

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

DENNIS LEE ADKINS :  
 :  
 v. : PRISONER  
 : Case No. 3:05CV1113 (SRU)  
 :  
 WARDEN, STATE PRISON :

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Dennis Lee Adkins (“Adkins”), an inmate confined at the Cheshire Correctional Institution in Cheshire, Connecticut, brings this action pro se for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. He pled guilty, under the Alford doctrine, to charges of felony murder, murder and carrying a pistol without a permit. On April 4, 2000, he was sentenced to a term of imprisonment of thirty-five years. For the reasons that follow, the amended petition is dismissed without prejudice.

I. Standard of Review

A prerequisite to habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of 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 Gen. of the State of New York, 696 F.2d 186, 190 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1984); 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 that 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.

The Second Circuit requires the district court to conduct a two-part inquiry. First, the petitioner must have raised before an appropriate state court any claim that he asserts in a federal habeas petition. Second, he must have “utilized all available mechanisms to secure appellate review of the denial of that claim.” Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)). “To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims ‘to the highest court of the pertinent state.’” Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994), cert. denied, 514 U.S. 1054 (1995) (quoting Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990) (“[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition.”)); Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991) (same).

## II. Discussion

Failure to exhaust state court remedies usually is raised in a motion to dismiss the petition. However, the court may raise failure to exhaust state court remedies sua sponte where petitioner’s failure to present his claims to the state’s highest court is apparent from the face of the petition. See Granberry v. Greer, 481 U.S. 129, 133 (1987) (holding that a circuit court may

raise sua sponte a habeas petitioner's failure to exhaust state remedies); Magouirk v. Phillips, 144 F.3d 348, 357 (5<sup>th</sup> Cir. 1998) (noting that federal court can raise failure to exhaust sua sponte); United States ex rel Riley v. McVicar, No. 98 C 5634, 1998 WL 665400, at \*1 (N.D. Ill. Sept. 15, 1998) (dismissing federal habeas petition sua sponte because failure to exhaust state court remedies was apparent from the face of the petition).

Adkins raises four grounds for relief in his amended petition: (1) actual innocence; (2) ineffective assistance of counsel; (3) invalidity of his guilty plea; and (4) failure of the prosecution to disclose evidence. Adkins states that he raised the first three grounds in a petition for writ of habeas corpus filed in state court. The denial of the state petition was affirmed by the Connecticut Appellate Court. Adkins states, however, that he did not seek certification to appeal the denial to the Connecticut Supreme Court. In addition, Adkins states that he has not raised the fourth ground for relief in any state court.

The Second Circuit requires that any ground for relief in a federal habeas petition be presented to the state's highest court. Adkins clearly states that he has not complied with this requirement. He states that his attorney refused to file a petition for certification regarding the first three grounds for relief. He does not indicate that he made any attempt to file a petition for certification on his own or that he has filed a second state habeas petition to raise the fourth ground for relief. The court concludes that Adkins has not exhausted his state court remedies with regard to any ground for relief contained in the amended petition.

Adkins also seeks appointment of counsel in this matter. Because the court has concluded that the petition must be dismissed without prejudice, appointment of counsel is not warranted. Adkin's motion for appointment of counsel is denied without prejudice as moot.

III. Conclusion

The amended petition for writ of habeas corpus [**Doc. #7**] is hereby **DISMISSED WITHOUT PREJUDICE** for failure to exhaust state court remedies. In addition, Adkin's motion for appointment of counsel [**Doc. #6**] is **DENIED** without prejudice.

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 claim, 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 Adkins has exhausted his state court remedies with regard to any ground for relief contained in this petition. Accordingly, a certificate of appealability will not issue. The Clerk is directed to close this case.

**SO ORDERED** this 16<sup>th</sup> day of December 2005, at Bridgeport, Connecticut.

/s/ Stefan R. Underhill  
Stefan R. Underhill  
United States District Judge