

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANDRE R. THOMAS, :
 :
 : Petitioner, :
 :
 : v. : Civ. Act. No. 03-202-JJF
 :
 : THOMAS L. CARROLL, Warden, :
 :
 : Respondent. :
 :

Armand J. Della Porta, Jr., Esquire, Wilmington, Delaware.
Counsel for Petitioner.

Thomas E. Brown, Deputy Attorney General, Delaware Department of
Justice, Wilmington, Delaware. Attorney for Respondent.

MEMORANDUM OPINION

January 30, 2004
Wilmington, Delaware

Farnan, District Judge

I. INTRODUCTION

Petitioner Andre R. Thomas is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the Court is Petitioner's Amended Petition for the Application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (D.I. 4.) As explained below, the Court concludes that Petitioner presents an unexhausted claim of ineffective assistance of counsel. Before dismissing the Petition for failure to exhaust state remedies, the Court will permit Petitioner to decide whether he wishes to withdraw his unexhausted claim or proceed on the petition as submitted.

II. BACKGROUND

The following facts are summarized from State v. Thomas, No. 9811014143, 2000 WL 33113941, at *1-2 (Del. Super. Ct. Oct 27, 2000) ("Thomas I") and Thomas v. State, No. 566, 2000, 2002 WL 243375, at **1,2 (Del. Feb. 15, 2002) ("Thomas II").

On Thanksgiving Day in 1998, Petitioner used cocaine while he was staying in a Wilmington hotel. Apparently, the combined effect of Petitioner's mental condition and his voluntary cocaine use produced some sort of hallucinatory, paranoid mental condition. He believed that drug dealers were attacking him in his hotel room, and he frantically called a friend. The friend then called the hotel's front desk and asked the desk-clerk to

check on Petitioner. The hotel desk-clerk heard a commotion in Petitioner's room, and called the Wilmington police.

Three police officers responded to the call. As they prepared to knock on Petitioner's hotel room door, Petitioner fired a gunshot through the door. After a brief standoff, Petitioner surrendered to the police. The police entered Petitioner's hotel room, and discovered that no one else was in the room. They did, however, observe spent shell casings and drug paraphernalia in plain view. An officer saw something hanging under a chair, and found a handgun in the chair's stuffing. The discovery of the weapon was the product of a warrantless search. Nonetheless, the police secured the area and obtained a search warrant, which authorized the police to search the hotel room and seize the evidence.

After his surrender, the police took Petitioner to the hospital emergency room. While at the hospital, Petitioner insisted that someone was pointing a gun at him through a hole in the examining room's suspended ceiling. Petitioner was reportedly "out of control," and he admitted using cocaine.

On December 21, 1998, Petitioner was indicted on eight charges, including Reckless Endangering in the First Degree, Possession of a Firearm During Commission of a Felony, and Possession of Deadly Weapon by a Person Prohibited. In February 1999, Petitioner was evaluated at the Delaware Psychiatric Center

to determine his competency to stand trial and his treatment. The preliminary psychiatric findings supported a finding that he was competent to stand trial and that he did not have a psychiatric illness except for his history of substance abuse. (D.I. 12, App. to Appellant's Op. Br. in Thomas v. State, No. 566,2000 at A-56.)

In April 1999, Petitioner underwent a psychological evaluation at his attorneys' request. Although the psychologist opined that Petitioner had many symptoms and characteristics of a personality disorder, the psychologist concluded that his symptoms were more likely the consequence of his chronic substance abuse. (Id. at A-58 to A-61.) An additional psychological examination was conducted in August 1999 by the same psychologist to determine the presence of primary pathological personality features. After this evaluation, the psychologist concluded that Petitioner exhibited characteristics of Histrionic Personality Disorder. (Id. at A-62 to A-65.)

Between August 1999 and the spring of 2000, there was no activity in this case. This delay was largely attributable to Petitioner's frequent decisions to change attorneys. He was represented by five different attorneys at various stages of the pre-trial proceedings, including the Public Defender, court-appointed "conflict counsel," and privately retained counsel.

In June 2000, Petitioner requested to represent himself. On

June 14, 2000, the Delaware Superior Court held a hearing on Petitioner's Motion to Proceed Pro Se. Petitioner was represented by counsel, and the court and Petitioner thoroughly discussed Petitioner's desire to represent himself. The court reviewed Petitioner's background, the seriousness of the charges, and the potential sentence. Petitioner claimed that his family had hired an attorney from Philadelphia, but even if the Philadelphia attorney did not represent him, he wished to represent himself. The court repeatedly told Petitioner that self-representation was a bad idea, and outlined the potential disadvantages he would face if he chose to represent himself. Despite the court's advice, Petitioner adamantly and clearly expressed his desire to represent himself. Accordingly, the court permitted Petitioner's fifth attorney to withdraw and granted his Motion to Proceed Pro Se.

Petitioner represented himself during the one-week jury trial in the Delaware Superior Court. On July 18, 2000, the jury convicted Petitioner on three counts of first degree reckless endangering, possession of a firearm during the commission of a felony, possession of a deadly weapon by a person prohibited, and two counts of criminal mischief. See Thomas 1 at *1,2. Shortly thereafter, Petitioner filed a Motion for New Trial. (D.I. 12, Del. Super. Ct. Crim. Dkt. in App. to Appellant's Op. Br. for Thomas v. State, No. 566,2000 at A-23.) On August 8, 2000, the

court ordered Petitioner to undergo another psychiatric evaluation. (Id. at A-24.) This evaluation concluded that Petitioner "had a history of Conduct Disorder during childhood, developing into Anti-Social Personality Disorder during adulthood, and of chronic chemical dependency. There is no convincing evidence of any specific affective (mood) or psychotic disorder." (Id. at A-68 to A-69.)

The Superior Court denied Petitioner's Motion for New Trial. Thomas I. Petitioner filed a second Motion for New Trial, which the court denied. Thomas II. Petitioner was declared an habitual offender and sentenced to a total of thirty five years in prison. Thomas II.

Petitioner appealed his conviction and sentence to the Delaware Supreme Court, alleging: (1) Petitioner's mental condition prevented him from knowingly waiving his state and federal right to representation by counsel; (2) the court erred in failing sua sponte to instruct the jury on reckless endangerment in the second degree; (3) there was insufficient evidence to convict Petitioner on the charge of reckless endangerment in the first degree; (4) during the waiver of representation hearing, Petitioner's counsel provided ineffective assistance of counsel by failing to introduce evidence of Petitioner's mental health history, and by failing to ensure that Petitioner was aware of the correct maximum penalty and potential

defenses; and (5) the trial court should have appointed stand-by counsel for Petitioner to consult with during his consideration of the State's plea bargain. (D.I. 12, Appellant's Op. Br. in Thomas v. State, No. 566, 2000.) The Delaware Supreme Court affirmed Petitioner's conviction and sentence. See Thomas II.

III. EXHAUSTION AND PROCEDURAL DEFAULT

A federal district court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The federal habeas statute states:

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). Before seeking habeas relief from a federal court, a state petitioner must first exhaust remedies available in the state courts. The exhaustion requirement is grounded on principles of comity in order to ensure 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). Although the State can waive the exhaustion requirement, the State "shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3).

A state prisoner must give "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, 844-45 (1999). To satisfy this requirement, a petitioner must demonstrate that the claim was fairly presented to the state's highest court, either on direct appeal or in a post-conviction proceeding. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citations omitted); Coverdale v. Snyder, 2000 WL 1897290, at *2 (D. Del. Dec. 22, 2000). If the petitioner fairly presented the issue on direct appeal, then the petitioner does not need to raise the same issue again in a state post-conviction proceeding. Lambert, 134 F.3d at 513; Evans v. Court of Common Pleas, Delaware County, Pa., 959 F.2d 1227, 1230 (3d Cir. 1992) (citations omitted). Moreover, a claim that was fairly presented to a state court is exhausted even if the state court fails to discuss the claim. Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984) (citing Picard v. Connor, 404 U.S. 270, 275 (1971)); United States ex rel. Geisler v. Walters, 510 F.2d 887, 892 (3d Cir.

1975).

A petitioner fairly presents a federal claim to the state's highest court for purposes of exhaustion by asserting a legal theory and facts that are substantially equivalent to those contained in the federal habeas petition. Coverdale, 2000 WL 1897290, at *2; Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). However, the petitioner does not need to identify a specific constitutional provision in his state court brief, provided that "the substance of the . . . state claim is virtually indistinguishable from the [constitutional] allegation raised in federal court." Santana v. Fenton, 685 F.2d 71, 74 (3d Cir. 1982) (quoting Biscaccia v. Attorney General of New Jersey, 623 F.2d 307, 312 (3d Cir. 1980)). Fair presentation also requires the petitioner to raise the claim in a procedural context in which the state courts can consider it on the merits. Castille v. Peoples, 489 U.S. 346, 351 (1989).

If a federal habeas claim was not fairly presented to the state courts, and further state court review is still available, that claim is not exhausted. Generally, federal courts will dismiss without prejudice claims that have not been properly presented to the state courts, thus permitting petitioners to exhaust their claims. Lines v. Larkins, 208 F.3d 153, 159-60 (3d Cir. 2000). When a petition contains both exhausted and unexhausted claims, the entire petition must be dismissed without

prejudice for failure to exhaust. Lundy, 455 U.S. at 510; Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). However, if the petitioner voluntarily withdraws the unexhausted claim, the federal court can provide federal habeas review of the exhausted claims. Carpenter v. Vaughn, 296 F.3d 138, 146 (3d Cir. 2002); McNeil v. Snyder, 2002 WL 202100, at *7 (D. Del. Feb. 8, 2002).

Although a federal court cannot grant habeas relief on an unexhausted claim, a federal court is authorized to deny habeas relief on the merits of an unexhausted claim. See 28 U.S.C. § 2254(b)(2). A petition containing an unexhausted claim, however, should not be denied on the merits unless "it is perfectly clear that the applicant does not raise even a colorable federal claim." Lambert, 134 F.3d at 515 (quoting Granberry v. Greer, 481 U.S. 129, 135 (1987)). "If a question exists as to whether the petitioner has stated a colorable federal claim, the district court may not consider the merits of the claim if the petitioner has failed to exhaust state remedies." Lambert, 134 F.3d at 515.

IV. DISCUSSION

Petitioner, by and through counsel, asserts the following six grounds for relief in his amended federal habeas petition:¹

1) Petitioner's waiver of his right to be represented by counsel

¹Petitioner amended his original petition only to name Respondent in the correct manner.

was not knowing, voluntary, or intelligent because of his "documented mental illness," thereby violating his Sixth Amendment Right to Counsel; 2) during the hearing on Petitioner's motion to represent himself at trial, Petitioner's court-appointed counsel provided ineffective assistance of counsel by failing to produce evidence regarding Petitioner's mental illness; 3) the trial court's failure to appoint counsel to advise Petitioner about the terms of a guilty plea offer violated Petitioner's Sixth Amendment Right to Counsel; 4) Petitioner's Fourteenth Amendment Right to Due Process was violated because there was insufficient evidence to support his convictions for the three counts of reckless endangering in the first degree; 5) the trial court's failure to instruct the jury sua sponte regarding the lesser included offense of second degree reckless endangering violated Petitioner's Due Process Right to a fair trial; and 6) the trial judge's failure to instruct the jury sua sponte as to the justification defense of self-defense based on Petitioner's subjective belief that he was in danger deprived Petitioner of his Due Process Right to a Fair Trial. (D.I. 4.)

Respondent asks the Court to dismiss Petitioner's federal habeas petition because Claims One and Two do not provide a basis for federal habeas relief under 28 U.S.C. § 2254(d)(1), Claims Three and Four are procedurally barred on independent and adequate state procedural grounds, and Claims Five and Six assert

state law violations that are not cognizable on federal habeas review and, alternatively, are procedurally barred. (D.I. 10.) Respondent states that Petitioner has exhausted state remedies for all six grounds.

After reviewing Petitioner's claims in light of the record, the Court disagrees with Respondent's conclusion that Petitioner has exhausted Claim Two regarding ineffective assistance of counsel. While it is true that Petitioner raised the substance of his federal habeas ineffective assistance of counsel claim on direct appeal, he did not follow the correct Delaware procedural rules. As such, he did not "fairly present" this claim to the Delaware Supreme Court for exhaustion purposes.²

To fairly present a claim for exhaustion purposes, a

²The two cases to which Respondent cites as support for its conclusion regarding exhaustion, Smith v. Digmon, 434 U.S. 332, 333-34 (1978) and Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984), are inapposite. Both Smith and Swanger set forth the principle that a claim fairly presented to a state court is exhausted even if the state court fails to discuss the claim. However, the cited cases still require the petitioner to fairly present the claims to the highest state court in the first place. See Castille v. Peoples, 489 U.S. 346, 350-51 (1989). Further, Respondent's conclusion regarding the exhaustion of this claim does not constitute an express waiver of the exhaustion requirement under 28 U.S.C. § 2254(b)(3). See George v. Sively, 254 F.3d 438, 441 n.4 (3d Cir. 2001) (where U.S. Attorney's argument that the Court of Appeals should not require petitioner to exhaust his territorial remedies was held not to be an express waiver under § 2254(b)(3)); see e.g. Dreher v. Pinchak, 61 Fed. Appx. 800, 2003 WL 693262, at **2 (3d Cir. Mar. 3, 2003) (for a state's waiver to be effective, something more than concession in an answer is required).

petitioner must raise the claim in a procedural context that allows the state courts to consider the merits of the claim. Castille, 489 U.S. at 351. In Delaware, claims for ineffective assistance of counsel are not properly raised for the first time on direct appeal. Drummond v. State, - A.2d -, 2003 WL 22321042, at *5 (Del. Oct. 2, 2003); Desmond v. State, 654 A.2d 821, 829 (Del. 1994); Casalvera v. State, 410 A.2d 1369 (Del. 1980). Rather, ineffective assistance of counsel claims should first be presented to the Superior Court, typically in a motion for post-conviction relief pursuant to Delaware Superior Court Criminal Rule 61. See, e.g., Russo v. Snyder, 2000 WL 52158, at *5 (D. Del. Jan. 6, 2000). The purpose of this limitation is to provide the accused attorney with a full opportunity to be heard on the claim of ineffective assistance. Collins v. State, 420 A.2d 170, 177 (Del. 1980).

Nothing in the record indicates that Petitioner presented this issue to the Superior Court before raising it on appeal. Petitioner did not file a Rule 61 motion for post-conviction relief. Moreover, although Petitioner did file several motions for new trial, it does not appear that he raised this ineffective assistance of counsel claim in any of them.³ Especially

³The Delaware Superior Court denied Petitioner's motions for new trial in two extremely detailed and thorough opinions. Neither of these opinions discuss this ineffective assistance of counsel claim.

significant is the fact that Respondent actually argued in its Answering Brief on appeal that “[u]nder well-settled state law, claims of ineffective assistance of counsel are not addressed on direct appeal . . . [Petitioner’s] claim now should be rejected.” (D.I. 12, State’s Ans. Br. in Thomas v. State, No. 566,2000, at 19.) Based on these facts, the Court concludes that Petitioner did not fairly present his ineffective assistance of counsel claim to the Delaware Supreme Court.

Normally, the Delaware Supreme Court would reject an ineffective assistance of counsel claim that was not first presented to the Delaware Superior Court. See Desmond v. State, 654 A.2d 821, 829 (Del. 1994) (“[t]his Court has consistently held it will not consider a claim of ineffective assistance of counsel on direct appeal if that issue has not been decided on the merits in the trial court”). If, after such a dismissal by the Delaware Supreme Court, the petitioner then filed a federal habeas petition in this Court, the Court’s next step would be clear: it would engage in the cause and prejudice analysis for procedurally defaulted claims. See McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

Unfortunately, this typical scenario did not occur in the present case because the Delaware Supreme Court did not dismiss Petitioner’s ineffective assistance of counsel claim. Moreover, because it is possible for a state court to waive a procedural

default by adjudicating a procedurally defaulted claim on the merits, the Court must now determine whether the Delaware Supreme Court waived Petitioner's procedural default. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) (if the last state court presented with a procedurally barred claim adjudicates the claim on the merits, such adjudication "removes any bar to federal court-review that might otherwise have been available") ; see also Gattis v. Snyder, 278 F.3d 222, 230 (3d Cir. 2002) (holding that the claim was not defaulted where the Delaware Superior Court expressly addressed the claim on the merits regardless of any procedural default and without any reference to procedural default). In the Third Circuit, a claim is not considered as adjudicated on the merits in state court unless it is "clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States." Everett, 290 F.3d at 508.

It is well-settled that Strickland v. Washington, 466 U.S. 668 (1984) provides the standard for ineffective assistance of counsel claims. See Wiggins v. Smith, - U.S. -, 123 S.Ct. 2527, 2529-30, 156 L.Ed.2d 471 (2003). Here, the Delaware Supreme Court did not implicitly or explicitly analyze the merits of Petitioner's ineffective assistance of counsel in light of Strickland. The state supreme court's failure to address the

merits of the claim is even more pronounced when compared to its explicit analysis of Petitioner's other appellate claims under either federal or state law.

Instead, it appears that the Delaware Supreme Court assumed that Petitioner's counsel provided effective assistance, as illustrated by its statement that "[t]he record in this case clearly indicates that [Petitioner] made his decision voluntarily, fully informed of the dangers inherent to self-representation, and with adequate assistance of counsel." Thomas v. State, 791 A.2d 751, at **1 (Del. 2002).⁴ If "the record" included a prior Rule 61 motion and/or evidentiary hearing on the ineffective assistance of counsel issue, then such a determination based on the record would be conclusive.⁵ However, no such prior proceedings occurred.

Further, while the Delaware Supreme Court clearly determined that Petitioner voluntarily and knowingly waived his right to representation, this conclusion does not address the particular ineffective assistance of counsel issue presented to both this Court and the state supreme court: did Petitioner's counsel

⁴The only other reference to counsel's role during the waiver hearing was the state supreme court's statement that "the record clearly demonstrates that the defendant was able to communicate with his lawyer in the pro se proceeding, despite the fact that he did not avail himself of counsel's assistance . . ." Thomas v. State, 791 A.2d 751, at **1 (Del. 2002).

⁵Provided, of course, that the proper Strickland analysis occurred under 28 U.S.C. § 2254(d). See 28 U.S.C. § 2254(e).

provide ineffective assistance during the waiver hearing by failing to produce evidence of Petitioner's mental illness? Because it is not "clear from the face of the state court decision" that the merits Petitioner's ineffective assistance of counsel claim were adjudicated, the Court is constrained to conclude that the Delaware Supreme Court did not waive Petitioner's procedural default. Thus, Petitioner's ineffective assistance of counsel claim is unexhausted.

Having determined that Petitioner did not exhaust his ineffective assistance of counsel claim, the Court must next consider whether this claim is clearly foreclosed from further state court review. If so, then the claim will be deemed exhausted, but still procedurally defaulted. If not, then Petitioner has presented the Court with a mixed petition containing both exhausted and unexhausted claims.

Any further state court review available to Petitioner would be by way of a Rule 61 motion for post-conviction relief. See Del. Super. Ct. Crim. R. 61(i). Although Rule 61 imposes several procedural hurdles that must be satisfied before a state court will consider the merits of a petitioner's claims, Id.; Younger v. State, 580 A.2d 552, 554 (Del. 1990); McNeil v. Snyder, 2002 WL 202100, at *5 (D. Del. Feb. 8, 2002), it does not appear that further state review is clearly foreclosed.

First, a Rule 61 motion would not be time-barred because

three years have not yet passed from the date on which Petitioner's conviction became final. Del. Super. Ct. Crim. R. 61(i)(1); see Jackson v. State, 654 A.2d 829, 833 (Del. 1985).⁶ Second, because Petitioner did not previously file a Rule 61 motion, the bar of Rule 61(i)(2) does not apply. See Del. Super. Ct. Crim. R. 61(i)(2); Robinson v. State, 562 A.2d 1184, 1185 (Del. 1989). Nor does the procedural bar of Rule 61(i)(3) apply here because Rule 61(i)(3) typically does not apply to ineffective assistance of counsel claims. See State v. McCluskey, 2000 WL 33114370, at *11 (Del. Super. Ct. Nov. 29, 2000); Cobb v. State, No. 362,1995 Order, at 7 (Del. Jan. 10, 1996). Finally, this claim is not barred by Rule 61(i)(4) because it was not formerly adjudicated. See Del. Super. Ct. Crim. R. 61(i)(4). Thus, it appears that the Petitioner can pursue state review of his ineffective assistance of counsel claim by filing a Rule 61 motion for post-conviction relief.

In short, the Court concludes that Petitioner's ineffective assistance of counsel claim remains unexhausted. However, Petitioner's remaining claims are exhausted, and therefore, Petitioner has presented the Court with a mixed petition.

Typically, when a federal court is presented with a mixed

⁶For relevant purposes, Petitioner's conviction became final on February 15, 2002, the date the Delaware Supreme Court issued its mandate. Del. Super. Ct. Crim. R. 61(m)(2). Petitioner is well within the three year time period for filing a post-conviction motion.

petition, it must dismiss the entire habeas petition to permit the petitioner to exhaust state remedies. See Rose v. Lundy, 455 U.S. 509, 522 (1982); Morris v. Horn, 187 F.3d 333, 337 (3d Cir. 1999); Lambert, 134 F.3d at 513-14; McNeil v. Snyder, 2002 WL 202100, at *6 (D. Del. Feb. 8, 2002).⁷ In this case, however, it appears that the one-year period of limitation for filing a federal habeas petition has expired. See 28 U.S.C. § 2244(d)(1). As such, if the Court dismisses without prejudice Petitioner's entire habeas petition, he will be time-barred from filing another habeas petition. See McNeil, 2002 WL 202100, at *6. To prevent this result, Petitioner may amend his current habeas petition to delete the unexhausted ineffective assistance of counsel claim, and proceed in this Court on the remaining claims. Lundy, 455 U.S. at 520; Webb v. Snyder, 2001 WL 1555255, at *5 (D. Del. Dec. 4, 2001); McNeil, 2002 WL 202100, at *7. If Petitioner deletes his unexhausted claim, however, he may be foreclosed from pursuing that claim at a later date because of AEDPA's severe restrictions regarding second or successive petitions. See 28 U.S.C. § 2244(b)(2), (3); Christy v. Horn, 115

⁷Under 28 U.S.C. § 2254(b)(2), the Court is authorized to deny an unexhausted claim on the merits. However, a federal court should exercise this authority only when it is perfectly clear that the petitioner did not raise "even a colorable federal claim." See 28 U.S.C. § 2254(b)(2); Lambert, 134 F.3d at 515. Because it is not perfectly clear, based on the record before the Court, that Petitioner has not raised a colorable federal claim, this exception to the exhaustion doctrine is inapplicable.

F.3d 201, 208 (3d Cir. 1997); McNeil, 2002 WL 202100, at *7.

To summarize, Petitioner's habeas petition contains an unexhausted claim of ineffective assistance of counsel. Petitioner must inform the Court whether he wishes to delete his unexhausted claim and proceed on his remaining claims. If Petitioner chooses to proceed with his habeas petition as submitted, or if he fails to inform the Court of his choice, the Court will dismiss the entire petition without prejudice for failure to exhaust, without further notice.

V. CERTIFICATE OF APPEALABILITY

Finally, this Court must decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. The Court may issue a Certificate of Appealability only when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner establishes a "substantial showing" by demonstrating "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 concluded that Petitioner's habeas petition must be dismissed for failure to exhaust state remedies, unless he voluntarily deletes the unexhausted claim. The Court is persuaded that reasonable jurists would not find these conclusions unreasonable. Accordingly, Petitioner has failed to

make a substantial showing of the denial of a constitutional right, and the Court declines to issue a Certificate of Appealability.

VI. CONCLUSION

For the foregoing reasons, the Court concludes that Petitioner's federal habeas petition must be dismissed without prejudice for failure to exhaust state remedies, unless he voluntarily deletes his unexhausted claim. Furthermore, the Court finds no basis for the issuance of a Certificate of Appealability.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANDRE R. THOMAS,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. Act. No. 03-202-JJF
	:	
THOMAS L. CARROLL, Warden,	:	
	:	
Respondent.	:	

ORDER

For the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that:

1. Not later than February 23, 2004, Petitioner Andre R. Thomas shall inform the Court in writing if: (a) he wishes to delete his claim for the ineffective assistance of counsel and proceed on the remaining claims; or (b) proceed on his habeas petition as submitted, in which case the Court will dismiss without prejudice the entire Petition for failure to exhaust state remedies. (D.I. 4.)
2. Failure to respond as instructed will result in the immediate dismissal of Petitioner's entire habeas petition

without prejudice for failure to exhaust state remedies.

(D.I. 4.)

3. The Court declines to issue a Certificate of Appealability.

Dated: January 30, 2004

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE