural default arguments and orders a more specific answer as to the merits of petitioner's claims of ineffective assistance of counsel, but agrees with the respondent that petitioner's two remaining claims are defaulted.

I. PROCEDURAL HISTORY

After entering a plea of guilty to four counts of possession with intent to deliver on October 25, 2000, petitioner was sentenced to a term of seven to fourteen years imprisonment on February 13, 2001, by the Honorable Maurino J. Rossanese of the Montgomery County Court of Common Pleas. Petitioner

did not file a direct appeal, but on April 2, 2001, he filed a *pro se* motion to modify his sentence, which Judge Rossanese denied.

On March 6, 2002, petitioner filed a petition for relief, under the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. § 9541, *et seq.*, which he alleges contained three claims of ineffective assistance of plea counsel. The Court appointed Jeanette Dickerson of the Public Defender’s Office to represent petitioner on April 3, 2002. On August 1, 2003, appointed counsel filed a Motion for Time Credit, which Judge Rossanese granted on December 10, 2003, giving petitioner credit for the time served from April 25, 2000 to May 25, 2000. Petitioner then filed a *pro se* motion for replacement of his collateral counsel on February 11, 2005, which he asserts was after counsel told him she was closing his file without addressing his claims of ineffective assistance of counsel. In response to the motion, appointed counsel filed a memorandum indicating that she had assisted petitioner with the motion for time credit, which had been granted, and had informed petitioner that she could not assist him “in the matter of the mandatory sentence.” (Respondent’s Exhibit G). The motion was dismissed on February 11, 2005, by order attaching counsel’s memorandum. On March 22, 2005, petitioner filed a Notice of Appeal to the Superior Court, which was presumably denied¹.

As petitioner asserts, the state court docket does not reflect that counsel ever filed a “no merit” letter or an amended PCRA petition and the Court never issued an order denying the *pro se* petition filed by petitioner. In an effort to pursue his claims, which petitioner states that he raised in his *pro se* PCRA petition, which had then been pending for over three years, on February 15, 2005, petitioner filed a Petition for Writ of Mandamus with the Supreme Court of Pennsylvania requesting that it compel the trial court to rule on his PCRA petition. The Pennsylvania Supreme Court denied the request on April 29,

¹An Order from the Superior Court is not included with the Exhibits presented in this case.

2005.

The instant petition for Writ Habeas Corpus was filed on February 21, 2006. Petitioner raises three claims: (1) ineffective assistance of plea counsel, (2) that his conviction was in violation of the Fifth and Fourteenth Amendments, and (3) that his conviction was obtained and sentence imposed in violation of the Eighth Amendment. The respondent argues that petitioner's claims are barred due to exhaustion and procedural default, since they have never been decided by the state court.

II. DISCUSSION

Exhaustion/Procedural Default

Respondent alleges that petitioner has failed to exhaust any of his three claims in the state courts and further asserts that since state-imposed time restraints bar petitioner from returning to the state courts to exhaust his claims, the claims are now procedurally defaulted for purposes of federal habeas review. While we agree with the respondent as to petitioner's second and third claims², on consideration of the rather convoluted record before us, however, the Court excuses exhaustion and, in turn, rejects respondents' procedural default argument, with respect to petitioner's claims of ineffective assistance of counsel.

²We will deem petitioner's second and third claims as unexhausted and procedurally defaulted as even according to petitioner's allegations they were not previously presented to the state courts and his time for now doing so has lapsed. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). In addition to his claims of ineffective assistance of counsel regarding his plea and sentence, petitioner also argues that his conviction was imposed in violation of the Fifth and Fourteenth Amendments and that his conviction and sentence are in violation of the Eighth Amendment. Since these claims are not raised as claims of ineffective assistance of counsel, as he stated were raised in his PCRA petition, we must assume that petitioner failed to present them to the state court.

Furthermore, with regard to petitioner's due process claim, in addition to arguing that his sentence exceeds the maximum and that he was improperly sentenced as a subsequent offender as he also argues in the context of his Sixth Amendment claim, petitioner once again argues that the delay by the state court in hearing his petition was inordinate. As we found merit to this claim and granted petitioner the corresponding relief – excusing the exhaustion requirement and waiving any resulting procedural default, we find this issue to be moot. With regard to his claim that his sentence is in violation of the Eighth Amendment, as Respondent notes, petitioner explicitly states in his brief that he declines to argue the claim. (Petitioner's brief at p. 9). He therefore has failed to set forth any grounds for relief even if we were to reach the merits of the claim.

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his available remedies in state court. O’Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731 (1999). In other words, a petitioner must invoke “one complete round of the State’s established review process” before he may assert the claim on federal habeas review. Id. at 845. A petitioner is not deemed to have exhausted the remedies available to him if he has a right, under state law, to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c). In the case of an unexhausted petition, federal courts should dismiss unexhausted claims without prejudice, so as not to deprive the state courts of the “opportunity to correct their own errors, if any.” Toulson v. Beyer, 987 F.2d 984, 989 (3d Cir. 1993).

Notably, exhaustion is not a jurisdictional requirement, but rather a rule of comity, which a federal court, in certain circumstances, may excuse. Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992). As such, “[i]f it appears that the prisoner’s rights have become an ‘empty shell’ or that the state process is a ‘procedural morass’ offering no hope of relief,” the federal court may consider petitioner’s claims on the merits, notwithstanding non-exhaustion. Hankins v. Fulcomer, 941 F.2d 246, 250 (3d Cir. 1991). Indeed, “exhaustion is not required if there is inordinate delay in state procedures, . . . if state officials have obstructed the petitioner’s attempts to obtain state remedies,” or because “the state court would refuse on procedural grounds to hear the merits of the claims.” Lines v. Larkins, 208 F.3d 153, 163 (3d Cir. 2000) (internal citations omitted). In cases of claimed inordinate delay, the Third Circuit has reasoned that “[i]t is the legal issues that are to be exhausted, not the petitioner.” Burkett v. Cunningham, 826 F.2d 1208, 1218 (3d Cir. 1987) (citations omitted). Although no bright-line rule exists, it remains well-established that “when a state court fails to act in spite of ‘ample opportunity’ to decide a prisoner’s claims, considerations of comity do not necessarily require dismissal for lack of exhaustion.” Hankins, 941 F.2d at 250. Inordinate delay has generally been found when the state courts have delayed

over multiple years in considering a state petition. See, e.g., Wojtczak v. Fulcomer, 800 F.2d 353, 354 (3d Cir.1986) (delay of thirty-three months sufficient to excuse exhaustion); Story v. Kindt, 26 F.3d 402, 406 (3d Cir.) (nine year delay sufficient to excuse exhaustion).

In the instant case, petitioner asserts that he filed a PCRA petition containing three claims of ineffective assistance of counsel (presumably including the same claims now presented in this petition³). Although, the respondent has been unable to locate a copy of the petition, the state court docket entry supports petitioner's allegation, as does the fact that counsel was appointed after petitioner filed the petition. Counsel then filed a motion for credit for time served, which was granted, but never filed an amended PCRA petition or submitted a "no merit" letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), pertaining to the *pro se* motion. Furthermore, the Court never ruled upon petitioner's claims. In effort to pursue his claims petitioner filed a motion to have collateral counsel replaced, which was denied. After three years had passed, having no other remedy, petitioner then filed a Writ of Mandamus or petition for extraordinary relief with the Pennsylvania Supreme Court, in which he explained that his PCRA petition remained pending; this was also denied.

We find that petitioner's diligent pursuit of available state remedies has proven to be an unequivocally futile exercise of his rights as evidenced not simply by the inordinate delay, but by the state court's refusal to acknowledge the existence of his pending action. It appears that petitioner has followed the appropriate state procedures in an effort to exhaust his claims, yet his efforts have been thwarted. By dealing only with the motion for credit for time served filed by appointed counsel and failing to actually

³Petitioner now asserts that he raised three claims of ineffective assistance of counsel in his PCRA petition. In his writ of mandamus, a copy of which was provided by the Respondent via facsimile upon request, he states this as well. Furthermore, appointed counsel's memorandum in response to petitioner's motion to replace collateral counsel references petitioner's arguments regarding his sentence, which also lends support to the assumption that the claims of ineffective assistance in his PCRA petition were the same as his claims of ineffective assistance now presented in this petition.

rule on petitioner's claims, the trial court created an initial obstacle for petitioner. By then failing to replace appointed counsel upon petitioner's motion or to act on his petition, the trial court compounded this. Petitioner proceeded to file a Writ of Mandamus to compel action, but to no avail. Hence, petitioner, through no fault of his own, cannot complete one full round of Pennsylvania's appellate procedure in order to exhaust his habeas claims here.

Having thus excused exhaustion on the basis of futility, we must now address the remaining defense of procedural default. The procedural default barrier, in the context of habeas corpus, precludes federal courts from reviewing a state petitioner's habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553, reh'g denied, 501 U.S. 1277, 112 S. Ct. 27 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. . . [b]ecause this Court has no power to review a state law determination that is sufficient to support the judgment." Id. Although the issue of procedural default is best addressed by the state courts in the first instance, a federal court may dismiss a petition as procedurally barred if state law would unambiguously deem it defaulted. Carter v. Vaughn, 62 F.3d 591, 595 (3d Cir. 1995).

Respondent relies on the well-established rule that "[i]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas" Coleman, 501 U.S. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). The purpose of this principle is to prevent habeas petitioners from being able to avoid the exhaustion doctrine by defaulting their federal claims in state court. Coleman, 501 U.S. at 732. However, we reject this argument. It is true that a finding of futility merely eliminates the

procedural pretense of requiring a federal habeas petitioner to return to an unavailable state forum for nonexistent relief, but does not dispose of potential procedural default. Lines, F.3d at 166. Nonetheless, the Third Circuit has recognized that in cases where the futility results from failures by the state, the federal court may proceed to the merits of a petitioner's claim. Id. at 166, n. 19. In the case before the Court, the futility does not arise from an adequate and independent state procedural bar, as required by Coleman, but rather from the state's own inordinate delay and refusal to process and hear petitioner's properly filed appeal. Accordingly, we reject respondents' procedural default claim.

In light of petitioner's diligence in pursuing his state remedies and the state's lack of willingness to provide the appropriate channels or relief, this Court now dismisses the affirmative arguments raised in respondent's brief as to his claims of ineffective assistance of counsel. Respondent has argued that petitioner's claims are without merit, but unfortunately, has neglected to offer much in the way of a substantive answer to the issues presented by petitioner.

Petitioner argues that his counsel was ineffective for failing to object to the judge's sentence because it was based on the use of improper guidelines which led to an illegal sentence. He also argues that counsel failed to file a motion for reconsideration which would have corrected the sentencing judge's errors. Specifically, petitioner argues that he was sentenced in excess of the statutory maximum. He asserts that counsel allowed him to be sentenced as a subsequent offender even though he was aware that this was petitioner's first offense, arguing that the maximum sentence is 10 years. Petitioner also alleges that counsel was ineffective for failing to advise him of his right to withdraw his guilty plea when the sentencing judge failed to accept his plea agreement, which he claims provided that his sentence would not exceed ten years. He submits a guilty plea colloquy form which states that the maximum sentence is ten years. (Petitioner's Exhibit 1).

In response to petitioner's claim that there was an agreement, respondent has pointed to the

testimony from the sentencing hearing which demonstrates that it was an open plea. However, with regard to petitioner's claim that he was improperly sentenced as a subsequent offender and that his sentence exceeds the maximum, respondent has simply stated that "petitioner's plea and sentence were in accordance with all constitutional standards." (Response at p.6, par. 25). As noted above, petitioner has attached a plea colloquy form and a copy of what he claims to be the relevant sentencing guidelines, arguing that he was improperly sentenced beyond the 10 year maximum term and that he was sentenced to the minimum term for a subsequent offender rather than a first time offender. To that end, the Court will order that respondents provide a specific and detailed answer to the substantive claims of ineffective assistance of counsel in the currently pending Petition for Writ of Habeas Corpus. We ask that respondent address the merits of petitioner's claim and provide a detailed answer including reference to the appropriate section of the statute⁴ and the sentencing guidelines used.

An appropriate order follows:

⁴The docket and the transcript from the sentencing hearing reflect that petitioner was convicted of violating 35 Pa.C.S. §760-113 §A30. According to petitioner, his conviction was with respect to possession of cocaine. However, since this directly impacts the statutory maximum sentence, we ask that the respondent reference the appropriate section of the statute at issue and the relevant sentencing guidelines.

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ORDER

AND NOW, this 26th day of April, 2006, it is hereby ORDERED that respondents shall submit, within twenty (20) days from the date of this order, a new, more specific Answer to petitioner's Petition for Writ of Habeas Corpus, addressing the merits of petitioner's ineffective assistance of counsel claims (Ground one referenced by petitioner) .

It is so ORDERED.

BY THE COURT:

/s/ Charles B. Smith

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE