

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

BOBBY K. PRICE JR.,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 99-623-GMS
)	
SHERESE BREWINGTON-CARR, Warden,)	
and ATTORNEY GENERAL OF THE)	
STATE OF DELAWARE,)	
)	
Respondents.)	
)	

MEMORANDUM AND ORDER

Bobby K. Price Jr. is an inmate at the Multi-Purpose Criminal Justice Facility (“MPCJF”) in Wilmington, Delaware. Following prison disciplinary proceedings, a hearing officer found Price guilty of attempted escape and possession of contraband. As a result, he lost 150 days of good time credits. Price has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the loss of his good time credits. For the reasons set forth below, the court concludes that each of Price’s claims is procedurally barred from federal habeas review, and will deny the petition and the requested relief.

I. BACKGROUND

In 1993, Bobby K. Price Jr. was convicted of felony theft and sentenced to thirty-five years in prison. On January 4, 1997, while incarcerated at the MPCJF, Price received a disciplinary report

charging him with attempted escape, possession of contraband, theft, and receiving stolen property. A disciplinary hearing was conducted before a hearing officer on January 10, 1997. The hearing officer found Price guilty as charged and recommended sanctioning him to the loss of 150 days of good time credits. On February 27, 1997, the warden of the MPCJF concurred with the hearing officer's findings and imposed the recommended sanction.

On February 11, 1998, Price filed in the Delaware Superior Court a petition for a writ of mandamus. In his mandamus petition, Price asked the Superior Court to restore his good time credits and expunge the record from the institution's file. On July 21, 1998, Price received notice that the Superior Court dismissed his mandamus petition on July 9, 1998. Price did not appeal to the Delaware Supreme Court.

Price has now filed with the court the current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.¹ The respondents ask the court to deny Price'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 –

¹ A state prisoner must rely on § 2254 and not § 2241 when challenging the execution of his sentence. *Coady v. Vaughn*, 251 F.3d 480, 485-86 (3d Cir. 2001). Specifically, § 2254 is the exclusive remedy for a state prisoner challenging the loss of good time credits. *Montgomery v. Anderson*, 262 F.3d 641, 643 (7th Cir. 2001).

- (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, and preserves the role of state courts in protecting federally guaranteed rights. *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 defaulted 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 [his] 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. 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). This 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 habeas petition, Price articulates the following claims for relief respecting the loss of his good time credits:

- (1) He was denied the right to an impartial hearing panel.
- (2) During the disciplinary proceedings, the staff failed to comply with state law and the established policies of the Delaware Department of Correction.
- (3) No evidence or witnesses were presented at the disciplinary hearing.
- (4) His right to due process was violated as a result of the errors that occurred during the disciplinary proceedings.

(D.I. 2.) The respondents contend that Price failed to present 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 deny Price's petition on the ground that his claims are procedurally barred from federal habeas review.

A review of the record confirms that Price did not present his current claims to the Delaware Supreme Court. Indeed, Price himself acknowledges that he did not appeal from the Superior Court's order dismissing his petition for a writ of mandamus. (D.I. 2 at ¶ 11(c); D.I. 9 at 2.) Price also correctly concedes that the time for filing a notice of appeal expired long ago. (D.I. 9 at 1.) In Delaware, a notice of appeal must be filed within thirty days after entry of a judgment or order. *See* Del. R. S. Ct. 6(a). The thirty-day time limit is jurisdictional and cannot be enlarged. *Carr v. State*, 554 A.2d 778, 779-80 (Del. 1989). Without a doubt, the Delaware Supreme Court would not consider the merits of Price's claims at this late date. Accordingly, Price's claims are procedurally barred from federal habeas review unless he demonstrates cause and prejudice or a fundamental

miscarriage of justice. *Coleman*, 501 U.S. at 750; *Kirby v. Delaware Via Detainer*, C.A. No. 99-703-SLR, 2001 WL 641729, *3 (D. Del. May 29, 2001).

Price's first response is that he need not present his claims to the Delaware Supreme Court in order to satisfy the exhaustion requirement. He is mistaken. A claim is not exhausted unless it has been fairly presented to the state's highest court. *Boerckel*, 526 U.S. at 845; *Lines*, 208 F.3d at 160. Price also explains that he did not receive notice that the Superior Court dismissed his mandamus petition until July 21, 1998, and by that time it was too late to file a notice of appeal. Again, he is mistaken. The Superior Court dismissed Price's mandamus petition on July 9, 1998. He could have filed a notice of appeal not later than August 8, 1998. He completely fails to explain what prevented him from filing a notice of appeal before the thirty-day period expired.

In short, Price procedurally defaulted his current claims by failing to present them to the Delaware Supreme Court. He has failed to articulate any facts that would allow the court to excuse his procedural default. Accordingly, his claims are procedurally barred from federal habeas review.

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 Price's claims is procedurally barred from federal habeas review. The court is persuaded that reasonable jurists would not find its conclusion debatable or wrong. Price 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. Price'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 30, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE