

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30697

DAVID THEODORE WARD, JR.,

Petitioner - Appellant

v.

WARDEN KEITH DEVILLE,

Respondent - Appellee



A True Copy

Certified order issued Nov 29, 2017

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Appeal from the United States District Court for the
Eastern District of Louisiana

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of November 29, 2017, for want of prosecution. The appellant failed to timely to comply with certificate of appealability requirements.

LYLE W. CAYCE

Clerk of the United States Court
of Appeals for the Fifth Circuit

Shea E. Pertuit

By: _____
Shea E. Pertuit, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

DAVID T. WARD, JR.

CIVIL ACTION

VERSUS

NO. 17-2292

WARDEN DEVILLE

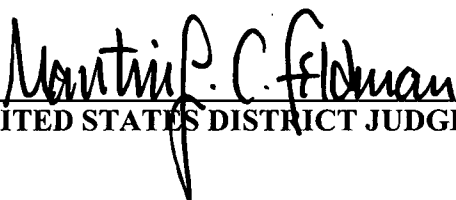
SECTION: "F"(1)

ORDER

The Court, having considered the petition, the record, the applicable law and the Report and Recommendation of the United States Magistrate Judge, and the objection to the Magistrate Judge's Report and Recommendation, hereby approves the Report and Recommendation of the United States Magistrate Judge and adopts it as its own opinion. Accordingly,

IT IS ORDERED that the federal application for habeas corpus relief filed by David T. Ward, Jr., is **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 24th day of July, 2017.


UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

DAVID T. WARD, JR.

CIVIL ACTION

VERSUS

NO. 17-2292

WARDEN DEVILLE

SECTION: "F"(1)

J U D G M E N T

The Court, having considered the petition, the record, the applicable law and for the written reasons assigned;

IT IS ORDERED, ADJUDGED, AND DECREED that the federal application for habeas corpus relief filed by David T. Ward, Jr., is **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 24th day of July, 2017.


UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

DAVID T. WARD, JR.

CIVIL ACTION

VERSUS

NO. 17-2292

WARDEN DEVILLE

SECTION: "F"(1)

REPORT AND RECOMMENDATION

This matter was referred to this United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Upon review of the record, the Court has determined that this matter can be disposed of without an evidentiary hearing. See 28 U.S.C. § 2254(e)(2). Therefore, for all of the following reasons, **IT IS RECOMMENDED** that the petition be **DISMISSED WITH PREJUDICE**.

Petitioner, David T. Ward, Jr., is a state prisoner incarcerated at the Winn Correctional Center in Winnfield, Louisiana. On July 21, 2014, he pleaded guilty to the following offenses, pleaded guilty to being a second offender, and was sentenced to the following terms of imprisonment: (1) distribution of marijuana or synthetic cannabinoids; fifteen years imprisonment without benefit of probation or suspension of sentence;¹ (2) distribution of alprazolam, ten years;

¹ This sentence was enhanced based on petitioner's status as a second offender.

(3) distribution of marijuana or synthetic cannabinoids, fifteen years; (4) distribution of alprazolam, ten years; and (5) second offense possession of marijuana, five years.²

On or about August 8, 2014, petitioner filed a “Motion for Reconsideration” with the state district court.³ That motion was denied on August 12, 2014.⁴

On or about August 12, 2014, petitioner filed a “Motion to Quash the Habitual Offender Adjudication” and a “Response and Objection to Habitual Offender Bill of Information” with the state district court.⁵ Those motions were denied on August 20, 2014.⁶

On or about August 13, 2014, petitioner filed a “Motion to Reconsider Sentence” with the state district court.⁷ That motion was also denied on August 20, 2014.⁸

On or about February 9, 2015, petitioner filed a “Motion to Correct an Illegal Sentence/Quash Multiple Bill” with the state district court.⁹ That motion was denied on February 19, 2015.¹⁰ Petitioner sought supervisory review, and the Louisiana First Circuit Court of Appeal denied relief on June 2, 2015.¹¹ The Louisiana Supreme Court then likewise denied his related writ application on May 27, 2016.¹²

² State Rec., Vol. 1 of 1, minute entry dated July 21, 2014; State Rec., Vol. 1 of 1, guilty plea form.

³ State Rec., Vol. 1 of 1.

⁴ State Rec., Vol. 1 of 1, Order dated August 12, 2014; State Rec., Vol. 1 of 1, Reasons for Judgment dated August 12, 2014.

⁵ State Rec., Vol. 1 of 1.

⁶ State Rec., Vol. 1 of 1, Order dated August 20, 2014.

⁷ State Rec., Vol. 1 of 1.

⁸ State Rec., Vol. 1 of 1, Order dated August 20, 2014.

⁹ State Rec., Vol. 1 of 1.

¹⁰ State Rec., Vol. 1 of 1, Order dated February 19, 2015.

¹¹ State v. Ward, No. 2015 KW 0519 (La. App. 1st Cir. June 2, 2015); State Rec., Vol. 1 of 1.

¹² State ex rel. Ward v. State, 193 So.3d 146 (La. 2016); State Rec., Vol. 1 of 1.

On or about July 1, 2016, petitioner filed an application for post-conviction relief with the state district court.¹³ That application was denied on August 26, 2016.¹⁴ Petitioner then filed an application for supervisory writs which was similarly denied by the state district judge on October 10, 2016.¹⁵

On or about February 28, 2017, petitioner filed the instant federal application seeking habeas corpus relief.¹⁶ On his application form, he listed three claims.

In his first claim, which he titled “Jurisdictional Defects; violation of Due Process Clauses; violation of United States Constitution,” petitioner stated:

The court used false information to enhance the petitioner’s sentence. The district attorney failed to amend the Bill of Information and indictment. The court lacked jurisdiction to accept the invalid guilty plea in the Multiple Offender Hearing. The court enhanced count (1) Distribution of Marijuana illegally under LA R.S. 15:529.1. Moreover, the court enhanced count (5) Possession of Marijuana to a second offense with incorrect information. Prior charge for LA R.S. 15:529 of Distribution of Marijuana in docket # 07-CF-015820 is non-reactive, nonresponsive, false, and invalid.¹⁷

In his second claim, which he titled “The plea of the defendant was not intelligently or voluntarily tendered on grounds of ineffective counsel, intimidation, and threatening measures,” he stated:

The petitioner’s attorney Marion Farmer wasn’t present, he sent James Burke, his associate, instead. Mr. Burke had little to no knowledge of the petitioner’s case, his background, and no concern for his best interests. The district attorney told the petitioner’s attorney that if he didn’t take the plea, he would receive a fourth offender enhancement under LA R.S., and receive a life sentence without parole. If the petitioner knew at the time about the false charges to enhance his punishment he would have objected then. Less than a month later the petitioner found out in

¹³ State Rec., Vol. 1 of 1.

¹⁴ State Rec., Vol. 1 of 1, Order dated August 26, 2016.

¹⁵ State Rec., Vol. 1 of 1.

¹⁶ Rec. Doc. 5. The application was filed in the United States District Court for the Western District of Louisiana; however, it was subsequently transferred to this Court. Rec. Doc. 2.

¹⁷ Rec. Doc. 5, p. 6.

prison and filed a "Response and Objection to Habitual Offender Bill of Information," which was denied on 8-20-14.¹⁸

In his third claim, which he titled "Ineffective assistance of counsel," he stated:

At no time did the defense attorney object [to] the allegations in the Multiple Offender Hearing, nor did he investigate the basis for the enhancement. He should have immediately filed a Motion to Quash before the enhancement was put into effect. Moreover, the petitioner's attorney Marion Farmer sent his associate, James Burke, to handle the defendant's case when 15 years of his life were at stake. James Burke obviously didn't care about the best interests of the defendant, nor knew anything about the case or his background.¹⁹

Although not technically listed as a claim, petitioner also stated on his federal application:

Walter Reed, the head District Attorney at the time of my conviction, has been founded [sic] guilty of numerous crimes. He is the one who set the standards for crime enhancements. This wasn't raised prior due to him being convicted somewhat recently.²⁰

In connection with his federal application, petitioner additionally submitted a rambling memorandum in an effort to further explain his claims.²¹ That memorandum, however, did little to cast his claims in a more understandable light. As far as the undersigned can decipher, petitioner's memorandum primarily argued that (1) a prior conviction from Florida was either illegal in some unexplained manner and/or was improperly used to enhance petitioner's instant charges or sentences, (2) petitioner was improperly allowed to enter pleas that did not conform to the charges alleged in the bill of information and/or multiple bill of information, (3) petitioner's sentences are excessive and/or otherwise improper, and (4) petitioner's counsel was ineffective for failing to perform an adequate investigation.

¹⁸ Rec. Doc. 5, p. 8.

¹⁹ Rec. Doc. 5, p. 10.

²⁰ Rec. Doc. 5, p. 14.

²¹ Rec. Doc. 5-1.

The state filed a response in this proceeding conceding that petitioner's application is timely but arguing, *inter alia*, that his claims are unexhausted and/or procedurally defaulted.²² The state is correct.

Regarding the exhaustion requirement, the United States Fifth Circuit Court of Appeals has explained:

A state prisoner normally must exhaust all available state remedies before he can apply for federal habeas relief. See Ex parte Royall, 117 U.S. 241, 251, 6 S.Ct. 734, 740, 29 L.Ed. 868 (1886). To have exhausted his state remedies, a habeas petitioner must have fairly presented the substance of his claim to the state courts. Picard v. Connor, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512-13, 30 L.Ed.2d 438 (1971). The exhaustion requirement is not satisfied if the prisoner presents new legal theories or factual claims in his federal habeas petition. Anderson v. Harless, 459 U.S. 4, 6-7, 103 S.Ct. 276, 277-78, 74 L.Ed.2d 3 (1982); Vela v. Estelle, 708 F.2d 954, 958 (5th Cir. 1983).

Nobles v. Johnson, 127 F.3d 409, 419-20 (5th Cir. 1997) (footnote omitted). The Fifth Circuit continued:

To meet the exhaustion requirement, “[i]t is not enough that all the facts necessary to support the federal claim were before the state courts.” Anderson, 459 U.S. at 6, 103 S.Ct. at 277. Rather, the federal habeas petitioner must have provided the state courts with a “‘fair opportunity’ to apply controlling legal principles to the facts bearing upon his constitutional claim.” Id., quoting Picard, 404 U.S. at 276-77, 92 S.Ct. at 513.

Nobles, 127 F.3d at 420.

Concerning the foregoing requirement, the United States Supreme Court has further held: “To provide the State with the necessary ‘opportunity,’ the prisoner must ‘fairly present’ his claim in each appropriate state court (including a state supreme court with powers of discretionary review)” Baldwin v. Reese, 541 U.S. 27, 29 (2004) (emphasis added). Therefore, a Louisiana

²² Rec. Doc. 9.

petitioner has exhausted his claims for federal purposes only if he has sought review of his claims in all three levels of the Louisiana state court system: the state district court, the applicable Court of Appeal, and the Louisiana Supreme Court.

As noted in the procedural history recounted above, although petitioner sought post-conviction or other collateral review on numerous occasions in the state courts, he pursued such review through all three of the required levels on only *one* occasion, i.e. with respect to the “Motion to Correct an Illegal Sentence/Quash Multiple Bill” filed on or about February 9, 2015. Therefore, only the claims asserted in that motion (i.e. claims concerning his adjudication and sentencing as a habitual offender, the purported excessiveness of his sentence, and the alleged ineffective assistance of counsel in the habitual offender proceeding) were presented to “each appropriate state court.” As a result, those claims – *and only those claims* – are exhausted.

However, despite being exhausted, those claims are also procedurally defaulted. The United States Fifth Circuit Court of Appeals has held:

A claim that a state has withheld a federal right from a person in its custody may not be reviewed by a federal court if the last state court to consider that claim expressly relied on a state ground for denial of relief that is both independent of the merits of the federal claim and an adequate basis for the court’s decision. To satisfy the “independent” and “adequate” requirements, the dismissal must “clearly and expressly” indicate that it rests on state grounds which bar relief, and the bar must be strictly or regularly followed by state courts, and applied to the majority of similar claims. This rule applies to state court judgments on both substantive and procedural grounds.

Finley v. Johnson, 243 F.3d 215, 218 (5th Cir. 2001) (citations omitted).

The last state court to consider the claims asserted in petitioner’s “Motion to Correct an Illegal Sentence/Quash Multiple Bill,” i.e. the Louisiana Supreme Court, denied those claims, stating:

Denied. Relator's sentencing claims are not cognizable on collateral review. La.C.Cr.P. art. 930.3; State ex rel. Melinie v. State, 93-1380 (La. 1/12/96), 665 So.2d 1172; see also State v. Cotton, 09-2397 (La. 10/15/10), 45 So.3d 1030; State v. Thomas, 08-2912 (La. 10/16/09), 19 So.3d 466. We attach hereto and make a part hereof the Court of Appeal's written reasons denying writs.²³

All three of the authorities cited by the Louisiana Supreme Court in denying relief clearly concern procedural matters: article 930.3 limits the grounds on which a prisoner may seek post-conviction relief; the Melinie decision held that article 930.3 does not allow post-conviction challenges to sentencing errors; and Cotton and Thomas held that article 930.3 and Melinie bar post-conviction claims alleging ineffective assistance of counsel in sentencing matters. Moreover, federal courts have repeatedly held that article 930.3 and the cited decisions are "independent" and "adequate" state rules to support a procedural bar in federal court. See, e.g., Hull v. Stalder, No. 99-31199, 2000 WL 1598016 (5th Cir. Sept. 28, 2000) (article 930.3 and Melinie are "independent" and "adequate" state grounds to support a procedural bar); Reavis v. Hedgeman,

²³ State ex rel. Ward v. State, 193 So.3d 146 (La. 2016); State Rec., Vol. 1 of 1. In the attached decision from the Louisiana First Circuit Court of Appeal, that court had similarly denied relief, stating:

WRIT DENIED. In the district court's written reasons for judgment, dated August 12, 2014, it appears that the court mistakenly referred to the prior felony conviction from the state of Florida as "Distribution of Marijuana." The attached criminal court minutes and the Florida case file for docket number 07-CF-015820 clearly reflect that relator entered a plea of nolo contendere and was adjudicated guilty of possession of a controlled substance (a third degree felony) in January 2010 in the 20th Judicial Circuit in Lee County Florida. Accordingly, relator's contention that the habitual offender adjudication and sentence are illegal is without merit. Furthermore, relator's sentence was the result of a negotiated plea. A defendant cannot seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. See La. Code Crim. P. art. 881.2(A)(2). The proper manner to attack the allegations of a habitual offender bill and claim that a conviction alleged in the petition is invalid is in a written response filed after the filing of the habitual offender petition. Any challenge to a previous conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence. See La. R.S. 15:529.1 (D) (1) (b). Moreover, relator's claim of ineffective assistance of counsel at the guilty plea and habitual offender proceedings is in the nature of a claim for postconviction relief, which may not be raised in a motion to correct an illegal sentence or in an application for postconviction relief. See La. Code Crim. P. art. 930.3; State v. Cotton, 2009-2397 (La. 10/15/10), 45 So.3d 1030 (per curiam).

State v. Ward, No. 2015 KW 0519 (La. App. 1st Cir. June 2, 2015); State Rec., Vol. 1 of 1.

Civ. Action No. 15-1982, 2015 WL 7307329, at *6-7 (E.D. La. Nov. 6, 2015) (article 930.3, Melinie, and Cotton are “independent” and “adequate”), adopted, 2015 WL 7306440 (E.D. La. Nov. 19, 2015); Williams v. Vannoy, Civ. Action No. 14-1914, 2015 WL 3505116, at *6-7 (E.D. La. June 3, 2015) (same); Holmes v. Cooper, Civ. Action No. 12-1350, 2013 WL 694073, at *7 (E.D. La. Jan. 22, 2013) (article 930.3, Melinie, and Thomas are “independent” and “adequate”), adopted, 2013 WL 695352 (E.D. La. Feb. 26, 2013).

Because the Louisiana Supreme Court rejected a petitioner’s exhausted claims based on independent and adequate state procedural rules, “federal habeas review is barred unless the petitioner demonstrates either cause and prejudice or that a failure to address the claim will result in a fundamental miscarriage of justice.” Hughes v. Johnson, 191 F.3d 607, 614 (5th Cir. 1999). In the instant case, petitioner demonstrates neither.

“To establish cause for a procedural default, there must be something external to the petitioner, something that cannot fairly be attributed to him.” Johnson v. Puckett, 176 F.3d 809, 816 (5th Cir. 1999) (quotation marks omitted). Objective factors that can constitute cause include interference by officials that makes compliance with the state procedural rule impracticable, a showing that the factual or legal basis for the claim was not reasonably available to counsel, and ineffective assistance of counsel. Romero v. Collins, 961 F.2d 1181, 1183 (5th Cir. 1992). Here, petitioner has not argued, much less established, cause for this procedural default. “Absent a showing of cause, it is not necessary for the court to consider whether there is actual prejudice.” Martin v. Maxey, 98 F.3d 844, 849 (5th Cir. 1996).

In that petitioner has not met the “cause and prejudice” test, this Court need consider his exhausted claims only if the application of the procedural bar would result in a “fundamental

miscarriage of justice.” However, in order to establish that there would be a “fundamental miscarriage of justice,” a petitioner must “make a persuasive showing that he is actually innocent of the charges against him. Essentially, the petitioner must show that, as a factual matter, he did not commit the crime for which he was convicted.” Finley v. Johnson, 243 F.3d 215, 220 (5th Cir. 2001) (citations omitted).

Petitioner has not made a showing of actual innocence. On the contrary, by pleading guilty, petitioner admitted his role in the crimes.²⁴ In light of his pleas, petitioner would face a daunting burden to present a credible “actual innocence” claim. Specifically, the United States Supreme Court has explained: “To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be *exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence* – that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.” Schlup v. Delo, 513 U.S. 298, 324 (1995) (emphasis added). Here, petitioner has presented no new evidence of the type or caliber referenced in Schlup.²⁵

²⁴ For example, petitioner signed the guilty plea form in which he acknowledged: “I am entering this guilty plea because I did in fact commit the crime(s).” State Rec., Vol. 1 of 1, guilty plea form, ¶ 4.

²⁵ Moreover, out of an abundance of caution, the undersigned notes that petitioner’s procedurally defaulted claims concern in part alleged noncapital sentencing errors -- and it is unclear whether the “actual innocence” exception is available *at all* to escape the procedural bar of such claims.

In Haley v. Cockrell, 306 F.3d 257 (5th Cir. 2002), the United States Fifth Circuit Court of Appeals, after noting that a split existed among the circuits on that issue, held that the “actual innocence” exception is available to petitioners in noncapital proceedings who claim they were erroneously sentenced as multiple offenders. Id. at 265-66. However, the Haley court held that, when barred claims dealt with such alleged sentencing errors, the “actual innocence” requirement is met only when the petitioner shows that “he would have not been legally eligible for the sentence he received.” Id. at 264. The Supreme Court subsequently vacated the Haley decision on other grounds and remanded the case to the Fifth Circuit. Dretke v. Haley, 541 U.S. 386 (2004). In so doing, the Supreme Court declined to answer the question of whether the “actual innocence” exception applies to noncapital sentencing errors. Id. at 393-94.

The undersigned does not attempt to answer the question left open by the Supreme Court. Nevertheless, even if the “actual innocence” exception is available to petitioner’s defaulted claims regarding noncapital sentencing errors, he has failed to present any evidence whatsoever showing that he was legally ineligible for the habitual offender

Accordingly, for the foregoing reasons, petitioner's *exhausted* claims are procedurally defaulted and barred from federal review.

For the following reasons, it is likewise clear that petitioner's remaining *unexhausted* claims are also procedurally defaulted. Procedural defaults arise not only in the traditional manner discussed above; they can also arise in another way. Specifically, the United States Fifth Circuit Court of Appeals has explained:

A procedural default also occurs when a prisoner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Coleman [v. Thompson], 501 U.S. [722,] 735 n. 1, 111 S.Ct. [2546,] 2557 n. 1, [115 L.Ed.2d 640 (1991)].

Nobles v. Johnson, 127 F.3d 409, 420 (5th Cir. 1997).

As the state correctly notes in its response, petitioner's remaining claims are unexhausted because they either were not presented to the state courts at all or were presented at only some, *but not all*, three levels of the Louisiana judicial system. Further, if petitioner were now to attempt to return to the state courts to exhaust those claims, it is clear that the state courts would find the claims procedurally barred. In fact, in denying petitioner post-conviction relief in 2016, the Louisiana Supreme Court expressly advised him:

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, see 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive

sentence he received. Thus, he has not demonstrated that a miscarriage of justice will result from application of the procedural bar to his sentencing claims.

application applies, relator has exhausted his right to state collateral review. The District Court is ordered to record a minute entry consistent with this per curiam.²⁶

Here, not only would any new attempt by petitioner be subject to immediate dismissal by the state courts as an improper successive application under article 930.4,²⁷ it would also be subject to dismissal as time-barred under the two-year limitations period of article 930.8, in that petitioner's convictions became final more than two years ago in 2014.²⁸

As with claims that are subject to a traditional procedural default, claims subject to a technical procedural default of this type are likewise barred from federal review unless the petitioner can demonstrate either (1) the existence of "cause" and "prejudice" or (2) that a failure to address the claims will result in a "fundamental miscarriage of justice." See, e.g., Bagwell v. Dretke, 372 F.3d 748, 756-57 (5th Cir. 2004). For the reasons already explained previously in this opinion, petitioner has not made either of those showings in the instant case.

²⁶ State ex rel. Ward v. State, 193 So.3d 146, 146-47 (La. 2016); State Rec., Vol. 1 of 1.

²⁷ For example, the court notes that petitioner's last attempt to seek post-conviction review in the state district court was in fact expressly denied on that very basis. State Rec., Vol. 1 of 1, Order dated August 26, 2016.

²⁸ See State v. Counterman, 475 So.2d 336, 338 (La. 1985) (conviction and sentence are final upon the failure of the defendant to make a timely motion for appeal). Louisiana law provides:

A. A motion for an appeal may be made orally in open court or by filing a written motion with the clerk. The motion shall be entered in the minutes of the court.

B. The motion for an appeal must be made no later than:

(1) Thirty days after the rendition of the judgment or ruling from which the appeal is taken.

(2) Thirty days from the ruling on a motion to reconsider sentence filed pursuant to Article 881.1, should such a motion be filed.

La. Code Crim. P. art. 914. As noted, petitioner's motion to reconsider sentence was denied on August 12, 2014. State Rec., Vol. 1 of 1, Order dated August 12, 2014; State Rec., Vol. 1 of 1, Reasons for Judgment dated August 12, 2014.

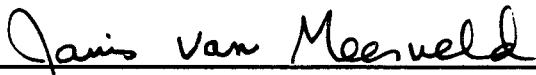
Accordingly, like petitioner's exhausted claims, his unexhausted claims are similarly procedurally defaulted and barred from federal review.²⁹

RECOMMENDATION

It is therefore **RECOMMENDED** that the federal application for habeas corpus relief filed by David T. Ward, Jr., be **DISMISSED WITH PREJUDICE**.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1); Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

New Orleans, Louisiana, this nineteenth day of May, 2017.



JANIS VAN MEERVELD
UNITED STATES MAGISTRATE JUDGE

²⁹ However, in the event the District Judge finds that petitioner's unexhausted claims are not procedurally defaulted, dismissal is nevertheless still appropriate. Under that scenario, petitioner has presented a "mixed petition" containing both exhausted and unexhausted claims which must be dismissed without prejudice. See Rose v. Lundy, 455 U.S. 509, 522 (1982) ("[B]ecause a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims."); see also Plier v. Ford, 542 U.S. 225, 230 (2004) ("Under Rose, federal district courts must dismiss mixed habeas petitions."); Alexander v. Johnson, 163 F.3d 906, 908 (5th Cir. 1998) ("A habeas petition containing both exhausted and unexhausted claims is a 'mixed' petition which should be dismissed without prejudice.").

**Additional material
from this filing is
available in the
Clerk's Office.**