

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

ROBERT LEE WEBB,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 98-310-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, Robert Lee Webb was convicted of trafficking in cocaine. He was sentenced to ten years imprisonment to be suspended after five years for work release and probation. Webb is presently incarcerated in the Delaware Correctional Center in Smyrna, Delaware. He has filed with the court¹ a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting several claims for relief. For the following reasons, the court concludes that Webb has failed to exhaust state court remedies, and will dismiss the petition without prejudice for failure to exhaust.

I. BACKGROUND

¹ This matter was originally assigned to the Honorable Sue L. Robinson, but was reassigned to this court on March 8, 1999.

On July 6, 1996, Robert Lee Webb was traveling on Route 1 through Kent County, Delaware, on his way from Connecticut to North Carolina. Webb was the driver and sole occupant of a small blue car. Delaware State Police Officers Cathell and Anderson were on traffic control and contraband interdiction duty in the area that day. As the officers were exiting from Route 1 onto Route 10, they observed Webb's car following about fifteen feet behind a truck at a speed of 40 to 50 miles per hour. The officers stopped Webb for following at an unsafe distance.

At Cathell's request, Webb produced his license and registration and stepped out of the car. According to the officers, Webb appeared extremely nervous and was shaking so hard that the officers became suspicious. They asked Webb if he was carrying contraband; Webb replied that he was not. Webb then consented verbally and in writing to the officers' request to search the car. As Anderson began searching the car, Webb asked Cathell if he could retrieve his cigarettes from the console. Rather than retrieving cigarettes, however, Webb attempted to reach for a duffel bag in the back seat. Cathell stopped him from reaching into the duffel bag. Anderson then searched the duffel bag and found a bag of white powder. It was later determined that the bag contained 99 grams of cocaine.

Based on these events, Webb was charged with trafficking in cocaine, possession with intent to deliver, and following a motor vehicle too closely. Webb moved to suppress the cocaine on the grounds that the officers lacked probable cause to stop him and that his consent to search the car was involuntary. The trial court denied Webb's motion to suppress. On April 15, 1997, a jury found Webb guilty of trafficking in cocaine, but not guilty on the charge of following too closely.² Webb was

² The prosecution entered a *nolle prosequi* on the charge of possession with intent to deliver.

sentenced on July 25, 1997, to ten years in prison to be suspended after five years for work release and probation. On direct appeal, Webb argued only that the officers lacked probable cause to stop him in violation of the Fourth Amendment. (D.I. 10, Appellant's Opening Br.) The Delaware Supreme Court affirmed Webb's conviction and sentence. (D.I. 10, Delaware Supreme Court Order, Mar. 26, 1998, at 4.) Webb did not seek post-conviction relief in the state courts.

Webb has now filed the current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents ask the court to dismiss the petition in its entirety for failure to exhaust state court remedies.

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, exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

To satisfy exhaustion, “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. Generally, federal courts will dismiss without prejudice claims that have not been properly presented to the state courts, thus allowing petitioners to exhaust their claims. *Lines v. Larkins*, 208 F.3d 153, 159-60 (3d Cir. 2000). A mixed petition, *i.e.*, one containing both exhausted and unexhausted claims, must be dismissed for failure to exhaust. *Lundy*, 455 U.S. at 510; *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1998).

While a federal court is prohibited from *granting* 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.

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 considered satisfied. *Lines*, 208 F.3d at 160. Such claims are deemed procedurally defaulted, not unexhausted, because further state court review is unavailable. *Id.* Federal courts should refrain from finding claims procedurally barred unless state law clearly forecloses review of claims which have not previously been presented to a state court. *Id.* at 163. In questionable cases or those involving an intricate analysis of state procedural law, “it is better that the state courts make the determination of whether a claim is

procedurally barred.” *Banks v. Horn*, 126 F.3d 206, 213 (3d Cir. 1997).

III. DISCUSSION

From Webb’s habeas petition, the court distills the following claims for relief:

- (1) The police stopped Webb’s car without probable cause in violation of the Fourth Amendment.
- (2) Because Webb’s consent to search his car was not voluntary, the search was in violation of the Fourth Amendment.
- (3) The prosecution engaged in misconduct by failing to disclose evidence favorable to Webb.
- (4) Counsel rendered ineffective assistance by unlawfully conspiring with the prosecution in violation of the Sixth Amendment.
- (5) Because Webb was assigned two different State Bureau of Investigation numbers, another person’s criminal history was erroneously attributed to him.
- (6) The trial court engaged in judicial misconduct.

The respondents concede that Webb’s first claim is exhausted, but argue that Webb did not fairly present any of his remaining claims to both the Delaware Superior Court and the Delaware Supreme Court. According to the respondents, Webb’s remaining claims, except his claim of ineffective assistance of counsel, are procedurally barred for failure to raise them on direct appeal. The respondents assert that Webb can present his ineffective assistance of counsel claim in a motion for post-conviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. Because Webb’s petition contains both exhausted and unexhausted claims, the respondents conclude, it must be

dismissed for failure to exhaust state court remedies.³

The court agrees that Webb's first claim, *i.e.*, that the police lacked probable cause to stop his car, is exhausted. Webb presented it to the Delaware Superior Court in his motion to suppress, and then to the Delaware Supreme Court on direct appeal. Exhaustion requires nothing more. *See Lambert*, 134 F.3d at 513 (stating that a petitioner who raised an issue on direct appeal is not required to raise it again in a state post-conviction proceeding).

Webb also raised his second claim based on involuntary consent to search his car in his motion to suppress. A review of his brief on direct appeal reveals that he failed to raise this issue to the Delaware Supreme Court – the sole issue on direct appeal was whether the officers lacked probable cause to stop his car. (D.I. 10, Appellant's Opening Br.) A thorough review of the state court records also establishes that Webb did not present any of his remaining claims to the state courts. The court thus agrees with the respondents that Webb's claim based on lack of probable cause is the only exhausted claim presented in this petition.⁴

³ Alternatively, the respondents suggested that Webb withdraw any unexhausted claims and proceed on the remaining claims raised in the current petition. In his reply brief, Webb declined their invitation to withdraw any unexhausted claims. (D.I. 12, Reply Br.)

⁴ The respondents also argue that federal habeas review of Webb's exhausted Fourth Amendment claim is precluded by *Stone v. Powell*, 428 U.S. 465 (1976). In *Stone*, the Supreme Court held that a federal court should not grant habeas relief based on an unconstitutional search or seizure if the state had already provided an "opportunity for full and fair litigation" of the Fourth Amendment claim. *Id.* at 494. "Even otherwise potentially meritorious Fourth Amendment claims are barred on habeas when the petitioner had a full and fair opportunity to litigate them." *Deputy v. Taylor*, 19 F.3d 1485, 1491 (3d Cir. 1994). Although it appears that the respondents may be correct, the court will not determine at this time whether Webb's Fourth Amendment claim is cognizable. As explained below, the court will dismiss the entire petition without prejudice for failure to exhaust state remedies, and will not reach the merits of any claims presented therein. If Webb decides to file a subsequent federal habeas petition, he should consider *Stone v. Powell* in deciding which claims to

The court must next determine whether there remains an available state court remedy for any of Webb’s claims that were not properly presented to the state courts. If Webb can return to the state courts for review of any claim, then his petition is a mixed petition that must be dismissed without prejudice for failure to exhaust. *Lundy*, 455 U.S. at 510; *Lambert*, 134 F.3d at 513. On the other hand, if each of Webb’s remaining claims is procedurally barred from state court review, the court “may not go to the merits of the barred claims, but must decide the merits of the claim[] that [is] exhausted.” *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993).

Webb’s potential avenue for obtaining state court review of his remaining claims is a motion for post-conviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. Rule 61, however, imposes several procedural hurdles that must be satisfied before a state court will consider the merits of a petitioner’s claims. *See* Super. Ct. R. Crim. P. 61(i); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). Relevant to the current inquiry is the procedural hurdle of 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). The failure to raise an issue on direct appeal renders a claim procedurally defaulted under Rule 61(i)(3). *Bialach v. State*, 773 A.2d 383, 386 (Del. 2001). Webb has offered no explanation for his failure to raise his remaining claims on direct appeal. It appears that

raise.

the Delaware Superior Court would find his remaining claims (with one exception) procedurally barred by Rule 61(i)(3).

The one exception is Webb's claim of ineffective assistance of counsel. The Delaware Supreme Court has repeatedly stated that claims of ineffective assistance of counsel are properly raised for the first time in a Rule 61 post-conviction motion, not on direct appeal. *See MacDonald v. State*, 778 A.2d 1064, 1071 (Del. 2001); *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990). For this reason, Webb's failure to raise his claim of ineffective assistance on direct appeal did not result in a procedural default under Rule 61(i)(3).

Rule 61(i) imposes yet another procedural hurdle that *may* bar state court consideration of Webb's ineffective assistance of counsel claim. Pursuant to Rule 61(i)(1), "[a] motion for postconviction relief may not be filed more than three years after the judgment of conviction is final." Super. Ct. R. Crim. P. 61(i)(1). The three-year period "is jurisdictional and cannot be enlarged." *Robinson v. State*, 584 A.2d 1203, 1204 (Del. 1991). For relevant purposes, a judgment of conviction is final when the Delaware Supreme Court issues an order finally determining the case on direct review. *Id.* 61(m). Here, the Delaware Supreme Court issued an order affirming the judgment of conviction on March 26, 1998. Obviously, more than three years have lapsed since that date. Thus, the Delaware Superior Court *may* refuse to entertain Webb's ineffective assistance claim as untimely.

Rule 61(i)(1)'s three-year period, however, "is not absolute." *Robinson*, 584 A.2d at 1204. Rule 61 expressly makes the three-year period inapplicable "to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." Super. Ct. R.

Crim. P. 61(i)(5). An allegation of a colorable claim of ineffective assistance of counsel satisfies Rule 61(i)(5) and renders the three-year period inapplicable. *See State v. Kendall*, 2001 WL 392650, *3 (Del. Super. Ct., April 10, 2001); *State v. Tolson*, 2001 WL 38944, *2 (Del. Super. Ct., Jan. 10, 2001).

Unfortunately, Webb has not provided the court with sufficient information to assess whether his claim of ineffective assistance of counsel is colorable within the meaning of Rule 61(i)(5). The fact that he has not provided sufficient information, however, does not lead necessarily to the conclusion that he cannot allege a colorable claim. On habeas review, this court must refrain from finding claims procedurally barred unless state law *clearly forecloses* review of claims. *Lines*, 208 F.3d at 163. Webb's failure to provide the court with sufficient information precludes a determination of whether his claim of ineffective assistance is colorable for purposes of Rule 61(i)(5). Under these circumstances, the court cannot conclude with certainty that his claim of ineffective assistance of counsel is procedurally barred. The court concludes that the proper course is to dismiss this claim without prejudice and allow Webb to present it to the state courts in a Rule 61 motion.

As mentioned above, it appears that Webb's remaining claims (other than his exhausted Fourth Amendment claim) are procedurally barred for failure to raise them on direct appeal. Because the court has concluded that his claim of ineffective assistance of counsel is not exhausted, the court does not determine finally whether each of Webb's remaining claims is procedurally barred. Such a determination will be made when and if Webb files a subsequent habeas petition after exhausting state court remedies. Webb is cautioned that if he chooses to exhaust remedies by initiating Rule 61 post-conviction proceedings in the Delaware Superior Court, he must satisfy *each* of the procedural hurdles

of Rule 61 as to *each* claim he raises.

Webb has another option if he chooses not to pursue state court remedies. He may abandon any unexhausted claims and file a subsequent federal habeas petition. If he so chooses, however, he is cautioned that federal law places severe restrictions on filing successive habeas petitions. *See* 28 U.S.C. § 2244(b); *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997).⁵ Thus, any claims abandoned in a second habeas petition may be lost forever.⁶

In sum, the court finds that Webb’s current habeas petition is a mixed petition containing both exhausted and unexhausted claims. For this reason, the petition will be dismissed without prejudice for failure to exhaust state court remedies.

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 Webb’s habeas petition must be dismissed for failure to

⁵ These restrictions do not apply where the prior habeas petition was dismissed for failure to exhaust state remedies. *Christy*, 115 F.3d at 208.

⁶ The court refrains from offering any opinion on the better course of action. Any decisions respecting Webb’s future course of action are entirely his own.

exhaust state court remedies. The court is persuaded that reasonable jurists would not find its assessment debatable or wrong. Webb therefore cannot make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not issue.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Webb's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED WITHOUT PREJUDICE for failure to exhaust state court remedies.
2. 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: December 4, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE