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

After pleading guilty in the Delaware Superior Court to trafficking in cocaine, Nathan McNeil was sentenced to five years in prison. He is presently incarcerated in the Delaware Correctional Center in Smyrna, Delaware. McNeil has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The respondents ask the court to dismiss McNeil's petition as time barred by the applicable one-year period of limitation. As explained below, the court concludes that McNeil's petition is not time barred, but that it presents an unexhausted claim of ineffective assistance of counsel. Before dismissing the petition for failure to exhaust state court remedies, the court will allow McNeil to decide whether he wishes to withdraw his unexhausted claim or to proceed on the petition as submitted.

I. BACKGROUND

On March 2, 1998, a grand jury in the Delaware Superior Court charged Nathan McNeil with twenty counts of drug and firearms offenses, including trafficking in cocaine. McNeil appeared before the Superior Court on August 3, 1998, and pleaded guilty to one count of trafficking in cocaine.[1] The Superior Court (Alford, J.) sentenced McNeil that same day to five years in prison. McNeil did not appeal to the Delaware Supreme Court, nor did he file a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. On October 29, 1998, McNeil filed in the Superior Court a motion for modification of sentence, which the Superior Court denied on January 13, 1999.

McNeil has now filed the current petition for a writ of habeas corpus. In his petition, McNeil articulates two separate grounds for relief: (1) his guilty plea was unlawfully induced due to the ineffective assistance of counsel; and (2) he was unlawfully prosecuted because his preliminary hearing was not recorded. According to the respondents, McNeil did not present either of these claims to the state courts. The respondents contend that his claim of unlawful prosecution is procedurally barred, but concede that his claim of ineffective assistance is unexhausted and not procedurally barred. They argue, however, that his habeas petition is subject to a one-year period of limitation that expired before McNeil filed it. Thus, they urge the court to dismiss the petition as time barred despite the presence of an unexhausted claim.

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[1] The prosecution entered a *nolle prosequi* on each of the remaining charges.

II. TIMELINESS

A. One-Year Period of Limitation

In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress amended the federal habeas statute by prescribing a one-year period of limitation for the filing of § 2254 habeas petitions by state prisoners. *Stokes v. District Attorney of the County of Philadelphia*, 247 F.3d 539, 541 (3d Cir.), *cert. denied*, 122 S. Ct. 364 (2001). Effective April 24, 1996, the AEDPA provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
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> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .

28 U.S.C. § 2244(d)(1).

The Superior Court sentenced McNeil on August 3, 1998. He could have filed a timely notice of appeal no later than September 2, 1998. *See* Del. R. S. Ct. 6(a)(ii)(requiring notice of appeal to be filed within thirty days after sentence is imposed in a direct criminal appeal). Although McNeil did not file a notice of appeal with the Delaware Supreme Court, the thirty-day period in which he could have filed a notice of appeal is encompassed within the meaning of "the conclusion of direct review or the expiration of the time for seeking such review," as set forth in § 2244(d)(1)(A). *See Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999). Therefore, McNeil's conviction became final for purposes of § 2244(d)(1) on September 3, 1998. Thus, he could have filed a timely habeas petition with this court not later than September 3, 1999.

The court's docket reflects that McNeil's petition was filed on November 22, 1999, about eleven weeks after the one-year period of limitation expired. (D.I. 1.) A pro se prisoner's habeas petition, however, is considered filed on the date he delivers it to prison officials for mailing to the district court, not on the date the Clerk dockets it. *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). The petition itself is dated October 21, 1999. The court will extend McNeil every benefit of the doubt and considers his petition filed on October 21, 1999, the date he signed it.

Even so, McNeil's habeas petition was filed forty-eight days after the one-year period of limitation expired. That, however, does not end the timeliness inquiry because the one-year period of limitation may be statutorily or equitably tolled. *See Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999).

B. Statutory Tolling

The AEDPA provides for statutory tolling of the one-year period of limitation:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). An application is "'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). According to the Third Circuit, "a properly filed application is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998).

As the respondents correctly point out, McNeil did not file a Rule 61 motion for postconviction relief in the Delaware Superior Court. The Superior Court Criminal Docket sheet, however, reflects

that on October 29, 1998, McNeil filed a motion for modification of sentence, which was denied on January 13, 1999. (D.I. 8, Docket Entry Numbers 19 and 20.) If McNeil's motion for modification of sentence can be considered "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment," the one-year period of limitation was tolled from October 29, 1998, until January 13, 1999. If the one-year period was tolled for this seventy-six day period while his motion was pending, McNeil's habeas petition was timely filed.

Inexplicably, the parties fail to even mention this motion, much less explain whether the one-year period of limitation should be tolled while it was pending. Nor have the parties provided the court with a copy of this motion or the order denying it. Notwithstanding, the court cannot ignore the fact that the motion and the order denying it plainly appear on the Superior Court Criminal Docket. (D.I. 8.) Before the court can dismiss McNeil's habeas petition as time barred, the court must determine whether his motion for modification of sentence constitutes "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment." 28 U.S.C. § 2244(d)(2).

First, the court finds that McNeil's motion for modification of sentence is an application for postconviction or other collateral review. The Third Circuit has instructed district courts to employ a flexible approach in determining whether a motion is a properly filed application under § 2244(d)(2). *Nara v. Frank*, 264 F.3d 310, 315 (3d Cir. 2001). The Third Circuit has also noted that "various forms of state review" qualify. *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999). Under the Third Circuit's flexible approach, these "various forms of state review" include a motion to withdraw a guilty plea *nunc pro tunc* filed more than eleven years after the guilty plea was entered. *Nara*, 264 F.3d at 316. The motion to withdraw a guilty plea *nunc pro tunc* qualified, the *Nara* court explained, because

it was "certainly akin to" an application for postconviction relief or other collateral review. *Id.* Under the Third Circuit's flexible approach, McNeil's motion for modification of sentence qualifies as an application for postconviction or other collateral review under § 2244(d)(2).

Whether McNeil's motion for modification of sentence was "properly filed" is not readily discernible based on the record currently before the court. As noted above, the parties have neglected to provide the court with a copy of the motion or the Superior Court's order denying it. They have also failed to inform the court of the substance of the motion or the Superior Court's reasons for denying it. The Superior Court's docket entry indicates only that the "motion for reduction/modification of sentence is denied." (D.I. 8, Superior Court Criminal Docket Entry No. 20.) Nothing on the Superior Court's docket sheet, however, suggests that McNeil failed to comply with the state's "applicable laws and rules governing filings" in filing this motion. *Artuz*, 531 U.S. at 8. For this reason, the court finds that McNeil's motion for modification of sentence was "properly filed" for purposes of § 2244(d)(2).

In sum, the court concludes that the one-year period of limitation was tolled while McNeil's motion for modification of sentence was pending in the Superior Court for seventy-six days. Excluding this seventy-six day period from the one-year period of limitation renders McNeil's habeas petition timely filed. For this reason, the court denies the respondents' request to dismiss McNeil's habeas petition in its entirety as time barred.[2]

[2] Because the statutory tolling provision renders McNeil's habeas petition timely filed, the court does not determine whether the doctrine of equitable tolling applies.

III. EXHAUSTION AND PROCEDURAL DEFAULT

A. Legal Principles

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 –
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
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> (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. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *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. 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). 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), *cert. denied*, 121 S. Ct. 1353 (2001).

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). A federal court may not consider the merits of a procedurally defaulted claim 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); *Werts*, 228 F.3d at 192.

B. Application of Principles to McNeil's Petition

The respondents assert that McNeil has never presented either of his claims to any state court. McNeil does not disagree, arguing instead that exhaustion should not be required. A review of the

state court record confirms that McNeil has never presented either of his current claims to any state court. According to the respondents, McNeil's claim of unlawful prosecution is procedurally barred because he cannot now present it to the state courts. The respondents also argue that McNeil's claim of ineffective assistance is unexhausted, not procedurally barred, because he may raise it in a Rule 61 motion for postconviction relief.

The court first considers whether McNeil may present his claim of ineffective assistance to the Superior Court in a Rule 61 motion. Rule 61 imposes several procedural hurdles that must be satisfied before a state court will consider the merits of a petitioner's claim. *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 default" 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).[3] The failure to raise an issue on direct appeal generally renders a claim procedurally defaulted under Rule 61(*i*)(3). *Bialach v. State*, 773 A.2d 383, 386 (Del. 2001). A claim of ineffective assistance of counsel, however, is properly raised for the first time in a Rule 61 postconviction motion, not on direct appeal. *MacDonald v. State*, 778 A.2d 1064, 1071 (Del. 2001); *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990). In other words, Rule 61(*i*)(3) does not bar McNeil from presenting his ineffective assistance of counsel claim to the Superior Court.

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[3] It appears that the respondents are correct that McNeil's claim of unlawful prosecution is procedurally barred under Rule 61(*i*)(3). The court will refrain from making this determination until McNeil informs the court on how he wishes to proceed, as explained below.

Rule 61(*i*) imposes yet another procedural hurdle that *may* bar state court consideration of McNeil'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 becomes final thirty days after the Superior Court imposes sentence. Super. Ct. R. Crim. P. 61(m)(1). The Superior Court sentenced McNeil on August 3, 1998; thus, his sentence became final for purposes of Rule 61 on September 2, 1998. Obviously, more than three years have lapsed since that date. Thus, the Superior Court *may* refuse to entertain McNeil's ineffective assistance claim as untimely.

While jurisdictional, Rule 61(*i*)(1)'s three-year period "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, McNeil 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 compel 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 those claims. *Lines*, 208 F.3d at 163. McNeil'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 that his claim of ineffective assistance of counsel is procedurally barred. The court is thus constrained to find that it remains unexhausted.

In the pre-AEDPA era, upon reaching the conclusion that a petition contains an unexhausted claim, a federal court would automatically dismiss the entire petition without prejudice for failure to exhaust. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Morris v. Horn*, 187 F.3d 333, 337 (3d Cir. 1999). The clear mandate of *Rose v. Lundy* is that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Lundy*, 455 U.S. at 522. The petitioner could then return to state court and exhaust his claims, and if relief was denied by the state courts, present his exhausted claims in a subsequent federal habeas petition. The federal court would then treat the subsequent habeas petition as though it were the petitioner's first. *See Slack v. McDaniel*, 529 U.S. 473, 487 (2000)(holding that a petition dismissed for failure to exhaust is treated as a first petition).

Unfortunately, the advent of the AEDPA has somewhat obscured the clear mandate of *Rose v. Lundy*. Since the imposition of the one-year period of limitation, a dismissal without prejudice for failure to exhaust may not achieve the desired result. Rather, a dismissal without prejudice for failure to exhaust may actually result in a dismissal *with* prejudice as to any future federal habeas review. McNeil's petition, assuming the court dismisses it for failure to exhaust, exemplifies this unseemly

phenomenon. In McNeil's case, it appears that the one-year period of limitation has now expired.[4] The time during which his current habeas petition is pending in this court cannot be statutorily excluded under § 2244(d)(2). *See Duncan v. Walker*, 121 S. Ct. 2120, 2129 (2001)(holding that a federal habeas petition is not an application for state postconviction or other collateral review under § 2244(d)(2)). Absent any extraordinary circumstances warranting the application of equitable tolling,[5] any subsequent federal habeas petition he files after exhausting state court remedies will probably be dismissed as time barred.

Several courts of appeals encourage district courts to stay habeas claims pending exhaustion where dismissal of the petition for failure to exhaust might completely eliminate federal habeas review of a meritorious claim. The Second Circuit, for example, has instructed district courts to exercise discretion either to dismiss only the unexhausted claim and stay proceedings on the remaining claims, or to dismiss the petition in its entirety. *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir.), *cert. denied*, 122 S. Ct. 506 (2001). According to the Second Circuit, a district court should dismiss only the unexhausted claims, not the entire petition, where a complete dismissal "jeopardize[s] the timeliness of a collateral attack." *Id.* at 382. The Sixth Circuit recently endorsed the Second Circuit's approach. *Palmer v. Carlton*, __ F.3d __, No. 99-5952, 2002 WL 10195, *4 (6th Cir. Jan. 4, 2002). The

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[4] The fact that the one-year period of limitation has *now* expired does not undermine the court's conclusion that the period of limitation had not expired when he filed his petition. *See supra* Part II.B.

[5] In his concurring opinion in *Duncan*, Justice Stevens (joined by Justice Souter) noted that a district court is not precluded from equitably tolling the one-year period while a federal habeas petition was pending. *Duncan*, 121 S. Ct. at 2130 (Stevens, J., concurring). In his dissenting opinion, Justice Breyer (joined by Justice Ginsburg) agreed with Justice Stevens' suggestion to employ equitable tolling. *Id.* at 2135 (Breyer, J., dissenting).

First and Seventh Circuits have also embraced similar approaches. *See Delaney v. Matesanz*, 264 F.3d 7, 14 n.5 (1st Cir. 2001)(encouraging district courts to stay, rather than dismiss, where "there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely."); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir.), *cert. denied*, 531 U.S. 946 (2000)(stating that staying a habeas petition is proper where dismissal would "jeopardize the timeliness of a collateral attack.").

The Third Circuit has not considered this precise issue in a published opinion. In several post-AEDPA decisions, however, the Third Circuit has staunchly enforced the clear mandate of *Rose v. Lundy*. *E.g.*, *Morris v. Horn*, 187 F.3d 333, 337 (3d Cir. 1999); *Lambert*, 134 F.3d at 513-14; *Christy v. Horn*, 115 F.3d 201, 206 (3d Cir. 1997). Indeed, in *Christy*, the Third Circuit vacated the district court's order holding in abeyance a habeas petition while the petitioner exhausted state court remedies because the petitioner failed to present any "exceptional circumstances of peculiar urgency" sufficient to "excuse exhaustion." *Christy*, 115 F.3d at 206-08. Although the circumstances presented in *Christy* did not implicate the timeliness concerns raised by McNeil's petition, *Christy* and the other above-cited decisions strongly suggest that district courts in the Third Circuit must dismiss an entire petition that contains an unexhausted claim. For this reason, this court will adhere to the mandate of *Rose v. Lundy*.

Before dismissing McNeil's petition without prejudice for failure to exhaust, the court will, in the interests of equity, advise him of his options and allow him to decide his future course of action. Rather than returning to the Superior Court to exhaust, McNeil may amend his current habeas petition to delete his unexhausted claim, and proceed in this court on his remaining claim. *Lundy*, 455 U.S. at 520. If he deletes his unexhausted claim, however, he risks forfeiting entirely any federal habeas review

of his unexhausted claim of ineffective assistance of counsel. The AEDPA imposes severe restrictions on the filing of second or successive habeas petitions, restrictions that may well foreclose federal habeas review of McNeil's unexhausted claim if he abandons it now. *See* 28 U.S.C. § 2244(b)(2) and (3); *Christy*, 115 F.3d at 208.

McNeil's remaining option is to proceed with his habeas petition as submitted. If he chooses this option, the court will dismiss the entire petition without prejudice for failure to exhaust for the reasons set forth above. McNeil is advised that if the state courts deny him relief, the one-year period of limitation will probably bar him from filing a subsequent federal habeas petition.

In sum, McNeil's habeas petition contains an unexhausted claim of ineffective assistance of counsel. McNeil must inform the court whether he wishes to delete his unexhausted claim and proceed on his remaining claim. If McNeil chooses to proceed with his habeas petition as submitted, or if he fails to inform the court of his choice, the court will dismiss the entire petition without prejudice for failure to exhaust and without further notice.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT not later than February 25, 2002, McNeil shall inform the court in writing how he wishes to proceed on his habeas petition. His options are: (1) to delete and abandon his unexhausted claim of ineffective assistance of counsel, in which case the court will render a decision on the remaining claim raised in his habeas petition; or (2) to proceed on the habeas petition as submitted, in which case the court will dismiss the entire petition without prejudice for failure to exhaust state court remedies. McNeil's failure to respond as instructed

will result in immediate dismissal of his entire habeas petition without prejudice for failure to exhaust state court remedies and without further notice.

IT IS SO ORDERED.

Dated: February 8, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE