IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARTIN W. LECATES, Petitioner,	)	
v.	)	Civ. Act. No. 02-1567-JJF
THOMAS L. CARROLL, Warden, Respondent.	)	

Martin W. Lecates, pro se Petitioner.

Loren C. Meyers, Chief of Appeals Division, Delaware Department of Justice, Wilmington, Delaware. Attorney for Respondent.

MEMORANDUM OPINION

September 29th, 2003

Wilmington, Delaware

Farnan, Judge

I. INTRODUCTION

Petitioner Martin W. Lecates is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the Court is Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I.s 4, 11.) For the reasons that follow, unless Petitioner voluntarily dismisses his unexhausted claims, the Court will dismiss the entire petition without prejudice for failure to exhaust state remedies.

II. BACKGROUND

In December 2001, Petitioner was indicted for second degree rape and second degree sexual contact. On July 28, 2002, Petitioner pled guilty to one count of second degree rape. He was sentenced to twenty years imprisonment, to be suspended after ten years imprisonment, and then ten years combined home confinement and probation.

Petitioner appealed his sentence, asserting one claim that his counsel's ineffective assistance of counsel led to an involuntary plea and one claim for police misconduct. The Delaware Supreme Court affirmed his conviction. Lecates v. State, No. 478,2002 (Del. Mar. 4, 2003).

While the appeal was pending, Petitioner filed several Rule 61 motions for post-conviction relief. The Superior Court

rejected the motions without prejudice because they were premature.

On October 28, 2002 and November 13, 2002, Petitioner filed two substantially similar habeas petitions, which the Court will regard as one all-inclusive petition.[1] (D.I.s 4, 11.) He appears to assert two claims for ineffective assistance of counsel and two claims regarding the police investigation. (Id.) Respondent contends that the ineffective assistance of counsel claims are unexhausted, and therefore, requests the Court to dismiss this mixed habeas petition. Respondent also asserts that Petitioner's police investigation claims do not provide a basis for federal habeas relief under 28 U.S.C. § 2254(d)(1). (D.I. 16.)

III. GOVERNING LEGAL PRINCIPLES

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). Before a court can reach the merits of a habeas petition, the court must first

[1]Petitioner filed an original federal habeas petition on October 28, 2002. (D.I. 4.) At the same time, he filed the AEDPA election form indicating that he wanted to withdraw his § 2254 petition to file one all-inclusive petition in the future. Id. Then, on November 13, 2002, Petitioner filed a document titled "Motion for PostConviction Relief" with a heading for the Delaware Superior Court. (D.I. 11.) In any event, the substance of both "petitions" is the same. (D.I.s 4, 11.)

determine whether the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are satisfied. 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).

When seeking habeas relief from a federal court, a state petitioner must first exhaust remedies available in the state courts. The 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). 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, 228 F.3d at 192.

To satisfy the exhaustion 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). However, if the petitioner did raise the issue on direct appeal, then the petitioner does not need to raise the same issue again in a state post-conviction proceeding. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1996); Evans v. Court of Common Pleas, Delaware County, Pennsylvania, 959 F.2d 1227, 1230 (3d Cir. 1992)(citations omitted).

A petitioner "fairly presents" a federal claim for purposes of exhaustion by presenting to the state's highest court 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). It is not necessary for the petitioner 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 raising 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). The state courts do not have to actually consider or discuss the issues in the federal claim, provided

that the petitioner did, in fact, present such issues to the court. See Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984).

If a petitioner failed to exhaust state remedies and state procedural rules preclude further relief in the state courts, the exhaustion requirement is deemed satisfied because there is no available state remedy. Lines, 208 F.3d at 160; Wenger v. Frank, 266 F.3d 218, 223 (3d Cir. 2001); see Teague v. Lane, 489 U.S. 288, 297-98 (1989). However, even though these claims are treated as exhausted, they are still procedurally defaulted. Lines, 208 F.3d at 160. In addition, if a state court refused to consider a petitioner's claims for failing to comply with an independent and adequate state procedural rule, the claims are deemed exhausted but, once again, 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 either cause for the procedural default and actual prejudice resulting therefrom, or a fundamental miscarriage of justice. McCandless, 172 F.3d at 260; Coleman v. Thompson, 501 U.S. 722, 750-51 (1999); Caswell v. Ryan, 953 F.2d 853, 861-62 (3d Cir. 1992). 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 can demonstrate actual prejudice by showing "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." Id. at 494. However, if the petitioner does not allege cause for the procedural default, then the federal court does not have to determine whether the petitioner has demonstrated actual prejudice. See Smith v. Murray, 477 U.S. 527, 533 (1986).

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); Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001). In order to demonstrate a miscarriage of justice, the petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. A petitioner establishes actual innocence by proving that no reasonable juror would have voted to find him guilty beyond a reasonable doubt. Sweger v. Chesney, 294 F.3d 506, 522-24 (3d Cir. 2002). The miscarriage of justice exception applies only in extraordinary circumstances and is appropriate only when actual innocence is established, rather than legal innocence. Sawyer v.

Whitley, 505 U.S. 333, 339 (1992).

IV. DISCUSSION

In his habeas petition, Petitioner raises the following claims for relief:

(1) His attorney provided ineffective assistance of counsel because she did not discuss the rape case with him

(2) The police investigation led to two different charges and the deputy attorney general did not address this issue

(3) The police officer investigating the rape claim did not read Petitioner his Miranda rights and also coerced the victim

(4) His attorney did not adequately investigate the charges

Respondent argues that Petitioner did not fairly present the ineffective assistance of counsel claims to the Delaware Supreme Court. As a result, the ineffective assistance of counsels claim are unexhausted. Respondent argues that the Court must dismiss this mixed petition unless Petitioner voluntarily dismisses the unexhausted claims. Respondent further asserts that the police misconduct claims do not provide a basis for federal habeas relief under 2254(d)(1).

The Court agrees with Respondent's assertion that Petitioner did not exhaust state remedies with respect to the ineffective assistance of counsel claims. In Delaware, it is well-settled that an ineffective assistance of counsel claim must first be raised in a post-conviction motion pursuant to Superior Court

Criminal Rule 61. Kendall v. Attorney General of Delaware, 2002 WL 531221, at *4 n.2 (D. Del. Mar. 26, 2002). Claims alleging ineffective assistance of counsel will not be considered on direct appeal for the first time. See, e.g., Duross v. State, 494 A.2d 1265, 1267 (Del. 1985); Wright v. State, 633 A.2d 329, 336 n.14 (Del. 1993).

By presenting these claims to the state supreme court on direct appeal, Petitioner did not utilize the correct procedural device permitting the Delaware courts to consider the ineffective assistance of counsel claims on the merits. See Dickens v. Redman, C.A. No. 91-90-SLR, at 8 (D. Del. Jan. 11, 1993). Indeed, the Delaware Supreme Court even stated that it could not consider the ineffective assistance of counsel claim for the first time on direct appeal. Lecates, No. 478,2002 at ¶ 5. As such, Petitioner did not exhaust state remedies with respect to these claims.

According to Respondent, Petitioner may return to state court and raise the ineffective assistance of counsel claims in a Rule 61 post-conviction motion. (D.I. 16.) Respondent contends that although the Delaware Supreme Court stated that it would not consider the claim of ineffective assistance of counsel for the first time on direct appeal, this statement does not foreclose Petitioner's return to state courts. O'Halloran v. Ryan, 835 F.2d 506, 509 (3d Cir. 1987)(the state supreme court "did not

remand for a hearing, nor did it hold that the claim of ineffective assistance of counsel had been waived, nor did it preclude further consideration of the matter); Toulson v. Beyer, 987 F.2d 984, 987-89 (3d Cir. 1993).

The Court agrees with Respondent's assertion that Petitioner may present his ineffective assistance of counsel claims to the Superior Court in a Rule 61 motion. Although Rule 61 imposes several procedural hurdles that must be satisfied before a state court will consider the merits of a petitioner's claim, none of the bars apply in the present situation. See Super. Ct. R. Crim. P. 61(i); Younger v. State, 580 A.2d 552, 554 (Del. 1990). First, the time for filing a post-conviction motion has not yet expired. Super. Ct. R. Crim. P. 61(i)(1). Second, these claims were not previously litigated, and thus, they are not barred by Rule 61(i)(4). Further, Rule 61(i)(2) does not bar further review because Petitioner has not yet asserted an appropriately filed post-conviction motion. Finally, Rule 61(i)(3) does not preclude further state releif because the appropriate method for raising an ineffective assistance of counsel claim is in a post-conviction proceeding, not in the proceeding leading up to the final judgment. See Kendall, 2002 WL 531221, at *4, n.2 In short, because Petitioner has an available state remedy, he must exhaust this remedy before seeking federal habeas relief.

Respondent also contends that Petitioner has exhausted state

remedies with respect to the police misconduct claims. If true, then Petitioner has presented this Court with a petition containing both exhausted and unexhausted claims ("mixed petition"). The Third Circuit requires a mixed petition to be dismissed without prejudice in order to permit the petitioner to exhaust state remedies. See Rose v. Lundy, 455 U.S. 509, 522 (1982); Christy v. Horn, 115 F.3d 201, 206, 207 (3d Cir. 1997); see also Brockenbrough v. Snyder, 890 F.Supp. 342 (D. Del. 1995)(where petitioner has not exhausted state remedies, a federal court may dismiss without prejudice in order to permit petitioner an opportunity to re-file his habeas petition after he exhausts available state remedies). Thus, the Court must now determine if Petitioner has, indeed, presented the Court with a mixed petition.

A thorough review of the record reveals that Petitioner did present his police misconduct claims to the Delaware Supreme Court in his direct appeal, thereby exhausting state remedies with respect to these claims. (D.I. 18, Appellant's Op. Br. in Lecates v. State, No.478,2002); Lecates, No. 478,2002, at ¶3. As a result, Petitioner has presented the Court with a mixed petition. Consequently, unless Petitioner decides to dismiss the unexhausted claims, the Court must dismiss the entire petition to permit Petitioner to return to the state courts to exhaust state remedies. McMahon v. Fulcomer, 821 F.2d 934, 940 (3d Cir.

1987).[2]

Before concluding, the Court must note the ramifications of either course of action. If Petitioner does decide to voluntarily dismiss the two unexhausted claims, those claims may thereafter be barred by the one-year time period for filing a federal habeas petition. See 28 U.S.C. § 2244(d)(1). If, however, Petitioner does not voluntarily dismiss the two unexhausted claims, and the Court dismisses the entire petition without prejudice, then all of the claims may thereafter be barred by the one-year filing period. Id. Thus, Petitioner must consider the effect of the one-year time period before responding to the Court.

V. Certificate of Appealability

Finally, the Court must decide whether to issue a certificate of appealabilty. *See* Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This showing is satisfied when the petitioner demonstrates "that reasonable jurists would find the district court's assessment of the denial

[2]The Court acknowledges Respondent's argument that Petitioner's claims of police misconduct do not provide federal habeas relief under 28 U.S.C. § 2254(d). (D.I. 16 at ¶ 4.) Unfortunately, because the Court is required to dismiss this mixed petition at this point in time, the Court cannot address this contention.

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

Moreover, when a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. *Id.* "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.*

For the reasons stated above, the Court concludes that Petitioner has presented the Court with a mixed petition containing both exhausted and unexhausted claims. As a result, unless Petitioner voluntarily deletes the unexhausted claims, the Court must dismiss the entire petition without prejudice. Reasonable jurists would not find these conclusions unreasonable. Consequently, Petitioner has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

VI. CONCLUSION

For the foregoing reasons, the Court concludes that Petitioner has presented a mixed petition containing both exhausted and unexhausted claims. As such, unless Petitioner voluntarily dismisses his unexhausted ineffective assistance of counsel claims, Petitioner's request for habeas relief filed pursuant to 28 U.S.C. § 2254 must be dismissed without prejudice. Therefore, the Court will grant Petitioner twenty days to provide the Court with a written statement indicating whether he wishes to delete the unexhausted claims from his pending habeas petition. If Petitioner fails to inform the Court within the prescribed time period, the Court will dismiss without prejudice the petition in its entirety. Furthermore, the Court finds no basis for the issuance of a certificate of appealabilty. An appropriate order shall issue.

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ORDER

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

1. Petitioner Martin W. Lecates must inform the Court in writing within twenty days of the issuing date of this Memorandum Opinion if he wishes to voluntarily dismiss the unexhausted claims regarding ineffective assistance of counsel.

2. If the Court does not receive Petitioner's written statement within twenty days, then Petitioner Martin W. Lecates' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I.s 4, 11.) will be DISMISSED without prejudice.

3. The court declines to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: September 29, 2003

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE