IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NATHAN McNEIL, Petitioner, v. ROBERT SNYDER, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.	)	Civil Action No. 99-802-GMS

M E M O R A N D U M A N D O R D E R

I. DISMISSAL WITHOUT PREJUDICE FOR FAILURE TO EXHAUST

On October 21, 1999, Nathan McNeil filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents asked the court to dismiss the petition as untimely. The court concluded that McNeil's petition should not be dismissed as untimely, but that it raised an unexhausted claim of an involuntary guilty plea due to the ineffective assistance of counsel. On February 8, 2002, the court instructed McNeil to inform the court in writing whether he wished to delete the unexhausted claim presented in his habeas petition. The court advised McNeil that if he did not withdraw his unexhausted claim by February 25, 2002, the court would dismiss his entire petition without prejudice for failure to exhaust and without further notice.

McNeil has filed no response. Accordingly, and for the reasons set forth in the court's memorandum and order filed February 8, 2002, the court will dismiss McNeil's petition without prejudice for failure to exhaust.

II. CERTIFICATE OF APPEALABILITY

Because the court is dismissing McNeil's habeas petition, 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).

When a district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, determining whether a certificate of appealability is warranted "has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). A certificate of appealability should issue in such cases only if 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 district court was correct in its procedural ruling. *Id.* at 484. *Slack*'s two-part standard governs whenever the subject of an appeal is (or would be) the district court's procedural ruling, not the merits of the constitutional claims. *Walker v. Gov't of Virgin Islands*, 230 F.3d 82, 89-90 (3d Cir. 2000).

Under *Slack*'s first prong, the court must determine if jurists of reason would debate whether McNeil's petition states a valid claim of the denial of a constitutional right. Several courts of appeals have opined that where a procedural ruling is at issue, this part of the test requires nothing more than a "quick look" to see if the petition facially alleges the denial of a constitutional right. *See Evicci v. Comm'r of Corr.*, 226 F.3d 26, 28 (1st Cir. 2000); *Paredes v. Atherton*, 224 F.3d 1160, 1161 (10th Cir. 2000); *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th

Cir. 2000); *Lambright v. Stewart*, 220 F.3d 1022, 1026-27 (9th Cir. 2000). The court should accept the allegations of the petition as true. *Franklin v. Hightower*, 215 F.3d 1196, 1200 (11th Cir. 2000), *cert. denied*, 532 U.S. 1009 (2001); *Lambright*, 220 F.3d at 1028.

In his habeas petition and subsequent memorandum, McNeil alleges that his guilty plea was involuntary and thus unlawful due to the ineffective assistance of counsel. (D.I. 2 at 5; D.I. 9 at 3.) McNeil asserts that counsel misinformed him of the guilty plea, failed to conduct an investigation of the charges, and failed to communicate with him. He specifically asserts that but for counsel's deficient performance, he would not have signed the plea agreement. (D.I. 9 at 3.) McNeil has facially alleged that his guilty plea was involuntary due to the denial of his Sixth Amendment right to effective assistance of counsel, as described in *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)(applying the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984)). For this reason, the court finds that McNeil's petition satisfies the first prong of *Slack*.

Respecting *Slack*'s second prong, the court acknowledges that its procedural ruling is subject to debate by jurists of reason. In its February 8, 2002 memorandum and order, the court considered whether *Rose v. Lundy*, 455 U.S. 509 (1982), requires the court to dismiss without prejudice an entire petition containing an unexhausted claim, where a subsequent federal habeas petition filed after exhaustion would be untimely under the AEDPA's one-year period of limitation. The court noted that several courts of appeals have instructed district courts to stay such petitions where dismissal without prejudice would eliminate completely federal habeas review of a meritorious claim. Notwithstanding the opinions of those other courts of appeals, the court ruled that dismissal without prejudice was mandated by *Rose v. Lundy* in light of the Third Circuit's jurisprudence. The court finds that jurists of reason could conclude that it should not

have dismissed McNeil's petition in its entirety, but should have stayed it pending exhaustion of remedies.

In sum, the court concludes that McNeil's petition makes a substantial showing of the denial of a constitutional right for the purpose of appealing from the court's order dismissing his petition without prejudice for failure to exhaust. A certificate of appealability as to the court's procedural ruling will issue.[1]

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

(1) Nathan McNeil's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 1) is DISMISSED WITHOUT PREJUDICE for failure to exhaust state court remedies.

(2) The court issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) on the following question:

> Whether *Rose v. Lundy*, 455 U.S. 509 (1982), requires district courts to dismiss without prejudice a habeas petition filed under 28 U.S.C. § 2254, where the petition presents an unexhausted claim, but where a subsequent federal habeas petition filed after the exhaustion of state court remedies would be dismissed as untimely under the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1); or whether district courts have discretion to stay such a habeas petition, or any portion thereof, pending exhaustion of state court remedies? *See Zarvela v. Artuz*, 254 F.3d 374,

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[1] McNeil is advised that he is not *required* to appeal from the court's order dismissing his habeas petition for failure to exhaust. Instead, he may present his claims to the Delaware Superior Court in a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. Alternatively, he may decide to pursue his claims no further. Whether McNeil chooses to appeal to the Third Circuit, pursue his claims in the state courts, or abandon his claims altogether is entirely his own decision.

378-82 (2d Cir. 2001).

IT IS SO ORDERED.

Dated: March 11, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE