

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

ERIC BARKLEY, : CIVIL ACTION
Petitioner :
 :
v. : NO. 99-858
 :
PRICE, et al., :
Respondents. :

MEMORANDUM

Giles, J.

April 28, 2006

Presently before the court is the *pro se* Motion of Petitioner to reopen his original petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is currently serving a twenty-five to fifty year sentence at the State Correctional Institution at Marienville, Pennsylvania. For the reasons that follow, the Petitioner's Motion is denied.

I. Factual and Procedural Background

On November 5, 1992, pursuant to a plea agreement, petitioner entered a plea of guilty to charges of burglary, robbery, and aggravated assault. During the sentencing hearing on March 23, 1993, the trial judge withdrew the guilty plea *sua sponte*. At petitioner's request, new counsel was appointed and the case proceeded to trial before a jury. On March 30, 1993, the jury found petitioner guilty of three counts of robbery, two counts of kidnapping, and one count of burglary. In June 1994, the trial judge sentenced him to fifty-five (55) to one-hundred (100) years imprisonment.

In December 1995, petitioner filed a direct appeal in Pennsylvania Superior Court claiming that: (1) the guilty plea was ineffective because the sentencing court improperly

withdrew the plea *sua sponte* (2) trial counsel was ineffective for failing to contest the trial court's improperly coerced withdrawal of his guilty plea; and (3) the jury trial constituted double jeopardy. He requested reinstatement of his original plea and a remand to the trial court for re-sentencing.

The Superior Court found merit in petitioner's claim regarding the trial court's withdrawal of his guilty plea. It concluded that the trial court was in error for withdrawing the guilty plea *sua sponte* and that the plea agreement remained in effect. It further held that the ensuing trial violated the Pennsylvania statute against double jeopardy. The court reinstated the guilty plea and remanded petitioner's case for re-sentencing under the original plea agreement. (Commonwealth v. Barkley, 449 Pa.Super. 716, 674 A.2d 311 (1995)).

Upon remand, petitioner was sentenced to twenty-five (25) to fifty (50) years for the convictions covered by the plea agreement. Petitioner, *pro se*, appealed the sentence to the Superior Court. In his petition, Petitioner set forth the following issues for review: "(1) whether the double jeopardy prohibition of the Fifth Amendment prevented the re-imposition of guilty plea; (2) whether re-imposition of the guilty plea was barred by 18 Pa. C.S. § 109; (3) whether Petitioner's counsel was ineffective for requesting that the court remand the guilty plea back to the lower court after a double jeopardy violation when there was no basis of law for the remedy he requested." (Commonwealth v. Barkley, No. 3854 Philadelphia 1996, at 2 (Pa. Super. May 13, 1998)).

On May 13, 1998, the Superior Court found his claims to be meritless and affirmed the sentence. Petitioner appealed this decision to the Pennsylvania Supreme Court. On February 3,

1999, the Court denied Petitioner's request for review. Petitioner did not present any of his claims in a petition under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Ann. § 9541 et seq.

On February 19, 1999, Petitioner filed a habeas petition for federal review of his conviction in this court. Petitioner presented four grounds for review. The first two claims alleged that the Superior Court's reinstatement of his guilty plea placed him in double or "triple" jeopardy. The additional two claims were that his guilty plea was involuntary and that it was unlawfully induced.

This court referred the habeas petition to a U.S. Magistrate Judge for Report and Recommendation. The Magistrate Judge agreed with the Commonwealth's argument that Petitioner had failed to exhaust remedies for two of his habeas claims in state court and concluded that the petition was "mixed," that is, the petitioner had exhausted state remedies on claims that reinstatement of his guilty plea constituted double jeopardy, but had not exhausted all state remedies on the claims that the guilty plea was involuntarily and unlawfully induced. The Magistrate Judge recommended that the petition be dismissed without prejudice for failure to exhaust state court remedies.¹ The Report and Recommendation was sent to petitioner to determine if he objected to any part of it.

Instead of objecting, petitioner opted to file a motion to amend his habeas petition. In it, he stated that he waived his unexhausted claims, and he raised one double jeopardy claim. The

¹ Federal district courts must dismiss mixed habeas petitions containing both exhausted and unexhausted claims. Pliker v. Ford, 542 U.S. 225 (2004); Rose v. Lundy, 455 U.S. 509, 522 (1982).

matter was again referred to the U.S. Magistrate for Report and Recommendation. The Magistrate Judge recommended that the petition be denied because the double jeopardy claim raised lacked merit. On August 13, 1999, this court approved and adopted the Report and Recommendation and denied the petitioner's habeas petition with prejudice.

On January 27, 2000, petitioner filed a PCRA petition in the Philadelphia Court of Common Pleas. That petition was based on the claim of a coerced guilty plea determined unexhausted by this court. Petitioner contended that his guilty plea was involuntarily and unlawfully induced because the 25 to 50 year sentence imposed was not in accord with the guideline sentence promised to him by the sentencing court. The PCRA court dismissed the petition, concluding that the claims had been "previously litigated."

In February 2004, the Superior Court denied petitioner's appeal of the PCRA court's dismissal of his claim for post-conviction relief. On appeal, petitioner claimed: (1) that his guilty plea was not knowingly and voluntarily entered where he was sentenced to a statutory maximum after the sentencing court promised and assured him that he would be sentenced within the guidelines.; and (2) that counsel was ineffective for failing to object to the sentence which was not in accord with the plea agreement.

The Superior Court found that Petitioner's claims had been "previously litigated" and affirmed the PCRA court's decision. On appeal, the Pennsylvania Supreme Court denied petitioner's request for discretionary review.

Now pending before this court is Petitioner's Rule 60(b) Motion to Reopen Original Writ

of Habeas Corpus Petition filed on February 19, 1999, pursuant to 28 U.S.C. § 2254.²

II. Legal Standard

Federal Rule of Civil Procedure 60(b) provides for relief from a final judgment.³ Such relief may be requested where “fraud, misrepresentation, or other misconduct of an adverse party” has occurred. Fed. R. Civ. P. 60(b)(3). Further, subsection 6 of Rule 60(b) allows for such relief for “any other reason justifying relief from the operation of judgment.” Fed. R. Civ. P. 60(b)(6).

Rule 60(b) applies to habeas proceedings “to the extent that the practice in such proceedings is not set forth in statutes of the United States” or “the Rules Governing Section 2254 Cases.” Fed. R. Civ. P. 81(a)(2). In Gonzalez v. Crosby, the Supreme Court considered the extent to which the Antiterrorism and Effective Death Penalty Act (“AEDPA”) limited the

²Petitioner seeks relief from this court’s final judgment on Petitioner’s amended habeas petition filed in June 1999. Therefore, this court will construe Petitioner’s motion as one arising under Rule 60(b).

³Rule 60(b) provides six grounds upon which relief from a final judgment may be sought. The Rule states:

On a motion and upon such terms that are just, the court may relieve a party...from final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

application of Rule 60(b). 125 S. Ct. 2641 (2005).⁴ The court ruled that where a motion for relief under Rule 60(b) sets forth what would constitute a “claim” for habeas relief under 28 U.S.C. § 2254 by either attempting to “add a new ground for relief,” or “attack the federal court’s previous resolution of a claim on the merits,” such a motion must be considered to be a successive petition for relief, which would require authorization from the circuit court of appeals. Id. On the other hand, a Rule 60(b) motion attacking “not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings” should not be construed as a second application for relief. Id.

Similarly, in Pridgen v. Shannon, the Third Circuit held that:

In instances in which the factual predicate of a petitioner’s Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits. However, when the Rule 60(b) motion seeks to collaterally attack the petitioner’s underlying conviction, the motion should be treated as a successive habeas petition.

380 F.3d 721, 727 (3d Cir. 2004).

However, Rule 60(b) relief is available only in cases evidencing extraordinary circumstances. Stradley v. Cortez, 518 F.2d 488, 493 (3d Cir. 1975), *citing* Ackermann v. United States, 340 U.S. 193 (1950). Even “legal error does not by itself warrant the application of Rule 60(b). Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b).” Pridgen, 380 F.3d at 728, *quoting* Martinez-McBean v. Government of Virgin Islands, 562 F.2d 908, 912 (3d Cir. 1977).

⁴The AEDPA prohibits state prisoners from filing second or successive habeas petitions.

III. Discussion

Petitioner's motion challenges the integrity of the federal habeas proceedings. According to Petitioner, the Commonwealth misrepresented to the federal court that he had failed to exhaust his guilty plea claim in his original habeas petition. The Commonwealth subsequently argued in the state courts that the same claim determined unexhausted in federal court had been "previously litigated" in the state courts. Petitioner claims that the arguments presented by the Commonwealth were irreconcilable and inconsistent. He asserts that these arguments demonstrate deliberate deception and constitute "government interference" intended to deny him an otherwise cognizable claim.

Because Petitioner's motion does not attempt to challenge the court's resolution of the previous habeas on the merits, include a new claim for relief, or directly challenge his conviction or sentence, it is not considered a second or successive habeas petition. Rather, Petitioner's 60(b) motion seeks to renew his initial petition by challenging the integrity of the habeas proceedings. Thus, it can be reviewed on the merits.

Exhaustion and Previously Litigated Claims

At the time Petitioner filed his original petition for habeas, the Magistrate Judge correctly found that the claims concerning the voluntariness and lawfulness of his guilty plea had not been exhausted in state court. The AEDPA requires a habeas petitioner challenging the determination of a state court to exhaust available state remedies for his claim before seeking federal habeas relief: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State...if he has the right under law of the State to raise, by any available procedure, the

question presented.” 28 U.S.C. 2254(b).

Before a petitioner can present a claim to a federal court, the claim must be “fairly presented” to the highest state court, either on direct review of the conviction or in a post-conviction attack. To be “fairly presented,” the federal claim must be the substantial equivalent of that presented to the state courts and must allow the state courts to complete their review of that claim... Picard v. Connor, 404 U.S. 270, 278 (1971); Landano v. Rafferty, 897 F.2d 661, 668-69 (3d Cir. 1990). The Third Circuit has interpreted “substantial equivalence” to mean that both the legal theory and the operative facts underlying a Petitioner’s federal claim must have been presented to the state courts. Ross v. Petsock, 868 F.2d 639 at 641 (3d Cir. 1989); Landano, 897 F.2d at 669. It is not sufficient that a “somewhat similar state law claim was made.” Anderson v. Harless, 459 U.S. 4, 6 (1982). Further, the burden of establishing that a habeas claim was fairly presented in the state court falls on the petitioner. Lines v. Larkins, 208 F. 3d 153, 159 (3d Cir. 2000).

The claim that Petitioner presented in direct appeal in the state courts and the claim that he presented in his initial federal habeas petition were based on different legal theories. On direct appeal, Petitioner argued that his sentence was illegal because the trial court “refused to sentence [him] within the statutory guidelines, refused to consider any mitigating factors and displayed ‘intentional bad faith’ and ‘extreme bias’ toward [him]” whereas, in his original habeas petition, he challenged the voluntariness of his guilty plea. Petitioner argued that his guilty plea was not knowingly and voluntarily given because the sentencing court promised him that he would be sentenced within the statutory sentencing guidelines and he was not. While the claims

are similar because they both challenge the propriety of his guilty plea, they are not substantially equivalent since they are not based on the same legal theory.

Federal courts will dismiss, without prejudice, claims that have not been “fairly presented” in state courts; thus, allowing a petitioner to exhaust his or her claim. Rose v. Lundy, 455 U.S. 509, 522 (1982). Instead of allowing the court to dismiss his initial petition without prejudice, and to stay the mixed petition so as to allow him to pursue unexhausted claims in the state courts without expiration of the one-year statute of limitations, Petitioner chose to amend his original petition to include only exhausted claims and to waive unexhausted claims.

Following the court’s denial of his amended habeas, Petitioner filed a PCRA petition based on the claim determined unexhausted. The PCRA court dismissed the petition citing that the claim had been “previously litigated.”⁵ That court found that, on direct appeal from his 50-100 year sentence, the Superior Court had reviewed Appellant’s same sentencing challenge that he had not been sentenced within the guideline range. Petitioner appealed this finding. The Superior Court concurred that Petitioner’s claims had been “previously litigated,” and it affirmed the PCRA court’s decision. That court concluded that it had previously reviewed and ruled on the merits of Petitioner’s same sentencing challenge objecting to the fact that he had not been

⁵To be eligible for relief under the PCRA, “the petitioner must plead and prove by a preponderance of the evidence” that “the allegation of error has not been previously litigated...” 42 Pa.C.S. § 9544(a)(3). The PCRA, 42 Pa.C.S. § 9544(a) provides that an issue has been previously litigated if: ...
(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or
(3) it has been raised and decided in a proceeding collaterally attacking to conviction or sentence.

sentenced within the guideline range. It stated: “When we initially remanded this matter for resentencing, we noted that the guilty plea of appellant was an ‘open plea agreement’ under which Judge Kafrissen was empowered to sentence appellant to any term of imprisonment up to the statutory maximum for each crime.’ We also noted that appellant had acknowledged during his guilty plea colloquy that the maximum possible sentence was 50 years.” (Commonwealth v. Barkley, No. 2793 Philadelphia 2001, at 4 (Pa. Super. February 2, 2004)).⁶

Unlike the federal exhaustion requirement where a claim must be the substantial equivalent of the claim presented in state court to be determined exhausted, the PCRA will deem any variant of a claim presented to the highest appellate court and reviewed on the merits as

⁶The following plea colloquy was conducted by the sentencing court:
The Court: All right. Sir, have you fully reviewed the written guilty plea colloquy?
The Defendant: Yes, sir.
The Court: And did you do that with your attorney and do you understand everything that is contained in there?
The Defendant: Yes, sir. I understand it...I’m pleading to robbery, burglary, and aggravated assault.
The Court: Right...Has anybody promised you anything or threatened you to use any force to get you to sign the colloquy?
The Defendant: No, sir.
The Court: Did you do it of your own free will?
The Defendant: Yes, sir.
The Court: Do you understand that when you plead guilty, you’re giving up all the rights that are explained in that colloquy?
The Defendant: Yes, sir.
The Court: ...Do you understand that the maximum sentence that can be imposed for the charge of robbery, a felony of the first degree, is 20 years in prison and/or a fine of \$15,000. And the maximum sentence that you can receive on aggravated assault, a felony of the second degree is 10 years in prison and/or a fine of \$25,000. And the maximum sentence that you can receive on a charge of burglary, a felony of the first degree is also 20 years in prison and/or a fine of \$25,000. Do you understand that?
The Defendant: Yes, sir.

“previously litigated.” Generally, a claim will be regarded as previously litigated but not as exhausted where it is supported by a different legal theory or a set of facts. Thomas v. Beard, 388 F.Supp.2d 489, 501 (E.D. Pa. 2005). Petitioner’s sentencing claim was adjudicated on the merits by the Superior Court during direct appeal, and thus, was “previously litigated.” Yet, for federal habeas purposes, the claim remained unexhausted because the original habeas presented a different legal theory than had been finalized in the state court system and, therefore, was not “substantially equivalent” to the claim presented on direct appeal in the state courts.

Procedural Default

A failure to exhaust in the state courts may be treated as “excused” on the basis of futility. Wenger v. Frank, 266 F.3d 218, 233 (3d Cir. 2001). “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) (*quoting* 28 U.S.C. § 2254(b)).

Under such circumstances, the claim is procedurally defaulted, and not unexhausted. Such claims, however, may only be heard on the merits by a federal court if there is a basis for excusing the procedural default. Specifically, review of a procedurally defaulted habeas claim is barred unless Petitioner can establish: (1) “cause for default and actual prejudice as a result of the alleged violation of law,” or (2) that a “failure to consider the claims will result in a fundamental miscarriage of justice.” McCandles, 172 F.3d at 260; Coleman v. Thompson, 501 U.S. 722, 750 (1990).

Because it was “previously litigated,” Petitioner’s claim is barred from further review in state court and his claim is exhausted due to procedural default. In addition to the allegation that the Commonwealth engaged in misrepresentation and deliberate deception, Petitioner argues that the federal court now can consider the merits of his claim because the existence of “cause” and “prejudice” excuse the procedural default.

The existence of cause for procedural default generally turns upon whether the petitioner can show that some “objective factor external to the defense” that impeded a petitioner’s, or counsel’s, attempt to comply with the state’s procedural rule. Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992); Murray v. Carrier, 477 U.S. 478, 488 (1986). Cause may exist where the “factual or legal basis for a claim was not reasonably available to counsel” or where “some interference by officials made compliance impracticable.” Id. (internal citations omitted).

Petitioner argues that there is cause in the present case because the Commonwealth’s alleged misrepresentation to this court, that he had failed to exhaust claims presented in his original habeas, rendered procedural compliance impracticable. Thus, according to Petitioner, the Commonwealth caused him to default his claim. In addition, Petitioner argues that his PCRA petition was dismissed because the Commonwealth represented to the Pennsylvania Court of Common Pleas that the same claim had been “previously litigated.” Petitioner alleges that Commonwealth’s adverse argument that the claim had been exhausted, and subsequently that it had been previously litigated, deprived him of a full and fair hearing on the merits of his claim. According to Petitioner, Commonwealth’s actions qualify as “government interference.” Petitioner argues that the claim was properly raised in his original habeas petition. It was filed

within the AEDPA's one year statute of limitations and contained only fully exhausted claims. He avers that but for the "government's interference," his claim would have been addressed by the court.

However, Petitioner has not claimed, nor can he demonstrate, the existence of any factor external to the defense that precluded him from presenting his claim, based on the same legal theory presented in his federal habeas petition, on direct appeal in the state court system or in an application for collateral review following his sentencing. As discussed previously, at the time he filed his original habeas petition, Petitioner's claim regarding the voluntariness of his guilty plea had not been exhausted. The exhaustion status of this claim in federal court was not in conflict with the PCRA's characterization of the claim as one that had been "previously litigated" in the Commonwealth's courts. The Commonwealth did not misrepresent the status of Petitioner's claims to this court.

Moreover, Petitioner's allegation that the Commonwealth's characterization of his claim as being unexhausted caused the federal district court to dismiss the (original) habeas petition without reaching the merits of the claim and without prejudice as required under Rose v. Lundy is totally erroneous. Indeed, this court never issued a decision concerning Petitioner's original habeas petition. The Report and Recommendation concluded that, since Petitioner's original habeas petition included both exhausted and unexhausted claims, "the petition should be dismissed without prejudice to the petitioner's right to renew the petition after he has exhausted *all* of his state court remedies for *all* of his claims." In addition, the Report and Recommendation noted that Petitioner also had the option of filing an amended petition that did

not include the unexhausted claims, but warned that if Petitioner chose that option, he could be precluded from later raising the unexhausted claims in federal court.

While it is now clear that the Petitioner's claim is procedurally defaulted, that was not definitively established at the time he filed the original habeas. This court was not at liberty to make that determination at that juncture. Unless a state court has concluded that a petitioner "is clearly precluded from state court relief, the federal habeas claim should be dismissed for nonexhaustion, even if it appears unlikely that the state will address the merits of the petitioner's claim." Lambert v. Blackwell, 134 F.3d 506, 517-18 (3d Cir. 1997); see also Lines v. Larkins, 208 F.3d 153, 163 (3d Cir. 2000) ("That it is merely unlikely that further state process is available is...insufficient to establish futility."); Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996) ("If the federal court is *uncertain* how a state court would resolve a procedural default issue, it should dismiss the petition for failure to exhaust state remedies even if it is unlikely that the state court would consider the merits...").

The burden of establishing that claims presented in a federal habeas petition were fairly presented in state court falls upon Petitioner. Lambert v. Blackwell, 134 F.3d 506, 512 (3d Cir. 1997). Petitioner did not file an objection to the conclusions offered by the Magistrate Judge's Report and Recommendation. Before this court could adopt the Report and Recommendation (concerning the original habeas petition), Petitioner chose to amend his petition to only include the claims deemed exhausted, and to waive the unexhausted claims.

Even if a petitioner establishes cause for the procedural default of his claims, he must still demonstrate that he experienced "actual" prejudice, such that the error in the proceedings

“worked to his [her] actual and substantial disadvantage” and was of “constitutional dimensions.” United States v. Frady, 456 U.S. 152, 170 (1982). Petitioner argues that prejudice can be presumed since despite properly filing his original habeas petition, he was deprived of his right to federal review of a cognizable claim. The petition was mixed, including exhausted and unexhausted claims. As the Third Circuit has noted:

Exhaustion is a rule of comity. ‘Comity’ in this context, is that measure of deference and consideration that the federal judiciary must afford to the co-equal judicial systems of various states, Exhaustion then, serves an interest of not state prosecutors but of state courts.

United States ex rel. Trantino v. Hatrack, 563 F.2d 86, 96(3d Cir. 1977).

Further, Petitioner has not shown that the federal court’s failure to consider the claim will result in a fundamental miscarriage of justice such that the procedural default should be excused. Murray, 477 U.S. at 496. The “fundamental miscarriage of justice” exception to procedural default has been narrowly interpreted to apply only “where a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Murray, 477 U.S. at 496. That is not the case here. Petitioner does not contest guilt as to the underlying crimes. He is seeking review of the claim that his guilty plea was not voluntarily or knowingly entered.

Petitioner’s claim does not demonstrate the existence of cause or prejudice sufficient to excuse procedural default, or demonstrate that denying him relief would result in a miscarriage of justice.

No Extraordinary Circumstances and Time Limitations

Petitioner is not entitled to relief pursuant to Rule 60(b). He has not demonstrated that the actions of the Commonwealth constitute fraud, misrepresentation to the court, or interference

sufficient to grant Petitioner relief pursuant to Rule 60(b)(3). Only “extraordinary and special circumstances” justify relief under Rule 60(b)(6). Petitioner has not presented any extraordinary circumstance that warrants reopening his original petition for federal habeas relief.

In addition, the petitioner’s motion is untimely under Rule 60(b). Motions grounded in Rule 60(b)(3) must be filed within one year after the judgment, order, or proceeding was entered or taken. Review under the residuary clause of Rule 60(b), subsection (6) is not subject to the one year statute of limitations, but it must be made within “reasonable time.” Fed. R. Civ. P. 60(b). This court made a determination on Petitioner’s habeas petition on August 13, 1999. Petitioner filed the present motion on August 29, 2005. Even accounting for equitable tolling during review of Petitioner’s application for collateral review under the PCRA, the time that elapsed between this court’s order and Petitioner’s motion well exceeds the “reasonable time” allowed under the Rule.

IV. Conclusion

For the foregoing reasons, Petitioner’s Motion to Reopen Original Writ of Habeas Corpus is denied.

An appropriate order follows.

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

ERIC BARKLEY,	:	CIVIL ACTION
Petitioner	:	
	:	NO. 99-858
v.	:	
	:	
PRICE, et al.,	:	
Respondents.	:	

ORDER

AND NOW, this 28th day of April, 2006, upon consideration of Petitioner's Motion to Reopen Original Writ of Habeas Corpus Petition, filed pursuant to 28 U.S.C. § 2254, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

S/ James T. Giles
J.