

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ANDREW FLOOD,)	
)	
<i>Petitioner</i>)	
)	
v.)	<i>No. 1:12-cv-174-DBH</i>
)	
PATRICIA BARNHART,)	
)	
<i>Respondent</i>)	

**MEMORANDUM DECISION AND ORDER
ON MOTION FOR RECONSIDERATION**

Andrew Flood seeks reconsideration of my recommended decision of July 16, 2012; in that decision, I recommended that the court dismiss the instant habeas petition on the ground that it qualified as a “second or successive” petition that could not go forward without the permission of the First Circuit, which he had not obtained. *See* Recommended Decision on 28 U.S.C. § 2254 Petition (“Recommended Decision”) (ECF No. 4) at 3; Petitioner’s Motion To Reconsider Recommended Decision (“Motion”) (ECF No. 11). For the reasons that follow, the motion is denied.

In gross, Flood argues that I improperly recommended the denial of the instant habeas petition (his third in this court) because, after his first petition was dismissed without prejudice for a failure to exhaust state remedies, the Law Court on June 10, 2011, ruled on the merits of his claims, entitling him to consideration by this court of the merits of those now-exhausted claims. *See* Motion ¶¶ 1-8. The premises of this argument are incorrect.

Flood’s first habeas petition was not dismissed without prejudice for failure to exhaust claims. To the contrary, the court dismissed that petition with prejudice based on Flood’s default

of procedural remedies available in state court, with respect to which Flood failed to make the requisite showing of either cause and prejudice or actual innocence. *See* Recommended Decision on 28 U.S.C. § 2254 Petition and Memorandum Decision on Motion To Reconsider Regarding Bail and Appointment of Counsel (“First Habeas Decision”) (ECF No. 20), *Flood v. Barnhart*, No. 1:11-cv-32-DBH (D. Me.) (“First Habeas Case”); Order Affirming Recommended Decision of the Magistrate Judge (ECF No. 28), First Habeas Case; *see also, e.g., Costa v. Hall*, 673 F.3d 16, 25 (1st Cir. 2012) (“As a rule, when a state prisoner has defaulted a federal claim in state court pursuant to an independent and adequate state procedural rule, federal habeas relief is barred unless the prisoner demonstrates either cause for and prejudice from the default or actual innocence.”) (citations omitted). The First Circuit denied Flood’s request for a certificate of appealability with respect to the decision, concluding that he had not made a substantial showing of the denial of a constitutional right. *See* ECF No. 38, First Habeas Case.

In its decision on Flood’s first habeas petition, this court noted that Flood had, as of that time, filed a series of rebuffed and pending motions in state court but found them “immaterial to the disposition of this 28 U.S.C. § 2254 petition because there was a clear adjudication by the post-conviction court and the Maine Law Court indicating that Flood was barred from advancing his challenges due to his failure to preserve his challenge to the revocation decision in the state courts through a timely 17-A M.R.S.A. § 1207(2) request for review.” First Habeas Decision at 5. Accordingly, this court denied Flood’s request for a stay and abeyance to permit him to exhaust his remedies in state court. *See id.* at 5-6.

Flood’s second habeas petition, which this court determined was second or successive, was dismissed without prejudice, but only to the extent that it was dismissed “without prejudice to Flood’s rights to return to this forum, after securing permission to do so from the First Circuit

Court of Appeals.” Recommended Decision on 28 U.S.C. § 2254 Petition (ECF No. 2), *Flood v. Jones*, No. 1:11-cv-00281-DBH (D. Me.) (“Second Habeas Case”) at 2; Order Affirming Recommended Decision of the Magistrate Judge (ECF No. 5), Second Habeas Case. Flood sought such permission, but it was denied. *See* ECF No. 7, Second Habeas Case.

It is true, as Flood observes, *see* Motion ¶ 7, that, on June 10, 2011, the Law Court ruled in the alternative on the merits of his claims, *see* Order Denying Certificate of Probable Cause, *Flood v. State of Me.*, Docket No. Was-11-86 (Me. June 10, 2011) (ECF No. 1-1), attached to Petition for Relief From a Conviction or Sentence by a Person in State Custody (“Third Habeas Petition”) (ECF No. 1) (“The Court has determined that Flood’s petition was untimely filed, but even if it had been timely filed, it fails on the merits and therefore no further hearing or other action is necessary to a fair disposition of the matter.”). However, that ruling did not call into question either the Law Court’s or this court’s reliance on Flood’s procedural default. “A state court does not waive a procedural default by looking beyond the default to determine if there are circumstances warranting review on the merits or by ruling on the merits in the alternative[.]” *Santiago v. Booker*, No. 07-cv-15455, 2010 WL 2105139, at *17 (E.D. Mich. May 25, 2010); *see also, e.g., Sharpe v. Bell*, 593 F.3d 372, 377 (4th Cir. 2010) (“Nor is a procedural default waived when a state court reaches the merits of a federal claim as an alternative basis for dismissal.”).¹

¹ As either an adjunct to his primary argument and/or as stand-alone arguments, Flood also contends that, (i) in the context of his first habeas petition, respondent Patricia Barnhart misled this court with respect to the underlying events leading to his probation revocation, *see* Motion ¶¶ 9-10, (ii) the state trial court violated his Fifth and Fourteenth amendment due process rights by tolling his probation period and thereby increasing it indefinitely, *see id.* ¶ 11, (iii) the requirements of the AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996) may not apply at all because, in connection with his Law Court appeal, Flood was denied the appointment of counsel and a request to have a transcript produced, and the Law Court’s determination that his claims were without merit is an unreasonable application of federal law, *see id.* ¶ 12, and (iv) the AEDPA does not apply because Flood is not seeking to have this court vacate his sentence or conviction, *see id.* ¶ 13. The first two points, as well as Flood’s challenge to the Law Court decision as contrary to federal law, implicate the merits of one or more of his habeas petitions. As discussed above, this court properly has declined to reach the merits because of Flood’s procedural default and his failure, with respect to his two later habeas petitions, to secure the required First Circuit permission for their filing. Flood does not explain, nor is it otherwise self-evident, how the Law Court’s denial of his requests (*continued on next page*)

Flood also contends that I erred when I deemed frivolous Ground Three of his third petition, the only one of his six claims that was new. *See* Motion ¶¶ 14-28. However, none of his arguments calls into question my conclusion that “[a] prisoner cannot claim ineffective assistance of counsel with respect to § 2254 petitions[.]” Recommended Decision at 2 (quoting *Herrington v. Johnson*, 159 F.3d 1357, at *1 (5th Cir. 1998)).

For the foregoing reasons, Flood’s motion for reconsideration is **DENIED**.

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 27th day of September, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

Petitioner

ANDREW FLOOD

represented by **ANDREW FLOOD**
DOWNEAST CORRECTIONAL
FACILITY
64 BASE RD
MACHIASPORT, ME 04655
PRO SE

V.

Respondent

for counsel and to obtain a transcript remove the instant petition from the ambit of the AEDPA. Flood’s assertion that he does not seek to vacate his sentence or conviction is disingenuous: the relief that he does seek, which includes his “release from illegal incarceration[.]” Third Habeas Petition at 16, is tantamount to a request to vacate his sentence or conviction.

PATRICIA BARNHART