

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

MICHAEL RIGHTER,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 98-615-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 Righter was convicted of trafficking in cocaine and possession of a deadly weapon during the commission of a felony. Righter is presently incarcerated in the Delaware Correctional Center, serving a sentence of forty-four years. He has filed with the court¹ a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting two claims for relief. For the reasons set forth below, the court concludes that each of Righter's claims is procedurally barred from federal habeas review, and will deny the petition and the requested relief.

I. BACKGROUND

On December 19, 1991, the Wilmington police simultaneously executed search warrants at two

¹ This matter was originally assigned to the Honorable Joseph J. Longobardi, but was reassigned to this court on August 18, 1999.

Wilmington residences. The first residence at 932 East 27th Street was the home of Michael Righter and his mother. After forcibly entering the home, the police found in Righter's bedroom more than 500 grams of cocaine, 192 vials of crack cocaine, empty vials and caps, two stolen firearms, ammunition, and approximately \$26,500 in cash. Righter was not at home. The police simultaneously executed the second search warrant at 831 East 26th Street. There they found Righter with \$1200 in cash and 21 vials of crack cocaine.

Based on these events, a grand jury in the Delaware Superior Court charged Righter with several drug and firearms offenses. Shortly before trial, defense counsel moved to suppress the evidence for lack of probable cause. The Superior Court denied Righter's motions to suppress. On June 17, 1992, the jury found Righter guilty of trafficking in cocaine, possession of cocaine with intent to deliver, possession of drug paraphernalia, possession of a deadly weapon during the commission of a felony, possession of a deadly weapon by a felon, receiving stolen firearms, maintaining a dwelling for keeping controlled substances, and conspiracy. The Superior Court sentenced Righter to forty-four years in prison followed by a period of work release and probation. On direct appeal, defense counsel argued only that the prosecutor improperly commented on the evidence during his opening and closing statements. (D.I. 9, Appellant's Br. at 7.) The Delaware Supreme Court affirmed Righter's conviction and sentence. *Righter v. State*, No. 304, 1992, 1993 WL 61691 (Del. Feb. 11, 1993).

On June 15, 1995, Righter filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. In his Rule 61 motion, Righter asserted that trial counsel rendered ineffective assistance by failing to move to suppress the evidence based on a violation of the "knock and announce" rule, and by permitting the jury to view a copy of the

indictment revealing his prior felony conviction. After appointing counsel and conducting an evidentiary hearing, the Superior Court denied Righter's Rule 61 motion on the merits. *State v. Righter*, No. IN-92-01-0019-RI, 1996 WL 280886 (Del. Super. Ct. Apr. 23, 1996). The Delaware Supreme Court affirmed. *Righter v. State*, 704 A.2d 262 (Del. 1997). The United States Supreme Court denied Righter's petition for a writ of certiorari. *Righter v. Delaware*, 523 U.S. 1126 (1998).

Righter has now filed with the court the current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents ask the court to deny Righter's petition on the ground that the claims presented therein are procedurally barred.

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*, 121 S. Ct. 1621 (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)). 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), *cert. denied*, 531 U.S. 1082 (2001).

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. *Id.* at 160. Although technically exhausted, such claims are 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. In addition to cause, a petitioner must 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. 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 memorandum of law in support of his habeas petition, Righter articulates the following claims for relief:

- (1) The trial court abused its discretion by ruling that the search was based on probable cause without inquiring into the reliability of the confidential informants.
- (2) Trial counsel rendered ineffective assistance by failing to argue the lack of probable cause, and by failing to investigate and challenge the charges against him.

(D.I. 2.) The respondents contend that Righter has never presented these claims to the Delaware Supreme Court, and that state procedural rules now preclude him from doing so. For this reason, they

ask the court to find Righter's claims procedurally barred from federal habeas review.

A review of the entire record in this matter confirms that Righter failed to fairly present either of his current claims to the Delaware Supreme Court. Although defense counsel raised the lack of probable cause to the Superior Court in his pretrial motions to suppress, Righter did not raise this claim on direct appeal. His only claims on direct appeal were of prosecutorial misconduct during opening and closing statements. Then, on appeal from the denial of his Rule 61 motion, Righter argued that counsel was ineffective by failing to assert a violation of the "knock and announce" rule. He did not, however, allege that counsel was ineffective by failing to argue lack of probable cause. The court thus agrees with the respondents that Righter has failed to fairly present his current claims to the Delaware Supreme Court.

The court must next consider whether any state procedural rules now preclude Righter from seeking further relief in the state courts. If so, his claims are procedurally defaulted, and the court may not consider their merits unless Righter 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 invoke three procedural bars to argue that further state court review of Righter's claims is foreclosed. These three procedural bars are set forth in Rule 61(i):

- (1) Time Limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
- (2) Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(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). The court considers these procedural bars in turn.

First, the court agrees with the respondents that a second Rule 61 motion would be time barred by Rule 61(i)(1). Righter's conviction became final when the Delaware Supreme Court affirmed his conviction and sentence nearly nine years ago on February 11, 1993. *See* Super. Ct. R. Crim. P. 61(m)(2).² Any second Rule 61 motion would now be untimely.

The court also agrees that Righter's current claims are barred by Rule 61(i)(2) because he did not include them in his first Rule 61 motion. A petitioner must present all his grounds for relief in his first Rule 61 motion. Super. Ct. R. Crim. P. 61(b)(2). *See Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989)(stating that petitioner is required to include "all grounds for relief that were available to him" in his first Rule 61 motion). Delaware courts will not consider any claim that was not asserted in a prior Rule 61 motion unless "warranted in the interest of justice." *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996). In order to satisfy the interest of justice exception, a petitioner must show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish" him. *Woods v. State*, No. 259, 1997, 1997 WL 425492 (Del. July 18, 1997)(citing *Flamer*

² Under Rule 61(m)(2), if a defendant files a direct appeal, his judgment of conviction is final when the Delaware Supreme Court issues an order finally determining the appeal. *Jackson v. State*, 654 A.2d 829, 833 (Del. 1995).

v. State, 585 A.2d 736, 746 (Del. 1990)). In the matter at hand, the record is devoid of any such subsequent legal developments. Accordingly, further state court review of Righter's claims is foreclosed by Rule 61(i)(2).

Additionally, the court agrees that Rule 61(i)(3) bars Righter's claim that the trial court erred in ruling that the search was based on probable cause without inquiring into the reliability of the confidential informants.³ In Delaware, the failure to raise an issue on direct appeal renders a claim procedurally defaulted absent a showing of cause and prejudice. *See* Super. Ct. R. Crim. P. 61(i)(3); *Bialach v. State of Delaware*, 773 A.2d 383, 386 (Del. 2001). Righter did not raise this issue on direct appeal. Although Righter alleges that counsel was ineffective for failing to raise this issue on direct appeal, his allegations are entirely conclusory. He has failed completely to offer any facts from which the court could conclude that he was prejudiced by counsel's failure to raise the probable cause issue on direct appeal. After all, the Superior Court rejected Righter's argument that the evidence should be suppressed for lack of probable cause. He has not explained in any way why the Delaware Supreme Court would have disagreed with the Superior Court's conclusion. The court thus concludes that Righter's claim based on lack of probable cause is procedurally barred by Rule 61(i)(3).

Before the court can conclude with certainty that Righter's claims are procedurally barred, the court must consider whether Rule 61(i)(5) renders any of these procedural bars inapplicable. Pursuant to Rule 61(i)(5):

³ Rule 61(i)(3) does not bar Righter's claim of ineffective assistance of counsel. Claims of ineffective assistance of counsel are properly raised for the first time in a Rule 61 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).

Bars Inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or 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). This “fundamental fairness exception . . . is a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal.” *Younger v. State*, 580 A.2d 552, 555 (Del. 1990). To satisfy Rule 61(i)(5), a petitioner must raise and support “a colorable claim which requires further inquiry.” *Webster v. State*, 604 A.2d 1364, 1367 (Del. 1992). Although a petitioner need not establish with certainty that a constitutional violation occurred, Rule 61(i)(5) is not a mechanism by which a petitioner may “challenge his conviction in perpetuity simply by coupling allegations of trial errors with bold assertions that they amount to a miscarriage of justice.” *State v. Mulkey*, No. N88-03-0075R3, 1995 WL 268510, *2 (Del. Super. Ct. Mar. 24, 1995).

The court finds that Righter’s claims fall far short of satisfying the narrow fundamental fairness exception of Rule 61(i)(5). Although Righter has alleged violations of the Fourth and Sixth Amendments, his allegations are entirely conclusory. Righter’s submissions are devoid of any facts giving rise to a colorable claim of a violation of his Fourth or Sixth Amendment rights. The court thus concludes that Righter has failed to satisfy the fundamental fairness exception of Rule 61(i)(5), and that the three procedural bars prescribed in Rule 61(i) foreclose any further state court review of his current claims.

The only remaining question is whether Righter has articulated any reason why his procedural defaults should be excused. He offers no explanation for failing to raise his current claims in his first

Rule 61 motion. He does allege, albeit in a conclusory fashion, that counsel was ineffective for failing to raise the probable cause issue on direct appeal. It is true that “in certain circumstances counsel’s ineffectiveness in failing properly to preserve [a] claim for review in state court” constitutes cause to excuse a procedural default. *Edwards*, 529 U.S. at 451. Nonetheless, claims of ineffective assistance of counsel, even when asserted as cause for the procedural default of a separate claim, must be fairly presented as an independent claim to the state courts. *Id.* at 451-52. Righter has never presented this claim of ineffective assistance to the state courts. Thus, even if Righter’s allegations of ineffective assistance gave rise to a Sixth Amendment violation (they do not), he cannot rely on that unexhausted claim as cause for the procedural default of a separate claim. *Id.* at 452. Moreover, counsel’s alleged ineffective assistance for failure to raise any claims *on direct appeal* is unrelated to Righter’s failure to present his current claims *on appeal from the denial of his Rule 61 motion*.

In short, the court finds that Righter failed to present his current claims to the Delaware Supreme Court either on direct appeal or in his Rule 61 proceedings, and that further state court review of his claims is clearly foreclosed. Righter has also failed to articulate any reason permitting the court to excuse these procedural defaults. Therefore, his claims are procedurally barred from federal habeas review, and his habeas petition will be denied.

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 each of Righter’s claims is procedurally barred from federal habeas review. The court is persuaded that reasonable jurists would not find its conclusion debatable or wrong. Righter 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. Righter’s petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED.
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: January 17, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE