

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

MICHAEL McKINLEY MUNDY,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 00-69-GMS
)	
ROBERT SNYDER, Warden, and)	
ATTORNEY GENERAL OF)	
THE STATE OF DELAWARE,)	
)	
Respondents.)	
)	

MEMORANDUM AND ORDER

Following a jury trial in the Delaware Superior Court, Michael McKinley Mundy was convicted of unlawful sexual intercourse, kidnaping, and possession of a deadly weapon during the commission of a felony. Mundy is presently serving his sentence of twenty-nine years at the Delaware Correctional Center in Smyrna, Delaware. He has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, as well as an amendment to his petition, asserting two claims for relief. For the reasons set forth below, the court concludes that Mundy's claims are procedurally barred from federal habeas review, and will deny the petition and the requested relief.

I. BACKGROUND

On March 17, 1997, a Delaware grand jury charged Michael Mundy with unlawful sexual intercourse in the first degree, two counts of attempted unlawful sexual intercourse in the second degree, two counts of kidnaping in the first degree, and possession of a deadly weapon during

the commission of a felony. The indictment alleged that on February 4, 1997, Mundy twice attacked the same victim, struck her, attempted to force her to engage in sexual intercourse, and forced her to perform oral sex while he was brandishing a stick. At trial, evidence was offered to show that the victim escaped the first attack only to be attacked a second time just a few blocks away. On November 18, 1998, a Superior Court jury found Mundy guilty of first degree unlawful sexual intercourse, one count of first degree kidnaping, and possession of a deadly weapon. The jury found Mundy not guilty of the remaining charges. The Superior Court sentenced Mundy on January 30, 1998, to twenty-nine years in prison followed by a period of probation. The Delaware Supreme Court affirmed Mundy's conviction. *Mundy v. State*, No. 86, 1998, 1998 WL 991235 (Del. Dec. 30, 1998).

On July 8, 1999, Mundy filed in the Superior Court a motion for trial transcripts, which the Superior Court denied. *State v. Mundy*, No. 9702002522 (Del. Super. Ct. July 15, 1999). Mundy appealed from the Superior Court's denial of his request for transcripts, but the Delaware Supreme Court dismissed the appeal for lack of jurisdiction. *Mundy v. State*, No. 347, 1999, 2000 WL 975111 (Del. Aug. 5, 1999). Mundy then filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. Again he asked the Superior Court for trial transcripts at no cost, but the Superior Court denied his request. *State v. Mundy*, No. 9702002522 (Del. Super. Ct. Jan. 7, 2000).

While his Rule 61 motion was pending, Mundy filed in this court the current petition for federal habeas relief raising a single claim of prosecutorial misconduct. (D.I. 2.) Before the respondents filed an answer, Mundy amended his petition to challenge the Superior Court's denial of his requests for trial transcripts. (D.I. 6.) Subsequently, the Superior Court denied

Mundy's Rule 61 motion. *State v. Mundy*, No. 9702002522, 2001 WL 914022 (Del. Super. Ct. July 30, 2001). The Delaware Supreme Court affirmed the denial of postconviction relief.

Mundy v. State, No. 400, 2001, 2002 WL 87720 (Del. Jan. 18, 2002).

Mundy's amended petition for federal habeas relief is now before the court.

II. 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, 844-45 (1999).

Although a state prisoner is not required to “invoke extraordinary remedies” to satisfy exhaustion, he must fairly present each of his claims to the state courts. *Boerckel*, 526 U.S. at 845, 848. A claim raised in a federal habeas petition has been fairly presented if it is “the

substantial equivalent of that presented to the state courts” and if the state court has “available to it the same method of legal analysis as that to be employed in federal court.” *Werts*, 228 F.3d at 192 (quoting *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997), *cert. denied*, 532 U.S. 919 (2001)). Fair presentation also requires the petitioner to utilize a state procedural vehicle that affords the state courts the opportunity to consider his claims on the merits. *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

If a claim has not been fairly presented to the state courts, but state procedural rules preclude a petitioner from seeking further relief in the state courts, 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. *Id.* Federal courts may not consider the merits of procedurally faulted 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.

In order to demonstrate cause for a procedural default, a petitioner must show that “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner may establish cause, for example, by showing that the factual or legal basis for a claim was not reasonably available or that government officials interfered in a manner that made compliance impracticable. *Werts*, 228 F.3d at 193. Additionally, ineffective assistance of counsel constitutes cause, but only if it is an independent constitutional violation. *See Coleman*, 501 U.S. at 755. A petitioner must also establish actual prejudice, which requires him to show “not

merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Murray*, 477 U.S. at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). The miscarriage of justice exception applies only in extraordinary cases “where a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Murray*, 477 U.S. at 496. Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To establish a miscarriage of justice, a petitioner must prove that it is more likely than not that no reasonable juror would have convicted him. *Schlup v. Delo*, 513 U.S. 298, 326 (1995); *Werts*, 228 F.3d at 193.

III. DISCUSSION

In his amended petition, Mundy articulates the following claims for relief:

- (1) The prosecutor engaged in misconduct in his closing rebuttal by referencing specific counts of the indictment to specific locations not set forth in the indictment.
- (2) The state courts violated his constitutional rights by refusing his requests for trial transcripts.

(D.I. 2, 6.) In their answer, the respondents contend that Mundy has never presented his claim of prosecutorial misconduct as a federal claim to any state court, and that state procedural rules now preclude him from doing so. For this reason, they ask the court to find Mundy’s claim of prosecutorial misconduct procedurally barred from federal habeas review. The respondents

neglect to address Mundy's claim respecting the denial of his requests for transcripts. The court addresses Mundy's claims in turn.

A. Prosecutorial Misconduct

In his petition, Mundy claims that the prosecutor engaged in misconduct in his closing rebuttal by improperly referencing specific counts of the indictment to specific locations. Although it is not entirely clear, it appears that Mundy alleges that the prosecutor improperly identified the two separate attacks by location when the indictment itself did not set forth any specific location of either attack. The respondents contend that Mundy raised this claim on direct appeal purely as a state law claim, not as a federal claim. They argue that to the extent Mundy now seeks to raise a federal claim, it is procedurally barred for failure to present it on direct appeal.

From Mundy's submissions, it is difficult to discern whether this claim rests solely on state law, or whether it asserts a violation of Mundy's constitutional right to due process. A very liberal reading of this claim suggests that Mundy attempts to allege violations of both state and federal law.

To the extent that this claim rests on state law, it is not cognizable in this habeas proceeding. A federal 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)(emphasis added). Claims based on errors of state law are not cognizable on federal habeas review. *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Riley v. Harris*, 277 F.3d 261, 310 n.8 (3d Cir. 2001). Thus, to the extent that Mundy alleges a violation of state law, the court concludes that this claim is not cognizable in this proceeding.

To the extent that Mundy alleges that the prosecutor's statements violated his federal constitutional right to due process, the court must first determine whether this claim was fairly presented as a federal claim to the state courts. According to the United States Supreme Court, a federal due process claim has not been fairly presented unless the state court has been "alerted to the fact that the prisoner[] [is] asserting claims under the United States Constitution." *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Referring to broad concepts such as "due process" and "a fair trial" is insufficient to alert a state court that a petitioner is raising federal constitutional claims. *Gray v. Netherland*, 518 U.S. 152, 163 (1996); *Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir.), *cert. denied*, 122 S. Ct. 396 (2001).

The court has reviewed Mundy's briefs submitted to the Delaware Supreme Court on direct appeal. The court is unable to locate a single reference to any federal constitutional provision or other federal law, or a single citation to a case interpreting any federal constitutional provision. Rather, Mundy's argument on direct appeal relies solely on cases from the Delaware courts interpreting state law. Particularly significant is the absence of any reference to the standard enunciated by the United States Supreme Court in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), for assessing constitutional challenges to a prosecutor's remarks. According to *Donnelly*, a prosecutor's remarks violate the Constitution only when they "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process," when examined in light of the entire trial. *Id.* at 643. Mundy's briefs are devoid of any references to the *Donnelly* standard. For these reasons, the court cannot conclude that Mundy fairly presented a federal due process claim to the Delaware Supreme Court.

Because Mundy did not present a federal claim to the Delaware Supreme Court, the court

must determine whether state procedural rules now preclude him from seeking relief in the state courts on his federal due process claim. If so, his claim is procedurally defaulted, and the court may not consider its merits unless Mundy demonstrates either cause and prejudice, or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Lines*, 208 F.3d at 160.

The respondents argue that Mundy's federal claim is procedurally barred because he failed to raise it on direct appeal. Pursuant to Rule 61(i)(3):

Procedural Default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

- (A) Cause for relief from the procedural default and
- (B) Prejudice from violation of the movant's rights.

Super. Ct. R. Crim. P. 61(i)(3). Under this rule, failure to raise an issue on direct appeal generally renders a claim procedurally defaulted absent a showing of cause and prejudice. *Bialach v. State*, 773 A.2d 383, 386 (Del. 2001). Here, Mundy did not raise a federal due process claim on direct appeal, nor has he explained why he did not. Accordingly, state court review of his federal due process claim is procedurally barred.

The remaining question as to this claim is whether the court can excuse Mundy's procedural default. His explanation for failure to exhaust his claims is that the Superior Court refused his requests for transcripts. Mundy's procedural default, however, is the failure to raise a federal claim on direct appeal. On direct appeal, Mundy's attorney submitted copies of portions of the transcript and cited to the transcripts in his briefs. Plainly, the lack of transcripts did not prevent Mundy from fairly presenting a federal claim to the Delaware Supreme Court.

In short, the court finds that Mundy failed to present his federal due process claim to the

Delaware Supreme Court on direct appeal, and that state court review of this claim is clearly foreclosed. Mundy has also failed to articulate any reason permitting the court to excuse his procedural default. Therefore, his federal due process claim based on the prosecutor's remarks is procedurally barred from federal habeas review.¹

B. Denial of Requests for Transcripts

In an amendment to his petition, Mundy alleges that the state courts violated his constitutional rights by denying his requests for transcripts. As described above, the Superior Court twice denied Mundy's requests for transcripts. The respondents have neglected to respond to this claim.

The court's independent examination of the record reveals that Mundy has failed to fairly present this claim to the Delaware Supreme Court. While it is true that Mundy attempted to present this claim on appeal from the first order denying his request for transcripts, the Delaware Supreme Court dismissed the appeal for lack of jurisdiction. The Delaware Supreme Court explained that it had no jurisdiction over such interlocutory appeals in criminal matters. *Mundy*, 2000 WL 97511 at ** 1. Because Mundy selected the incorrect procedural vehicle to present this claim, he did not fairly present it to the Delaware Supreme Court. *See Castille*, 489 U.S. at

¹ Even if the court could conclude that Mundy fairly presented his federal due process claim to the Delaware Supreme Court on direct appeal, this claim lacks merit. Under *Donnelly*, a prosecutor's remarks violate a criminal defendant's constitutional right to due process only when those remarks "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process," when examined in light of the entire trial. *Donnelly*, 416 U.S. at 643. Here, Mundy challenges the prosecutor's reference in his closing rebuttal to the specific locations of the two attacks on the ground that those locations were not set forth in the indictment. The court is unable to fathom, nor has Mundy explained, how these isolated, brief, and apparently innocuous remarks could have infected Mundy's trial with such unfairness as to invalidate his conviction.

351. Additionally, Mundy did not present this claim to the Delaware Supreme Court on appeal from the denial of postconviction relief. The court thus concludes that Mundy has never fairly presented this claim to the Delaware Supreme Court.

The court must next determine whether this claim is now procedurally barred from further state court review. Pursuant to Rule 61(i)(4):

Former Adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

Super. Ct. R. Crim. P. 61(i)(4). Reconsideration is warranted in the interest of justice where “subsequent legal developments have revealed that the trial court lacked the authority to convict or punish the accused.” *Cruz v. State*, No. 446, 1995, 1996 WL 21060 (Del. Jan. 10, 1996) (quoting *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)).

In the matter at hand, Mundy twice requested trial transcripts from the Superior Court. The second request was raised in the context of Mundy’s postconviction proceedings. Both requests were denied, thus rendering this claim formerly adjudicated by the Superior Court. The record reveals no subsequent legal developments suggesting that the Superior Court lacked the authority to convict or sentence Mundy. The court thus concludes that further state court review of this claim is clearly foreclosed by Rule 61(i)(4).

Because Mundy’s claim based on the denial of transcripts is procedurally defaulted, the court must determine whether his procedural default may be excused. Mundy could have presented this claim to the Delaware Supreme Court in his postconviction appeal. *See Browne v. State*, No. 492, 1991, 1992 WL 21146 (Del. Jan. 21, 1992). He offers absolutely no explanation for his failure to do so. The court can discern no reason to excuse his default.

In short, Mundy failed to fairly present his claim based on the denial of trial transcripts to the Delaware Supreme Court. This claim is now procedurally barred. The court is unable to conclude that this procedural default should be excused. Federal habeas review of this claim, therefore, is unavailable.

C. Request for Production of Documents

On March 10, 2000, Mundy filed a document asking the court to order the production of certain documents, including trial transcripts and briefs he submitted to the state courts. (D.I. 9.) In federal habeas proceedings, discovery is not permitted unless “the judge in the exercise of his discretion and for good cause shown grants leave to do so.” Rule 6(a) of Rules Governing Section 2254 Cases in the United States District Courts. After examining the record in this matter, the court has concluded that federal habeas relief as to Mundy’s claims is unavailable. Thus, good cause to grant Mundy’s request is lacking. Accordingly, the court will deny Mundy’s request to order the production of documents.

IV. 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 the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires the petitioner to “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 concluded that Mundy’s claims are procedurally barred from federal

habeas review. The court is persuaded that reasonable jurists would not find its conclusions debatable or wrong. Mundy has, therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Michael McKinley Mundy's amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2, 6) is DENIED.
2. Mundy's request for the production of documents (D.I. 9) is DENIED.
3. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated: June 10, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE