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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

MARTIN A. CURTIS,)	
)	
Petitioner,)	
)	
v.)	C.A. 3:90CV00421
)	
DAVID A. GARRAGHTY, WARDEN,)	
)	
Respondent.)	

MEMORANDUM OPINION

This matter is before the Court on Respondent's motion to dismiss Petitioner's petition for a writ of habeas corpus. Respondent alleges that the Virginia Supreme Court denied the petition on the ground that Petitioner procedurally defaulted by failing to timely file his Petition for Appeal.

FACTS

On September 25, 1981, Petitioner Curtis was convicted on two counts of first degree murder. He was sentenced to life imprisonment. Petitioner took some action toward filing a direct appeal, but none was ultimately filed. In 1988, Curtis commenced a habeas corpus proceeding in state court. On November 30, 1988, after an evidentiary hearing, the Circuit Court of Rockingham County denied the petition. On February 28, 1989, Petitioner's attorney, Marvin Miller, sent a Petition For Appeal to the Virginia Supreme Court via Federal Express. The petition arrived at the Supreme Court the next day, March 1, 1989.

On May 10, 1989, the Virginia Supreme Court issued an order "[f]inding that the appeal was not perfected in the manner provided by law," and dismissing the Petition for Appeal. The order cited Rule 5:17(a)(1), which requires that "in the case of an appeal direct from a trial court, ... a petition for appeal must be filed with the clerk of this Court ... not more than three months after entry of the order appealed from" Petitioner filed a motion for reconsideration, which the Virginia Supreme Court treated as a petition to set aside the May 10 judgment. This motion was denied by order of the Supreme Court dated June 9, 1989.

DISCUSSION

As a general matter, federal review of a habeas corpus petition is barred if there exists an "adequate and independent state ground" for rejecting the petition. Harris v. Reed, 109 S.Ct. 1038, 103 L.Ed.2d 308, 316 (1989). As a general proposition, this doctrine serves to bar habeas claims where there has been procedural default in the state courts. Coleman v. Thompson, 895 F.2d 139 (4th Cir. 1990) (state court notice of appeal filed one day late, hence federal review was barred). In order to bar federal review, the last state court rendering a judgment must "clearly and expressly" state that its judgment rests upon a state procedural bar. Harris, 103 L.Ed.2d at 317.

Petitioner contends that this requirement was not met, because the motion for rehearing invited review on the merits. This argument is without merit. The June 9, 1989 order explicitly states that the Supreme Court treated the motion for rehearing as

a motion to set aside the May 10th dismissal. The May 10 dismissal was clearly and explicitly based upon procedural default, and thus qualifies under Harris.

Although state procedural default will usually suffice to bar federal review, this Court may properly look to the adequacy of the state grounds. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977) (reviewing the adequacy of the state contemporaneous objection requirement). To be considered "adequate," the state procedural rule must be "consistently or regularly applied." Johnson v. Mississippi, 100 L.Ed.2d 575, 586 (1988) (finding no bar when procedural default was inconsistently applied). Indeed, this Circuit has reviewed procedural determinations of the Virginia Supreme Court to assess their adequacy. Johnson v. Muncy, 830 F.2d 508 (4th Cir. 1987) (rejecting state grounds as inadequate).

This Court finds that the grounds for dismissal stated by the Virginia Supreme Court are inadequate to bar federal habeas review. Although this Court does not sit in an appellant capacity over the Supreme Court of Virginia, review of that Court's decision is appropriate to determine whether federal review of habeas claims is barred.

The Petitioner in this case delivered his Petition for Appeal to Federal Express within 90 days, and within 3 calendar months, of the date of entry of the trial court's order. Rule 5:5(b) of the Rules of the Supreme Court of Virginia provides that "Any document required to be filed with the clerk of this Court ... shall be deemed to be timely filed if it is mailed postage prepaid to the clerk of this Court by registered or certified mail ..."

Thus if Rule 5:5(b) applies to the Petition for Appeal, then delivery to Federal Express on February 28, 1990 was sufficient to make the Petition timely under Rule 5:17(a)(1). The Virginia Supreme Court's dismissal of the Petition for Appeal presumably rests upon the ground that Rule 5:5(b) does not apply because Petitioner did not "mail" the Petition by certified or registered mail.¹ Thus the grounds for the Supreme Court of Virginia's ruling is that Federal Express delivery does not constitute "mailing" within the meaning of Rule 5:5(b).

Rule 5:5(b) was enacted "(1) to circumvent the inconvenience of having to personally appear in the Clerk's office to effect a filing, and (2) to protect a party from those delays which often occur in the regular dispatch of mail and naturally are outside a party's control." Reese v. Wampler Foods, Inc., 278 S.E.2d 870, 872 (Va. 1981). This analysis applies equally well to packages sent via Federal Express.

Using rapid delivery systems, such as Federal Express or overnight delivery, parties can continually track a document's progress. Practical experience shows such services to be equally or more reliable than the U.S. Mail. From the time of the pony express, there has always been a demand for fast and reliable delivery of mail and parcels. The widespread use of Federal Express and similar services evidences the importance of these

¹ The Virginia Supreme Court issued no opinion with either its original order or its denial of reconsideration, thus this Court must guess as to the reason behind the denial. Since February 28, 1989 is clearly within three months of November 30, 1988, this Court must presume that the Virginia Supreme Court declined to extend the provisions of Rule 5:5(b) to the Petition.

services in today's environment. There is no legitimate state interest in giving preference to the U.S. Mails over Federal Express. Nor is there any state law articulating such a preference or applying it consistently.

The Virginia Court's interpretation of "mail" as "U.S. Mail" was an arbitrary decision which denied Petitioner his right to appellate review. Under these circumstances, comity does not require that this Court give effect to the state procedural default. This Court therefore finds that the Virginia Supreme Court's refusal to apply the terms of Rule 5:5(b) to the Petition for Appeal was not an adequate and independent state ground. Since the grounds of the state decision were not adequate, this Court will proceed to consider the petition on the merits, and the Respondent's motion will be DENIED.²

Let the Clerk send a copy of the Memorandum Opinion to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE

² This resolution of the issue makes it unnecessary to consider whether Petitioner has established sufficient cause and prejudice under Murray v. Carrier, 477 U.S. 478 (1986), to overcome the procedural bar.