

Farnan, District Judge.

Presently before the Court is a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner Stanley E. Shabazz.¹ (D.I. 2.) Also pending in this matter are Petitioner's motion to amend the Petition, (D.I. 6), and motions for appointment of counsel, (D.I. 5 and 17). For the reasons set forth below, the Court will deny the Petition, grant the motion to amend the Petition, and deny as moot the motions for appointment of counsel.

I. BACKGROUND

On January 29, 1997, Petitioner pleaded guilty in the Delaware Superior Court to two counts of burglary in the second degree. At the time he entered his plea, Petitioner was represented by Edward Pankowski, an assistant public defender who had previously represented Petitioner in an unrelated criminal matter in 1991. Prior to sentencing, Petitioner moved to withdraw his 1997 guilty plea on the grounds that: (1) he was under the influence of heroin when he pleaded guilty; (2) Pankowski coerced him to plead guilty; and (3) Pankowski's representation was impaired by a conflict of interest that arose in the 1991 trial. Pankowski in turn moved to withdraw as counsel for petitioner. The Superior Court granted Pankowski's motion to withdraw as counsel, and appointed Joseph Gabay to

¹ Petitioner is also known as Stanley Ellington Washington, Mustafa Shabazz, and Khaatir A. Muhammad.

represent Petitioner. After conducting a hearing, the Superior Court denied Petitioner's motion to withdraw his guilty plea. State v. Washington, No. IN-96-05-1687, 1998 WL 960715 (Del. Super. Ct. Oct. 14, 1998). The Superior Court sentenced Petitioner on November 13, 1998, to ten years in prison followed by six years of decreasing levels of supervision. The Delaware Supreme Court affirmed. Shabazz v. State, No. 527, 1998, 1999 WL 1192969 (Del. Nov. 30, 1999).

On November 13, 2000, Petitioner filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. The Superior Court summarily dismissed Petitioner's motion on February 26, 2001. State v. Shabazz, No. 9605009979 (Del. Super. Ct. Feb. 26, 2001). Petitioner appealed from the denial of postconviction relief, but the Delaware Supreme Court dismissed the appeal for failure to prosecute. Shabazz v. State, No. 129, 2001, 2001 WL 1287034 (Del. Oct. 18, 2001).

Petitioner has now filed the current Petition for federal habeas relief. Also pending in this matter are Petitioner's motions to amend his petition and for appointment of counsel.

II. GOVERNING LEGAL PRINCIPLES

A. Exhaustion and Procedural Default

Pursuant to the federal habeas statute:

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.

28 U.S.C. § 2254(b) (1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001).

To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Although a state prisoner need not "invoke extraordinary remedies" to satisfy exhaustion, he must fairly present each of his claims to the state courts. Id. at 844-45. A claim has not been fairly presented unless it was presented "at all levels of state court adjudication." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002).

If a claim has not been fairly presented, and further state court review is procedurally barred, the exhaustion requirement is deemed satisfied because further state court review is

unavailable. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000), cert. denied, 531 U.S. 1082 (2001). Although deemed exhausted, such claims are nonetheless procedurally defaulted. Lines, 208 F.3d at 160. In addition, where a state court refuses to consider a petitioner's claims because he failed to comply with an independent and adequate state procedural rule, his claims are deemed exhausted but procedurally defaulted. Harris v. Reed, 489 U.S. 255, 263 (1989); Werts, 228 F.3d at 192. A federal court may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Lines, 208 F.3d at 160.

B. Standards of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") mandates the following standards of review:

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 -

(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 . . .

28 U.S.C. § 2254(d). A federal court may issue a writ of habeas corpus under this provision only if it finds that the state court decision on the merits of a claim either: (1) was contrary to

clearly established federal law, or (2) involved an unreasonable application of clearly established federal law. Williams v. Taylor, 529 U.S. 362, 412 (2000).

III. DISCUSSION

Petitioner articulates the following claims for relief:²

- (1) Pankowski's prior representation created an actual conflict of interest.
- (2) Pankowski induced Petitioner to plead guilty by withholding information respecting prior representation.
- (3) Gabay rendered ineffective assistance of counsel at the hearing on Petitioner's motion to withdraw his guilty plea by failing to investigate the record.
- (4) Gabay rendered ineffective assistance by failing to raise all meritorious issues on direct appeal.

Respondent acknowledges that Petitioner exhausted his conflict of interest claim by presenting it on direct appeal, and asks the Court to deny this claim on the merits. Respecting Petitioner's remaining claims of ineffective assistance, Respondent asserts that these claims are procedurally barred from federal habeas review because Petitioner failed to fairly present them to the Delaware Supreme Court on postconviction appeal.

A. Conflict of Interest

Petitioner's first claim is that Pankowski's representation in the matter at issue was hindered by an actual conflict of

² The Court derives Petitioner's claims from the Petition itself, as well as the amendment to the Petition and the memorandum of law in support thereof. (D.I. 2, 6, and 7.)

interest arising from his prior representation of Petitioner in 1991. The basis for this claim began in 1990 when Petitioner was represented by an assistant public defender (not Pankowski) on charges of terrorist threatening. As part of his 1990 sentence, the Superior Court ordered Petitioner to reimburse the public defender's office for the costs of defending him. Apparently Petitioner failed to do so.

In 1991, Petitioner was again before the Superior Court on unrelated robbery charges, this time represented by Pankowski of the public defender's office. After Petitioner was convicted, Pankowski informed the Superior Court that Petitioner had not complied with the 1990 order to reimburse the public defender's office, and remarked on Petitioner's expensive clothing. The Superior Court entered judgment against Petitioner for the amount previously owed. On direct appeal from the 1991 conviction, Pankowski was permitted to withdraw. Petitioner now alleges that because of their "adversarial" relationship, Pankowski's representation in the matter at issue constitutes an actual conflict of interest in violation of the Sixth Amendment.

The Sixth Amendment's right to effective assistance of counsel includes the right to counsel's undivided loyalty. Wood v. Georgia, 450 U.S. 261, 271 (1981). A criminal defendant alleging a violation of his right to counsel's undivided loyalty "must establish that an actual conflict of interest adversely

affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). The possibility of a conflict of interest is insufficient to establish a constitutional violation. Id. An actual conflict of interest "may arise out of personal interests of counsel that were 'inconsistent, diverse or otherwise discordant' with those of his client." Government of Virgin Islands v. Zepp, 748 F.2d 125, 135 (3d Cir. 1984).³

In the matter at hand, Petitioner has failed to establish that Pankowski's performance was adversely affected by any actual conflict of interest. To the extent that Petitioner may be attempting to allege a financial conflict of interest, the Court perceives no apparent conflict. Petitioner was ordered to reimburse the public defender's office, not Pankowski. As Respondent points out, Petitioner's failure to repay the public defender's office had no effect on Pankowski's salary. In short, the Court can find no actual conflict of interest based on Pankowski's prior representation of Petitioner.

In addition, Petitioner has failed to describe how Pankowski's performance was adversely affected. His only

³ Recently, the United States Supreme Court noted that Sullivan was a multiple representation case, and opined that it remains an open question whether Sullivan should be extended to other types of conflict of interest cases. Mickens v. Taylor, 122 S. Ct. 1237, 1246 (2002). The Third Circuit, however, has expressly extended Sullivan to other types of conflict of interest cases. Zepp, 748 F.2d at 135. For this reason, the Court assumes that Sullivan applies in the current case.

complaint appears to be that Pankowski should have informed both Petitioner and the trial court of the prior representation. Apart from disclosing the fact of prior representation, Petitioner offers no alternate course of action which Pankowski should have pursued. Although Petitioner suggests that Pankowski wrongly induced him to plead guilty, Petitioner offers no facts to support any such finding. The Court cannot conclude that Pankowski's failure to discuss their prior relationship wrongly induced Petitioner to plead guilty.

For these reasons, the Court concludes that Petitioner has failed to establish that an actual conflict of interest adversely affected Pankowski's representation. Accordingly, Petitioner's request for federal habeas relief as to this claim will be denied.

B. Ineffective Assistance of Counsel

Petitioner next alleges that both Pankowski and Gabay rendered ineffective assistance of counsel. According to Respondents, Petitioner's claims of ineffective assistance are procedurally barred because he failed to fairly present them to the Delaware Supreme Court on postconviction appeal. A review of the record confirms that Petitioner presented his claims of ineffective assistance to the Superior Court in his motion for postconviction relief. The Delaware Supreme Court dismissed his postconviction appeal for failure to prosecute because he did not

submit a brief. Shabazz, 2001 WL 1287034 at **1.

In dismissing the appeal, the Delaware Supreme Court relied solely on its Rule 29(b), which permits the court to dismiss an appeal "for failure of a party diligently to prosecute the appeal." Del. R. Sup. Ct. 29(b). Rule 29(b) is an independent and adequate procedural rule for purposes of procedural default. See Gibbs v. Redman, Civ. A. No. 89-351-LON, Order at 4-5 (D. Del. Oct. 11, 1991). Accordingly, the Court finds that Petitioner's claims of ineffective assistance are procedurally defaulted under Rule 29(b). Thus, federal habeas review is unavailable absent a showing of either cause and prejudice or a miscarriage of justice. See Coleman, 501 U.S. at 750.

The Court has carefully reviewed each of Petitioner's submissions in an effort to discern why he failed to file a brief on postconviction appeal. Petitioner has failed to provide this Court with any explanation for this procedural default. In his postconviction appeal, he argued to the Delaware Supreme Court that he had not filed his brief on time because Community Legal Aid did not respond to his request for legal assistance. (D.I. 16, No. 129, 2001, Letter from Petitioner dated Oct. 8, 2001.)

Even if this is true, the Court cannot excuse his procedural default on this basis. "There is no constitutional right to an attorney in state post-conviction proceedings." Coleman, 501 U.S. at 752. Thus, even if Community Legal Aid somehow prevented

Petitioner from filing his brief on time, Petitioner "must bear the burden of a failure to follow state procedural rules" in postconviction proceedings. Id. at 754.

Under these circumstances, the Court cannot find cause to excuse Petitioner's procedural default in his postconviction appeal. Petitioner makes no allegations that he is actually innocent for the purpose of demonstrating a fundamental miscarriage of justice. Because the Court cannot find a reason to excuse his procedural default, the Court concludes that Petitioner's claims of ineffective assistance of counsel are procedurally barred from federal habeas review.

C. Motion to Amend Petition

Shortly after filing his Petition, and before Respondent filed an answer, Petitioner filed a motion to amend his Petition. (D.I. 6.) Rule 15 of the Federal Rules of Civil Procedure provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a); see Riley v. Taylor, 62 F.3d 86, 89 (3d Cir. 1995) (stating that Rule 15(a) applies to motions to amend habeas petitions). Petitioner filed his motion to amend before Respondent served his answer. For this reason, his motion to amend will be granted.⁴

⁴ As noted above, the Court has considered Petitioner's amendments and his memorandum in support of his Petition in rendering its decision.

D. Motions for Appointment of Counsel

Additionally, Petitioner has filed two motions requesting that the Court appoint counsel to represent him in this matter. (D.I. 5 and 17.) It is well established that Petitioner has no constitutional right to counsel in this habeas proceeding. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); United States v. Roberson, 194 F.3d 408, 415 n.5 (3d Cir. 1999). A district court, however, may appoint counsel to represent an indigent habeas petitioner "if the interest of justice so requires." Rule 8(c) of the Rules Governing Section 2254 Cases.

For the reasons stated, the Court has determined that Petitioner's claims do not provide a basis for federal habeas review. Accordingly, his motions for appointment of counsel will be denied as moot.

E. Certificate of Appealability

Finally, the Court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. The Court may issue a certificate of appealability only if Petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Under this standard, Petitioner must "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).

Here, the Court has determined that federal habeas relief is unavailable as to each of Petitioner's claims. The Court is persuaded that reasonable jurists would not debate the correctness of its assessments. Because the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability.

IV. CONCLUSION

For the reasons discussed above, the Court will deny the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Petitioner Stanley E. Shabazz. The Court will grant Petitioner's motion to amend the Petition, and will deny as moot his motions for appointment of counsel. The Court will not issue a certificate of appealability.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STANLEY E. SHABAZZ, :
 :
 Petitioner, :
 :
 v. : Civil Action No. 01-816-JJF
 :
 TOM CARROLL, Warden, :
 :
 Respondent. :
 :

O R D E R

At Wilmington, this 21 day of August 2002, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Petitioner Stanley E. Shabazz's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (D.I. 2), as amended (D.I. 6), is DENIED.
2. Petitioner's Motion to Amend Petition (D.I. 6) is GRANTED.
3. Petitioner's Motions for Appointment of Counsel (D.I. 5 and 17) are DENIED AS MOOT.
4. The Court declines to issue a certificate of appealability under 28 U.S.C. § 2253(c)(2).

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE