UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

HOWARD ALLEN, Petitioner,	:	
	:	PRISONER
v.	:	Case No. 3:04CV306 (MRK)
	:	
THERESA LANTZ and DAVE STRANGE, Respondents.	:	

RULING AND ORDER

Petitioner, an inmate at the Osborn Correctional Institution in Somers, Connecticut, brings this action *pro se* for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his August 1990 state court conviction. For the reasons set forth below, the petition is DISMISSED.

I.

In August 1990, in the Connecticut Superior Court for the Judicial District of Fairfield at Bridgeport, a jury convicted Petitioner of manslaughter in the first degree, and the court sentenced Petitioner to twenty years imprisonment. *See Allen v. Warden, State Prison*, Nos. CV 90 1107 S, CV 92 1496 S, 1993 WL 293973, at *2 (Conn. Super. Ct. Aug. 2, 1993). The Connecticut Appellate Court affirmed the conviction on June 30, 1992. *See State v. Allen*, 28 Conn. App. 81 (1992). On September 17, 1992, the Connecticut Supreme Court denied certification to appeal the decision of the Connecticut Appellate Court. *State v. Allen*, 223 Conn. 920 (1992).

In 1990, Petitioner filed a petition for writ of habeas corpus in state court and then, in 1992, filed a second habeas petition, raising various claims in both petitions, including

ineffective assistance of counsel. *See Allen v. Warden, State Prison*, Nos. CV 90 1107 S, CV 92 1496 S, 1993 WL 293973, at *1 (Conn. Super. Ct. Aug. 2, 1993). On August 2, 1993, after an evidentiary hearing, Connecticut Superior Court Judge Sferrazza dismissed both petitions, a decision which Petitioner did not appeal, because, as he states, "My certification was denied." Petition [doc. #1], at 4. Petitioner alleges that he filed a petition for a writ of errors coram nobis and a motion to impeach the verdict in Bridgeport Superior Court[1] and claims the court denied these motions in August 2003. He claims that he did not appeal the decision because "there was no record." *Id.* at 4-5.

II.

A prerequisite to habeas relief under section 2254 is the exhaustion of all available state remedies. *See* 28 U.S.C. § 2254(b)(1)(A); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). The exhaustion requirement is not jurisdictional but is a matter of federal-state comity, designed to give state courts an opportunity to correct any errors which may have crept into the state criminal process. *See Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (per curiam). Ordinarily, the exhaustion requirement has been satisfied if the federal issue has been properly and fairly presented to the highest state court either by collateral attack or direct appeal. *See O'Sullivan*, 526 U.S. at 843. The Second Circuit has held that to "satisfy § 2254's exhaustion requirement, a petitioner must present the substance of the same federal constitutional claims that he now urges upon the federal courts to the highest court in the pertinent state." *Aparicio v. Artuz*, 269 F.3d 78, 89-90 (2d Cir. 2001).

[1]There is no indication in the Petition as to when these motions were filed. The case does not appear on Lexis or Westlaw.

However, as the Second Circuit has pointed out, "For exhaustion purposes, 'a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred.'" *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991) (quoting *Harris v. Reed*, 489 U.S. 255, 263 n.9 (1989)). In such cases, the Supreme Court has required that a prisoner "demonstrate cause for his state-court default of any federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim. The one exception to that rule . . . is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

"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." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). "Cause may be demonstrated with a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that some interference by state officials' made compliance impracticable, . . . [or that] the procedural default is the result of ineffective assistance of counsel." *Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994).

Petitioner raises three claims in his petition. He claims (1) that "the Judge refused to accept not guilty verdict then expunged the transcript;" (2) that "Assistant State's Attorney Steven Sedensky entered perjured testimony;" and (3) "denial of self-representation." Petition at 6-11. Petitioner did not raise any of these claims on direct appeal. He claims that he raised the second and third claims in the state habeas petition filed in 1990 and raised the first claim in a state habeas petition, a writ of mandamus, and in a motion to dismiss, though he also states that

this first claim was the subject of the petition for a writ of errors coram nobis and a motion to impeach the verdict. He states that he did not appeal any of the decisions rendered on these various petitions. It is unquestioned that Petitioner has failed to exhaust any of these claims by appealing the adverse decisions to the highest state court. *Aparicio*, 269 F.3d at 89-90.

Insofar as Petitioner has failed to exhaust his state remedies, his federal claim cannot proceed. Petitioner has two options: he can either continue with the state process until his claims are exhausted, or, if he asserts that his state claims have been procedurally defaulted because of his failure to appeal, he can file a new petition for habeas corpus demonstrating cause for and prejudice from the default of the state claims, or alleging actual innocence.

The petition for writ of habeas corpus [doc. # 1] is thus DISMISSED without prejudice. Petitioner's Motion for Summary Judgment and Motion for Judgment on the Pleadings [doc. # 3] is DENIED as moot. The Clerk is directed to enter judgment and close this case.[2]

The Supreme Court has recently held that "[w]hen the district court denies a habeas

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[2] Petitioner is on notice that there is now a one-year statute of limitations applicable to petitions for writs of habeas corpus filed in federal court by state prisoners. *See* 28 U.S.C. § 2244(d)(1)(A) (the limitations period begins to "run from the latest of -- the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"); *Williams v. Artuz*, 237 F.3d 147, 151 (2d Cir. 2001) (one-year statute of limitations set forth in § 2244(d)(1)(A) begins to run only after "the completion of direct appellate review in the state court system and either the completion of certiorari proceedings in the United States Supreme Court, or--if the prisoner elects not to file a petition for certiorari--the time to seek direct review via certiorari has expired"). The one-year limitations period may be tolled during the time "which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. 2244(d)(2). In addition, the Second Circuit has held that the limitations period may be equitably tolled. *See Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (adopting the position that "the one-year period is a statute of limitations rather than a jurisdictional bar so that courts may equitably toll the period"). The filing of a federal habeas petition, however, does not toll the running of the one-year limitations period for filing a federal habeas petition. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

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. . . . Where 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This Court concludes that a plain procedural bar is present here, as no reasonable jurist could conclude that Petitioner has exhausted his state court remedies or that Petitioner should be permitted to proceed further. Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: **June 22, 2004.**