

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

GLENN BAILEY, :  
Petitioner, :  
 : PRISONER  
v. : Case No. 3:03cv1413(WWE)  
 :  
WARDEN CARTER :  
Respondent. :

MEMORANDUM OF DECISION

The petitioner, Glenn Bailey ("Bailey"), currently confined at the MacDougall-Walker Correctional Institution in Suffield, Connecticut, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction on charges of sexual assault in the first degree and risk of injury to a child. For the reasons set forth below, the petition will be denied.

I. Procedural Background

Bailey was convicted after a jury trial in the Connecticut Superior Court for the Judicial District of Hartford, of two counts of sexual assault in the first degree and two counts of risk of injury to a child. In January 1997, he was sentenced to a total effective term of imprisonment of

forty years.

Bailey raised two issues on direct appeal: (1) the trial court improperly refused to give a missing witness instruction and (2) the trial court improperly instructed the jury on the state's burden of proof. Bailey's conviction was affirmed by the Connecticut Appellate Court. See State v. Bailey, 56 Conn. App. 760, 746 A.2d 194 (2000). Bailey did not file a petition for certification from the Connecticut Supreme Court at that time.

While Bailey's direct appeal was pending, he filed a petition for writ of habeas corpus in state court. The sole ground contained in the state petition was that trial counsel was ineffective for failing to subpoena the victim's mother. The petition was denied in March 2000. (See Resp't's Mem. Opp'n App. B.) Bailey did not appeal the denial. In July 2000, he filed a second petition for writ of habeas corpus in state court on the ground that appellate counsel was ineffective for not filing a petition for certification with the Connecticut Supreme Court. The second petition remains pending in state court.

In 2001, Bailey filed a petition for writ of habeas corpus in federal court, Bailey v. Warden, 3:01cv2291 (SRU). Bailey challenged his conviction on three grounds: (1) the

state court deprived him of an evidentiary hearing, (2) jury selection was unconstitutional and (3) ineffective assistance of appellate counsel. That petition was denied without prejudice in January 2002 because Bailey had not exhausted his state court remedies with regard to any ground for relief.

Following the dismissal, Bailey sought leave from the Connecticut Supreme Court to file a late appeal from the decision of the Connecticut Appellate Court. In his April 2003 petition, he included two new grounds for relief: (1) the trial court erred in sealing the victim's medical file and (2) there was insufficient evidence to establish sexual assault. (See Resp't's Mem. Opp'n App. C.) The State opposed the petition on the grounds that the petition was untimely and that Bailey had not raised either issue before the Connecticut Appellate Court. (See Resp't's Mem. Opp'n App. D.) The Connecticut Supreme Court granted leave to file the petition for certification out of time, but, on May 21, 2003, denied the petition without opinion. (See Resp't's Mem. Opp'n App. E & F.)

In this petition, dated August 13, 2003, Bailey challenges his conviction on the same grounds included in his petition for certification to the Connecticut Supreme Court.

## II. Standard of Review

The federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A claim that a state conviction was obtained in violation of state law is not cognizable in the federal court. See Estelle v. McGuire, 502 U.S. 62, 68 (1991); Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998).

Collateral review of a conviction is not merely a "rerun of the direct appeal." Lee v. McCaughtry, 933 F.2d 536, 538 (7<sup>th</sup> Cir.), cert. denied, 502 U.S. 895 (1991). Thus, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Brecht v. Abrahamson, 507 U.S. 619, 634 (1993) (citations and internal quotation marks omitted).

A prerequisite to habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of all available state remedies. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982); Daye v. Attorney General of the State of New York, 696 F.2d 186, 190 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1982); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a

matter of federal-state comity. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors which may have crept into the state criminal process. See id. "Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, . . . 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." See O'Sullivan, 526 U.S. at 845.

### III. Discussion

The respondent argues that the federal court should not review the merits of Bailey's claims because he procedurally defaulted on the claims in state court. Bailey contends that the court should review the merits of his claims because his late-filed petition for certification satisfies the exhaustion requirement. He argues further that certification was denied without opinion and that this court should not infer that the basis for the denial was procedural default.

The availability of review on the merits of a

constitutional claim is limited by various procedural barriers, such as statutes of limitation and rules governing procedural default and exhaustion of state court remedies. See Daniels v. United States, 525 U.S. 374, 381 (2001); Coleman v. Thompson, 501 U.S. 722, 750 (1991). When a habeas petitioner has failed to comply with state procedural requirements, the claims will not be reviewed on a federal petition for writ of habeas corpus unless the petitioner can demonstrate cause for his state-court default and prejudice resulting therefrom. The only exception to this prohibition is where the petitioner can demonstrate that the failure to review the federal claim will result in a fundamental miscarriage of justice. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (citations omitted).

The respondents contend that the federal court should decline to review the merits of Bailey's claims and dismiss the petition because the Connecticut Supreme Court denied certification based upon Bailey's procedural default, an independent and adequate state ground. Ascertaining whether the state court decision rests on independent and adequate state procedural grounds can be difficult. Thus, the state court's "reliance on state law must be clear from the face of the opinion." Fama v. Comm'r of Corr. Servs., 235 F.2d 804,

809 (2d Cir. 2000)(internal citation and quotation marks omitted).

The Second Circuit has held, however, that the requirement that a state court decision's reliance on state law must be clear from the face of the opinion does not apply where the state court affirms without opinion "unless there is good reason to question whether there is an independent and adequate state ground for the decision." Quirama v. Michele, 983 F.2d 12, 14 (2d Cir. 1993). In Quirama, the state had argued on appeal that a claim was both meritless and procedurally barred. The state court affirmed the conviction without discussion. The Second Circuit held that "there is no good reason to believe that the [appellate court's] silence reflects a decision on the merits." Id. This reasoning was applied by a district court where there was no reasoned opinion addressing the particular claim and the state argued that the claim was both unpreserved and without merit. See Kirby v. Senkowski, 141 F. Supp. 2d 383, 394 (S.D.N.Y. 2001), aff'd, 61 Fed. Appx. 765, 2003 WL 1973614 (2d Cir. Apr. 23, 2003) (summary order).

As in Kirby, there is no reasoned opinion addressing the claims Bailey asserts in this petition. The claims were presented for the first time to the Connecticut Supreme Court

in the late-filed petition for certification. The argument for application of a procedural bar is stronger here than in Kirby or Quirama. In both of those cases, the state had opposed the claim as barred procedurally and lacking merit. Here, the state opposed Bailey's petition for certification only on the grounds that it was untimely and procedurally barred. The state did not address the merits of the claims. Clearly, the Connecticut Supreme Court rejected the timeliness argument when it permitted the petition to be filed out of time. Thus, the only argument left for the court to consider was the procedural bar.

Further, a request for certification presupposes that the Connecticut Appellate Court has considered the claim and issued an adverse decision. The criteria upon which the Connecticut Supreme Court bases its decision are set forth in the Connecticut Practice Book at section 84-2.<sup>1</sup> A review of

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<sup>1</sup>Section 84-2 provides:

Certification by the supreme court on petition by a party is not a matter of right but of sound judicial discretion and will be allowed only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of the reasons which will be considered:

(1) Where the appellate court has decided a question of substance not theretofore determined by the supreme court or has decided it in a way probably

that section indicates that, usually, the Connecticut Supreme Court determines whether to grant certification based upon the action of the appellate court on the issues included in the petition for certification. Here, the Connecticut Appellate Court was not afforded an opportunity to rule on Bailey's claims. Thus, the court concludes that the denial of certification was premised on Bailey's procedural default, an independent and adequate state ground.

To obtain review of this claim, Bailey must demonstrate both cause for his default and prejudice resulting therefrom or that denial of review will result in a fundamental miscarriage of justice. Regarding cause, Bailey states

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not in accord with applicable decisions of the appellate court.

(2) Where the decision under review is in conflict with other decisions of the appellate court.

(3) Where the appellate court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by any other court, as to call for an exercise of the supreme court's supervision.

(4) Where a question of great public importance is involved.

(5) Where the judges of the appellate panel are divided in their decision or, though concurring in the result, are unable to agree upon a common ground of decision.

Connecticut Practice Book § 84-2.

only that his attorney did not raise these issues on direct appeal.

In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. Murray v. Carrier, 477 U.S., at 488, . . . . Objective factors that constitute cause include "'interference by officials'" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." Ibid. In addition constitutionally "[i]neffective assistance of counsel . . . is cause." Ibid. Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. Id., at 486-488.

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991).

Bailey has not identified any objective factors showing that trial counsel was prevented from raising these issues on appeal. In addition, Bailey has not raised in this action, or pursued successfully in state court, a claim of ineffective assistance of trial counsel. Thus, the court concludes that Bailey has not demonstrated cause to excuse his procedural default. Because Bailey has not shown cause for the procedural default, the court need not address the prejudice prong of the test. Thus, Bailey's procedural default precludes federal review of his claims.

The Supreme Court interprets the fundamental miscarriage of justice exception to mean that the constitutional violation "has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). Nowhere does Bailey argue that he is innocent of all charges. Thus, the exception does not apply. See Schlup v. Delo, 513 U.S. 298, 316 (1995) (requiring that petitioner must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error" to satisfy the fundamental miscarriage of justice exception). Accordingly, the court declines to review the merits of Bailey's claims.

#### IV. Conclusion

The petition for a writ of habeas corpus [**doc. #2**] is **DENIED**. The Clerk is directed to enter judgment and close this case.

The Supreme Court has held that,

[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists

of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). In addition, the Court stated that, "[w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id. This court concludes that a plain procedural bar is present here; no reasonable jurist could conclude that Bailey did not procedurally default on his claims in state court or that he should be permitted to proceed further. Accordingly, a certificate of appealability will not issue.

**SO ORDERED** this \_\_\_\_\_ day of January, 2004, at Bridgeport, Connecticut.

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Judge

\_\_\_\_\_/S/\_\_\_\_\_  
Warren W. Eginton  
Senior United States District