

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

RUSSELL WYDELL COLEY,
Petitioner,

v.

EDWARD KLEM, *et al*,
Respondents.

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: CIVIL ACTION
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: NO. 06-324
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Memorandum and Order

YOHAN, J.

September ____, 2006

Petitioner Russell Wydell Coley, a prisoner in the Mahoney State Correctional Institution at Frackville, Pennsylvania, has filed a *pro se* Petition for Writ of Habeas **Corpus pursuant to 28 U.S.C. § 2254, asserting four grounds for relief.** After conducting a *de novo* review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, and upon consideration of petitioner’s objections thereto, Coley’s petition will be dismissed without prejudice.

I. Factual & Procedural History

This petition arises out of Coley’s March 10, 2004 conviction for delivery of a controlled substance. After accepting Coley’s guilty plea, the Delaware County Court of Common Pleas (“trial court”) sentenced him to 20 to 48 months of imprisonment pursuant to his negotiated agreement. (Trial Tr. 3-7, 10, Mar. 10, 2004.) On March 16, 2004, Coley filed a Petition for Modification or Reconsideration of Sentence arguing that he should receive a lesser sentence because, among other things, he pled guilty and his cooperation with law enforcement officers

placed him at risk of harm in prison. (*Id.* at 15.) The trial court denied Coley’s petition. Following denial, Coley filed a direct appeal to the Superior Court of Pennsylvania. Coley presented only one issue to the Superior Court, “[w]hether the trial court erred in denying [Coley’s] petition for modification/reconsideration of sentence without [a] hearing in that the judgment of sentence was unduly harsh and excessive.” *Pennsylvania v. Coley*, No. 1937-EDA-2004, slip op. at 2 (Pa. Super. Ct. Aug. 11, 2005) (non-precedential). The Superior Court affirmed the judgment of the trial court on August 11, 2005. *Id.* at 5.

Coley filed two identical petitions under the Pennsylvania Post-Conviction Relief Act (“PCRA”), 42 Pa. Cons. Stat. §§ 9541-46, first on June 29, 2005, and then on August 22, 2005. In those petitions, Coley claimed that the government had violated his rights of due process and effective assistance of counsel, subjected him to prosecutorial misconduct, and unlawfully induced his guilty plea. In addition, Coley claimed that new exculpatory evidence had come to light. The PCRA court dismissed Coley’s claims. On March 13, 2006, Coley appealed the dismissal to the Superior Court. Pa. Super. Ct. Docket No. 611-EDA-2006 at 4. Coley filed his brief with that court on August 21, 2006, and the government filed its response on August 28, 2006. *Id.* at 5. Coley then filed a reply on September 20, 2006. *Id.* The appeal is still pending before the Superior Court. *Id.*

On January 25, 2006, Coley filed the instant Petition for Writ of Habeas **Corpus pursuant to 28 U.S.C. § 2254**. **In his § 2254** Petition, Coley alleges (1) ineffective assistance of counsel due to his status as indigent; (2) serial ineffective assistance of counsel at trial and on appeal; (3) illegal search and seizures, and illegal alteration of court documents; and (4) that the government coerced him to pleading guilty. (§ 2254 Pet. 9.) On January 31, 2006, I referred this case to

Magistrate Judge David R. Strawbridge for a Report and Recommendation. Respondents filed their answer on March 29, 2006 and the magistrate judge issued a Report and Recommendation on May 9, 2006. On June 19, 2006, Coley filed his objections to the Report and Recommendation.

II. Legal Standards

28 U.S.C. § 2254 empowers federal courts to grant habeas corpus relief to a prisoner “in custody pursuant to the judgment of a State court” where his custody violates the Constitution of the United States. 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) entitles a petitioner habeas relief only where the state court proceedings “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.” § 2254(d)(1). However, before a federal court can review the merits of a state prisoner’s petition for a writ of habeas corpus, the court must determine whether the petitioner has met the requirements of the doctrines of exhaustion and procedural default.

A federal court will not grant a state prisoner’s petition unless available state court remedies on the federal constitutional claims have been exhausted. § 2254(b)(1). “In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). This exhaustion rule requires petitioner to “fairly present” his federal claims at each level of the state court system. *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999)

(citations omitted). To “fairly present” a claim, a petitioner must present its “factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.” *Id.* at 261 (citations omitted). While a petitioner need not cite “book and verse” of the federal Constitution, *Picard v. Connor*, 404 U.S. 270, 277 (1971), he must “give the State ‘the opportunity to pass upon and correct’ alleged violations of its prisoners’ federal rights” before presenting those claims in federal court. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard*, 404 U.S. at 275). Under this rule, a federal court must dismiss without prejudice habeas petitions that contain any unexhausted claims. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004).

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), **this court’s review of “those portions of the report or specified proposed findings or recommendations to which objection is made” is *de novo*.** 28 U.S.C. § 636(b). After conducting such a review, this court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” *Id.*

III. Discussion

A. Coley’s Objections to the Report & Recommendation

In his objections to the Report and Recommendation, Coley argues that this court did not acquire his consent to designate his petition to the magistrate judge under Federal Rule of Civil Procedure 53(a)(1)(A). (Pet’r’s Objections to Report & Order 1.) However, it is not Rule 53(a)(1)(A), but rather **28 U.S.C. § 636(b)** that empowers this court to “designate a magistrate [judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court

proposed findings of fact and recommendations for the disposition, by a judge of the court... of applications for post[.]trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.” 28 U.S.C. § 636(b).

Coley also objects to the Report and Recommendation because he was denied the benefit of appointed counsel for his habeas petition. (Pet’r’s Objections to Report & Order 1-3.) This objection cannot be sustained because “the Supreme Court has determined that while the Constitution guarantees the right to counsel on direct appeal, it does not guarantee the right to counsel in a habeas petition.” *Virgin Islands v. Warner*, 48 F.3d 688, 693 (3d Cir. 1995) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1990)). Therefore, I will overrule Coley’s objections to the Report and Recommendation.

B. Coley’s § 2254 Petition

In his habeas petition, Coley raises four claims, which include: (1) ineffective assistance of counsel due to his status as indigent; 2) serial ineffective assistance of trial and appellate counsels; (3) illegal search and seizures, and illegal alteration of court documents; and (4) a coerced guilty plea. After conducting a *de novo* review, this court agrees with the findings and conclusions of Magistrate Judge Strawbridge and dismisses Coley’s habeas petition without prejudice.

Coley’s appeal of the dismissal of his claims under the PCRA is still pending before the Superior Court of Pennsylvania. Pa. Super. Ct. Docket No. 611-EDA-2006 at 5. The parties only recently completed filing briefs to the Superior Court. *Id.* (**reflecting that petitioner submitted his reply to the government’s brief on Sept. 20, 2006**). In his appeal to the Superior Court, Coley presents claims for violation of due process rights, ineffective assistance of counsel,

prosecutorial misconduct, and unlawful inducement of his guilty plea. I will assume, without deciding, that Coley has presented the “factual and legal substance to the state court[] in a manner that puts [it] on notice that a federal claim is being asserted” however, he has not given the state court “an opportunity to act on his claims.” *O’Sullivan*, 526 U.S. at 841. Further, in his direct appeal to the Superior Court, Coley did not present any constitutional claims. Rather, Coley’s appeal only asserted that the trial court, without holding a hearing, erred in refusing to reconsider or modify his sentence because it was unduly harsh and excessive. *See Pennsylvania v. Coley*, No. 1937-EDA-2004, slip op. at 2 (Pa. Super. Ct. Aug. 11, 2005) (non-precedential).

Therefore, because Coley has failed to first “give the State, ‘the opportunity to pass upon and correct’ alleged violations of [his] federal rights” before presenting those claims before this court, he has not exhausted the available state remedies as required by the ADEA. *Duncan*, 513 U.S. at 365; § 2254(b)(1). Under the exhaustion rule, a federal court must dismiss without prejudice habeas petitions that contain any unexhausted claims. Because Coley’s habeas petition fails to meet the exhaustion requirement, I will dismiss the petition without prejudice.

IV. Conclusion

For all of the above stated reasons, Coley’s objections to Magistrate Judge Strawbridge’s Report and Recommendation are overruled, and the § 2254 petition is dismissed without prejudice. The court must now determine if a certificate of appealability should issue. A court may issue a certificate of appealability only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires that the petitioner “demonstrate that reasonable jurists would find the district court’s assessment of the

constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

“Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.* As shown above, Coley’s § 2254 petition plainly violates the procedural rule requiring exhaustion of available state remedies. Therefore, a certificate of appealability will not issue.

An appropriate order follows.

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Order

YOHN, J.

September ____, 2006

And now, this ____ day of September 2006, upon careful consideration of the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, the Response, the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, and petitioner's objections, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED.
2. The Report and Recommendation of United States Magistrate Judge David R. Strawbridge is APPROVED and ADOPTED.
3. The petition for writ of habeas corpus is DISMISSED WITHOUT PREJUDICE.
4. The petitioner having failed to demonstrate that a reasonable jurist could conclude that the court is incorrect in dismissing the petition, there is no ground to issue a certificate of appealability.

s/ William H. Yohn Jr., Judge
William H. Yohn Jr., Judge