

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHAEL RINALDI,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
FRANK GILLIS, Warden, ET AL.,	:	NO. 98-2301
Respondents.	:	
	:	

**Memorandum and Order**

YOHN, J.

March 21, 2000

Michael Rinaldi (“Rinaldi”) is a prisoner in the custody of the Commonwealth of Pennsylvania (“Commonwealth”). Before the court is Rinaldi’s petition for a federal writ of habeas corpus and related filings.

On November 18, 1982, a Pennsylvania jury convicted Rinaldi of first-degree murder and criminal conspiracy. Rinaldi filed post-trial motions and pursued his direct appeals until the Pennsylvania Supreme Court denied his petition for allocatur on September 22, 1987.

Almost seven years later, on August 25, 1994, Rinaldi filed a petition for relief under the state Post Conviction Relief Act, 42 Pa. C.S.A. § 9541 *et seq.* (1988) (“PCRA”). The state court heard argument on the question of whether Rinaldi’s seven-year delay in filing his petition prejudiced the Commonwealth in its ability to respond to the petition or in its ability to retry the case. Following a hearing, the state court dismissed Rinaldi’s PCRA petition as unreasonably and prejudicially delayed. Rinaldi appealed the dismissal to the Pennsylvania Superior Court,

which affirmed the dismissal. The Pennsylvania Supreme Court denied allocatur.

Within one year thereafter, Rinaldi instituted this action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994 & 1999 Supp.). The matter was referred to a Magistrate Judge for a Report and Recommendation. Rinaldi filed objections to the Report and Recommendation. I will dismiss the petition.

## BACKGROUND

On May 19, 1980, Rinaldi, Theodore DiPreoro (“DiPreoro”), and Edward Bianculli (“Bianculli”) drove to a deserted area near the Philadelphia Airport in Tinicum Township, Pennsylvania. *See Pennsylvania v. Rinaldi*, No. 3323-82 Trial Tr. Vol. I at 89-93 (Pa. C.P. Ct. Del. Cty. Tr. of Nov. 16, 1982) (DiPreoro testifying) [hereafter “Trial Tr. I”];<sup>1</sup> *Pennsylvania v. Rinaldi*, No. 3323-82 Trial Tr. Vol. II at 81-84 (Pa. C.P. Ct. Del. Cty. Tr. of Nov. 17, 1982) (Rinaldi testifying) [hereafter “Trial Tr. II”].<sup>2</sup> Upon arrival, the car was parked at the roadside and Rinaldi remained in the car while DiPreoro and Bianculli exited and walked into tall weeds nearby. *See* Trial Tr. I at 92-94; Trial Tr. II at 84. DiPreoro shot and killed Bianculli. *See* Trial Tr. I at 94-95; Trial Tr. II at 84. DiPreoro returned to the car, which he and Rinaldi drove back to Philadelphia. *See* Trial Tr. I at 95-96; Trial Tr. II at 85-86. In 1982, DiPreoro confessed to an unrelated killing and then confessed to killing Bianculli. *See* Trial Tr. I at 73-76. He implicated Rinaldi in the killing of Bianculli. *See* Trial Tr. I at 76. Rinaldi was arrested and, on July 27,

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<sup>1</sup> Unless otherwise indicated, I cite “Trial Tr. I” for testimony of DiPreoro.

<sup>2</sup> Unless otherwise indicated, I cite “Trial Tr. II” for testimony of Rinaldi.

1982, was charged with murder and criminal conspiracy. *See Pennsylvania v. Rinaldi*, Crim. No. 3323-82, July 27, 1982 Crim. Info. (Doc. No. 2 of State Ct. Rec.).

On November 16, 1982, Rinaldi's jury trial commenced. *See generally* Trial Tr. I. DiPretoro testified for the Commonwealth to the effect that he and Rinaldi had agreed to kill Bianculli, and that DiPretoro had then done so. *See* Trial Tr. I at 84-96. Rinaldi testified on his own behalf to the effect that he had been in the car and present when DiPretoro killed Bianculli, but that he had never intended, known of, or agreed to a plan to kill Bianculli. *See* Trial Tr. II at 80-86. On November 18, 1982, the court charged the jury on the crimes of first-degree murder, third-degree murder, voluntary manslaughter and criminal conspiracy. *See Pennsylvania v. Rinaldi*, No. 3323-82 Trial Tr. Vol. III at 39-53, 59-60 & 65-68 (Pa. C.P. Ct. Del. Cty. Tr. of Nov. 18, 1982) [hereafter "Trial Tr. III"]. On November 18, 1982, the jury returned a verdict of guilty on the counts of first-degree murder and criminal conspiracy and not guilty on the remaining two counts. *See id.*

Rinaldi filed post-trial motions, which were denied. *See* Pet. for Writ of Habeas Corpus at 5 (Doc. No. 1) [hereafter "Pet."]; C.P. Ct. Del. Cty. May 23, 1983 Order (Doc. No. 13 of State Ct. Rec.). On June 6, 1983, Rinaldi was sentenced to life in prison. *See* Cert. of Imposition of J. of Sent. No. 3323-82 (Doc. No. 15 of State Ct. Rec.). Rinaldi then appealed his conviction to the Superior Court of Pennsylvania. On January 25, 1985, that appeal was denied. *See* Pet. at 4 ¶ 9. Rinaldi's judgment of conviction became final when the Pennsylvania Supreme Court denied Rinaldi's motion for allocatur on September 22, 1987. *See* Pet. at 5 ¶ 9.

On August 25, 1994, Rinaldi filed a petition for state post-conviction relief under the Pennsylvania Post Conviction Relief Act, 42 Pa. C.S.A. § 9541 *et seq.* (1988), Act of Apr. 13,

1988 P.L. 1988-47, § 3 in I Gen. Laws of Assembly of Pa. 336 (1988) (“PCRA”). *See* Pet. at 5. The Commonwealth responded, arguing that consideration of Rinaldi’s state petition was procedurally barred under 42 Pa. C.S.A. § 9543(b) (1988) because the petition was unreasonably and prejudicially delayed. *See* Commw. Ans. to State Ct. Pet. at 1-4 (Doc. No. 17 in State Ct. Rec.). The Commonwealth argued that the delay of seven years had prejudiced its ability both to respond to the motion and to retry Rinaldi. *See id.* The Common Pleas Court considered briefs and oral argument on the question and dismissed the petition as unreasonably and prejudicially delayed. *See Pennsylvania v. Rinaldi*, C.P. Ct. Del. Cty. Mar. 15, 1995 Order, No. 3323-82 (Doc. No. 21 of State Ct. Rec.). Neither the order nor the supporting subsequent opinion addressed the merits of petitioner’s claims. *See id.*; *see also Pennsylvania v. Rinaldi*, C.P. Ct. Del. Cty. Jan. 25, 1996 Op. (Doc. No. 27 of State Ct. Rec.). The Superior Court affirmed the order of the Common Pleas Court, over one dissent. *See* Pet. at 5-6 ¶ 11; *Pennsylvania v. Rinaldi*, No. 01260 Phila. 1995 Pa. Super. Ct. June 26, 1996 Op. The Pennsylvania Supreme Court denied Rinaldi’s motion for allowance of appeal. *See* Pet. at 6 ¶ 11(c); *Pennsylvania v. Rinaldi*, No. 0721 E.D. Alloc. Dock. 1996 Pa. S. Ct. May 9, 1997 Order.

On May 1, 1998, Rinaldi filed a petition for a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994 & Supp. 1999). *See* Pet. (Doc. 1). The petition alleges three grounds for relief: first, denial of due process due to the trial court’s failure to instruct the jury on accessory-after-the-fact liability; second, that petitioner’s trial counsel was constitutionally ineffective for failing to request an instruction on accessory-after-the-fact liability; and third, that trial counsel was constitutionally ineffective for failing to call witnesses who would impeach DiPretoro. *See* Pet. at 8. The Commonwealth answered the petition, arguing that the court should not reach the

merits of Rinaldi's claims for two reasons: first, Rule 9(a) following § 2254 permits the court to bar a petition as unreasonably and prejudicially late without consideration of the merits of the claims; and second, the state court procedural bar of the Rinaldi's PCRA petition precludes federal consideration of the merits of his claims. *See* Resp. Ans. to Pet. at 4-13 (Doc. No. 4) [hereafter "Ans."]. Rinaldi filed a reply brief. *See* Pet'r Reply to Resp. Ans. to Pet. (Doc. No. 5) [hereafter "Reply"]. The matter was referred to a Magistrate Judge for Report and Recommendation, which was filed on August 31, 1999. *See* Doc. No. 6. Rinaldi filed objections thereto on September 13, 1999. *See* Doc. No. 7. Having reviewed the records and all filings, I will dismiss the petition for the reasons which follow.

## DISCUSSION

The Commonwealth argues first that Rule 9(a) following 28 U.S.C. § 2254 should preclude federal review of the merits of Rinaldi's claims.<sup>3</sup> The Commonwealth argues further that federal review of the merits of Rinaldi's claims is precluded by the state court's reliance on 42 Pa. C.S.A. § 9543(b) to dismiss the state petition on procedural grounds.<sup>4</sup> Because I find the latter persuasive, I do not address the former.

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<sup>3</sup> A brief discussion of Rule 9(a) and my reason for not applying it in this matter is reserved for Part III, *infra*.

<sup>4</sup> The argument is that state court reliance on an independent and adequate procedural rule precludes federal review of the merits of a claim. *See* Ans. at 11-13; *see also infra*, Part II.A. It is a question of federal law whether a state court rule is sufficiently "independent" and "adequate" to bar federal habeas review. *See Neely v. Zimmerman*, 858 F.2d 144, 147 (3d Cir. 1988) (quoting *Henry v. Mississippi*, 379 U.S. 443, 447 (1965)).

## I. EXHAUSTION AND ABSENCE OF STATE CORRECTIVE PROCESS

Pursuant to § 2254, the court has a duty to “entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2254(a) (1994 & 1999 Supp.).

No application shall be granted, however, unless “the applicant has exhausted the remedies available” in the state courts. *See* § 2254(b)(1)(A). A petitioner has not exhausted his state court remedies until he has “fairly presented” each claim in his petition to each level of the state courts, including the highest state court, empowered to consider it. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Evans v. Court of Comm. Pls.*, 959 F.2d 1227, 1230 (3d Cir. 1992). In order to “fairly present” a claim to the state courts, the petitioner “must present a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.” *See McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).

In this matter, the Commonwealth admits that the two claims of ineffective assistance of counsel were presented to the state courts. *See* Ans. at 2-3 ¶ 14. The exhaustion requirement will not bar consideration of a claim where “the State, through counsel, expressly waives the requirement.” *See* § 2254(b)(3). Therefore, I find that the ineffective assistance of counsel claims have been exhausted.

The Commonwealth denies, however, that the claim of trial court error was fairly presented to the state courts. *See* Ans. at 2-3 ¶ 14. Nevertheless, “[w]hen a claim is not exhausted because it has not been ‘fairly presented’ to the state courts, but state procedural rules

bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is ‘an absence of available State corrective process.’” *See McCandless*, 172 F.3d at 260 (citing § 2254(b)(1)(B)(i)). In cases where a state procedural rule “clearly forecloses state court review of the unexhausted claims,” *see Doctor v. Walters*, 96 F.3d 675, 681 (3d Cir. 1996), “applicants are considered to have procedurally defaulted their claims.” *See McCandless*, 172 F.3d at 260. The exhaustion requirement does not prohibit federal review of such procedurally defaulted claims because exhaustion is not possible, as the state court would refuse to hear the merits of the claims on procedural grounds. Compliance is therefore excused because any further attempts to assert the claim would be futile. *See Doctor*, 96 F.3d at 683.

I conclude that all of Rinaldi’s claims satisfy the exhaustion requirement because they are procedurally defaulted due to an “absence of available State corrective process.” *See* § 2254(b)(1)(b)(i). Relying on § 9543(b), the PCRA court dismissed Rinaldi’s petition after finding his delay caused the loss of both the District Attorney’s case file and the case file of the District Attorney’s Criminal Investigation Division. *See* C.P. Ct. Del. Cty. Jan. 25, 1996 Op. at 6-8. The court stated:

The information in those files, together with the leads and references therein contained, is essential not only to the issues concerning alleged ineffectiveness, *but also as to any potential retrial*. The Court found that this record supported a conclusion that the Commonwealth of Pennsylvania had suffered severe prejudice.

*See id.* at 8 (emphasis added). Thus, even if the allegation of trial error was not raised earlier, the state courts would not now consider the merits of Rinaldi’s claims because the Commonwealth has been prejudiced in its ability to retry his case. State court review of Rinaldi’s claims on their merits is clearly foreclosed, creating an absence of available state corrective process. Therefore, I

conclude that Rinaldi's claims satisfy the exhaustion requirement as procedurally defaulted.

## II. PROCEDURAL DEFAULT

Undergirding the exhaustion requirement is a respect for the sovereignty of state courts. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). State courts should be given the first opportunity to resolve federal constitutional questions implicated by a prisoner's custody. *See Murray*, 477 U.S. at 489. Similar considerations of comity and federalism led the Supreme Court to hold that federal review of the merits of a state prisoner's habeas petition is barred "when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet [independent and adequate] state procedural grounds." *See Coleman*, 501 U.S. at 729-730. "Thus, even though a prisoner may have exhausted his federal claims in the state court without having a decision on the merits, he may be unable to obtain a decision on the merits in the federal courts." *Cabrera v. Barbo*, 175 F.3d 307, 312-13 (3d Cir. 1999). Because Rinaldi's claims were procedurally defaulted, they are reviewable on their merits here only if he demonstrates: (1) that the procedural rule is not "independent" and "adequate"; (2) "cause" for his failure to comply with the procedural rule and "prejudice" therefrom; or (3) that he is actually innocent of the charge. *See Coleman*, 501 U.S. at 750; *McCandless*, 172 F.3d at 260; *Doctor*, 96 F.3d at 683.

The Commonwealth argues that because the state courts declined to consider the merits of Rinaldi's claims due to his procedural default, this court also may not consider the merits of those claims unless Rinaldi shows cause for the default and prejudice therefrom or shows his

actual innocence. *See* Ans. at 11. Rinaldi disagrees, arguing that the relevant state procedural rule is not sufficiently independent and adequate to bar federal habeas review. *See* Reply at 7-10.

**A. Independent and Adequate State Procedural Rule**

The state courts relied on § 9543(b) to bar consideration of Rinaldi's claims as unreasonably and prejudicially delayed. That section provides:

[T]he petition shall be dismissed if it appears that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

*See* 42 Pa. C.S.A. § 9543(b) (1988), Act of Apr. 13, 1988, P.L. 1988-47 § 3, *in* I Laws of the Gen'l Assembly of Pa. 336, 339 (1988).

1. Independent State Rule

A state rule is independent if its application does not turn on the construction of federal law. *See Ford v. Stepanik*, No. 97-2116, 1998 U.S. Dist. Lexis 8436, at \*13 (E.D. Pa. June 2, 1998) (holding that state waiver provision which depended on federal law was not independent). Rinaldi does not suggest that § 9543(b) is not independent. Moreover, the application and construction of § 9543(b) do not depend on federal law. Therefore, I conclude that the state court procedural rule relied upon to bar consideration of the merits of Rinaldi's PCRA petition was an

independent state ground.

2. Adequate State Procedural Rule

The Third Circuit has explained that a state rule is adequate “only if: (1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner’s claims on the merits; and (3) the state courts’ refusal in this instance is consistent with other decisions.” *See Doctor*, 96 F.3d at 683-84; *see also Cabrera*, 175 F.3d at 313. The purpose of the adequacy requirement is to ensure that, at the time of default or waiver, the petitioner had reasonable notice of the risk of such. *See Cabrera*, 175 F.3d at 313; *Doctor*, 96 F.3d at 684.

Rinaldi admits that the state courts refused to hear his claims on the merits. *See Reply* at 8. He argues, however, that § 9543(b) is neither unmistakable in its terms nor consistently applied.

Rinaldi argues first that the relevant time to determine the clarity and consistency of the law is the time his judgment of conviction became final: September 22, 1987.<sup>5</sup> *See Reply* at 9

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<sup>5</sup> The date is relevant due to a subsequent change in the law. On May 13, 1982, the Pennsylvania legislature enacted the Post Conviction Hearing Act, P.L. 1982-122 § 2, *codified at* 42 Pa. C.S.A. § 9541 *et seq.*, *reprinted in* Laws of Gen’l Assembly of Pa. 418 (1982). The relevant provisions of that law remained unchanged until after the date on which Rinaldi’s judgment of conviction became final. On April 13, 1988, the state legislature amended the Post Conviction Hearing Act by enacting the Post Conviction Relief Act, P.L. 1988-47 § 3, *codified at* 42 Pa. C.S.A. § 9541 *et seq.*, *reprinted in* Laws of Gen’l Assembly of Pa. 337 (1988). The amended provisions were effective and applied by the PCRA court when Rinaldi filed his PCRA petition. The law changed between the time Rinaldi’s judgment became final and the time he filed his petition, and the change affects whether the merits of Rinaldi’s claims should be heard by the court. *See infra* at 12-15.

(citing *Doctor*, 96 F.3d at 684). If Rinaldi were correct, his procedural rights could never change after the date his conviction became final.<sup>6</sup> Moreover, Rinaldi construes too broadly the Third Circuit’s opinion in *Doctor*. In *Doctor*, the Third Circuit explained that courts “must decide whether the rule was firmly established and regularly applied, not . . . when the [state] court relied on it, but rather as of the date of the waiver that allegedly occurred.” See *Doctor*, 96 F.3d at 684. Thus, the date of waiver, not final judgment per se, is the relevant date. By the terms of § 9543(b) as applied to Rinaldi, he defaulted his right to have the merits of his claims considered when his unreasonable delay in filing his PCRA petition prejudiced the Commonwealth’s ability to respond to the petition or to retry his case. Because Rinaldi is wrong that the date of his final judgment is critical, and because Rinaldi’s PCRA petition was filed over six years after § 9543(b) became effective, I conclude that § 9543(b) is the law to be analyzed for adequacy as a procedural bar, rather than its predecessor, 42 Pa. C.S.A. §§ 9544 & 9545 (1982).

Rinaldi next argues that § 9543(b) is not unmistakably clear. See Reply at 8. In this respect, he notes that there was no “limitation period for filing a PCRA petition” prior to 1995. See *id.* He is wrong. For seven years prior to 1995, § 9543(b) imposed limitations on delayed PCRA petitions. More important, Rinaldi does not argue that § 9543(b) is unclear either objectively or subjectively. He argues only that a later law is clear, which is irrelevant. No other argument being made, I conclude that § 9543(b), the procedural rule which the state courts

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<sup>6</sup> Of course, prisoners often are bound by changes in procedural law occurring after their conviction. Cf. *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 2063 (1997); *Landgraf v. USI Film Productions*, 511 U.S. 244, 275 n.28 (1994); *Burns v. Morton*, 134 F.2d 109, 111 (3d Cir. 1998). Moreover, Rinaldi does not suggest that application of § 9543(b) to his PCRA petition was unconstitutionally retroactive. Cf. *Landgraf*, 511 U.S. at 269-70; *Burns v. Morton*, 134 F.3d at 111.

applied to dismiss Rinaldi's PCRA petition, speaks in unmistakable terms.

Rinaldi's principal argument is that § 9543(b) was applied to his petition in a manner inconsistent with prior law. According to Rinaldi, "in 1987, the courts consistently allowed petitioners to bring [post-conviction relief] claims regardless of the delay in filing." *See Reply at 9.* Rinaldi further asserts that prior to 1995, "the courts were hesitant to dismiss a petitioner's claim due to a delay in filing a petition for relief." *See Reply at 9.* He is right about the former and wrong about the latter. I will explain.

Rinaldi is correct that prior to April 14, 1988, the state courts permitted delayed petitions to be heard on the merits. *See Reply at 8-9.* On March 11, 1987, the Pennsylvania Supreme Court declared that the doctrine of laches had no place in the criminal law and that prejudicial delay in filing a PCRA petition was relevant only to the petition's merits, not an independent ground for dismissal. *See Pennsylvania v. Weddington*, 522 A.2d 1050, 1051-52 (Pa. 1987); *see also Pennsylvania v. Johnson*, 532 A.2d 796, 799 (Pa. 1987). In so holding, the court was interpreting a law which explicitly permitted a post-conviction petition to be filed "at any time." *See Weddington*, 522 A.2d at 1051-52 (discussing Pa. C.S.A. § 9545(a) (1982), Act of May 13, 1982, P.L. No. 1982-122 § 2, *in I* Laws of the Gen'l Assembly of Pa. 417, 420 (1982)). The court expressed regret in so holding but felt constrained by statutory law which did not permit state courts to "contain the growing quagmire of collateral attacks" which bred "an intolerable disrespect for the court system of the Commonwealth." *See Weddington*, 522 A.2d at 1052.

On April 14, 1988, the state legislature unbound the state courts and made two relevant changes to the law. First, the language permitting a post-conviction petition to be "filed at any time" was deleted from § 9545(a). *See Act of Apr. 13, 1988, P.L. No. 1988-47 § 3, in I* Laws of

Gen'l Assembly of Pa. at 340-41 (1988). Second, language making a prejudicial delay grounds for dismissal was inserted in § 9543(b). *See id* at 339. That is, a rule rejected reluctantly by the state Supreme Court in 1987 was enacted explicitly by the state legislature in 1988. The unmistakable terms of the new law advised a potential petitioner that unreasonable delay in filing would be at his own risk. Rinaldi does not suggest otherwise.<sup>7</sup>

Rinaldi argues that “[p]rior to 1994, when Petitioner brought his first and only petition for post-conviction relief, the law was ‘firmly established and regularly applied’ in favor of allowing petitions to move forward, even after lengthy delays.” Reply at 10. He is wrong. Initially, I note that Rinaldi cites no case law after 1987.<sup>8</sup> Moreover, the court’s research reveals only three cases decided between 1988 and 1994 which applied the terms of § 9543(b) to delayed petitions. *See*

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<sup>7</sup> I note that even prior to the 1988 amendment to § 9543, unexplained delay in filing a petition for post-conviction relief could be fatal to the claims advanced as relevant to their merits. *See, e.g., Pennsylvania v. McAndrews*, 520 A.2d 870, 872-73 (Pa. Super. Ct. 1987) (finding delay of two and one-half years relevant to question of whether claims were frivolous); *Pennsylvania v. McGeth*, 500 A.2d 860, 866 (Pa. Super. Ct. 1985) (finding an unexplained four-year delay evidence of a frivolous claim); *Pennsylvania v. Thompson*, 495 A.2d 560, 564 (Pa. Super. Ct. 1985) (dismissing claim in light of unexplained delay of five and one-half years and lost records). Thus, § 9543(b) did not change the law wholesale but rather clarified and extended the risks a petitioner faced.

<sup>8</sup> *See* Reply at 8-10 (citing *Pennsylvania v. Johnson*, 532 A.2d 796 (Pa. 1987); *Pennsylvania v. Weddington*, 522 A.2d 1050 (Pa. 1987); *Pennsylvania v. McCabe*, 519 A.2d 497 (Pa. Super. Cr. 1986); *Pennsylvania v. Blagman*, 504 A.2d 883 (Pa. Super. Ct. 1986); *Pennsylvania v. Berthesi*, 504 A.2d 891 (Pa. Super. Ct. 1986); *Pennsylvania v. Taylor*, 502 A.2d 195 (Pa. Super. Ct. 1985); *Pennsylvania v. Hairston*, 470 A.2d 1004 (Pa. Super. Ct. 1984); *Pennsylvania v. Kenney*, 463 A.2d 1142 (Pa. Super. Ct. 1983)). For the proposition that state courts were hesitant to dismiss post-conviction petitions due to delay alone prior to 1995, Rinaldi cites the recent decision of the Third Circuit in *Lambert v. Blackwell*, 134 F.3d 506, 524 n.33 (3d Cir. 1997). *See* Reply at 8. The cases on which the *Lambert* language relied all predate the 1988 amendment to § 9543(b). *See Lambert*, 134 F.3d at 524 n.33. Moreover, the statement in *Lambert* was dictum noting that a question of waiver had not been tested under the post-1995 PCRA. *See id.* It was unrelated to § 9543(b). Therefore, it does not help Rinaldi.

*Clark v. Pennsylvania*, 892 F.2d 1142 (3d Cir. 1989); *Pennsylvania v. McGriff*, 638 A.2d 1032 (Pa. Super. Ct. 1994); *Pennsylvania v. Weinder*, 577 A.2d 1364 (Pa. Super. Ct. 1990). In each case, the courts applied the law in a manner consistent with its amended terms: an unreasonable and prejudicial delay in filing a petition would warrant dismissal without consideration of its merits.<sup>9</sup>

In *Clark v. Pennsylvania*, the Third Circuit predicted that a 16-year passage of time between conviction and a PCRA petition, combined with the loss of the trial transcript and the death of the trial judge, would lead the state courts to refuse to consider the merits of a petition on the ground that it was unreasonably and prejudicially delayed. *See id.*, 892 F.2d at 1148. The import is that the court recognized that prejudicial delay alone would justify dismissal under the new law. *See id.* at 1148. The following year, in *Pennsylvania v. Weinder*, the Pennsylvania Superior Court held that a PCRA petition was unreasonably delayed when filed less than nine months after the effective date of the new law and five years after final judgment of conviction. *See Weinder*, 577 A.2d at 1375.<sup>10</sup> As with the Third Circuit's decision in *Clark*, *Weinder* made clear that prejudicial delay, *even delay occurring before amendment to § 9543(b)*, would lead the

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<sup>9</sup> Subsequent decisions have applied § 9543(b) in a manner consistent with the language of the section and the earlier cases cited. *See, e.g., Hampton v. Vaughn*, No. 96-470, 1996 U.S. Dist. Lexis 9076 (E.D. Pa. June 27, 1996) (remanding case to magistrate judge for determination of whether § 9543(b) would bar state court review of claims); *DiVentura v. Stepanik*, No. 95-0443, 1995 U.S. Dist. Lexis 20563 (E.D. Pa. June 21, 1995) (concluding petitioner would be barred by § 9543(b)); *Pennsylvania v. Bell*, 706 A.2d 855 (Pa. Super. Ct. 1998) (strictly applying § 9543(b) and saying that relevant date of prejudice is the date of claim presentation); *Pennsylvania v. Young*, 695 A.2d 414 (Pa. Super. Ct. 1997) (dismissing claim under § 9543 due to five-month delay and death of witness). Although not relied upon to prove consistent application at the time of Rinaldi's filing, they are additional evidence of a lack of inconsistency.

<sup>10</sup> The *Weinder* court remanded the matter to the trial court for a hearing on the question of prejudice. *See Weinder*, 577 A.2d at 1375.

state courts to dismiss PCRA petitions without resolution of the merits. *See also McGriff*, 638 A.2d at 1036 (dismissing PCRA petition challenging ten year-old plea agreement where notes of testimony were lost, no explanation for delay was given, and delay prejudiced Commonwealth in its ability to respond to the petition). In each case, unreasonable and prejudicial delay precluded consideration of the merits of the PCRA petitions. I conclude that the decisions were consistent with the language of § 9543(b), with one another, and with that of the PCRA court in Rinaldi's case.

In sum, Rinaldi admits that the merits of his claims were not adjudicated by the PCRA courts. Rinaldi does not allege that the terms of § 9543(b) were less than unmistakably clear. He alleges only that judicial interpretation of prior law would have required a different result. The application of laws not affecting Rinaldi's default is not a question for the court. Further, petitioner is wrong that § 9543(b), as applied to him, was not applied consistently with other relevant decisions. Following enactment of § 9543(b), courts recognized that the rule requires dismissal of a PCRA petition without consideration of the merits if the filing of the petition was unreasonably delayed and prejudicial to the Commonwealth's ability to retry the petitioner or to respond to the petition. Rinaldi cites no case after the enactment of the law which demonstrates that § 9543(b) was interpreted in any other way. I find that § 9543(b) is unmistakable in its terms and has been consistently applied. I conclude, therefore, that § 9543(b) is an independent and adequate state procedural rule which will bar consideration of the merits of Rinaldi's claims.

## **B. Cause and Prejudice**

A federal court may review the merits of claims which were procedurally defaulted in the state courts if the petitioner is able to demonstrate cause for the state procedural default and prejudice therefrom, or is able to demonstrate that procedural default will result in a fundamental miscarriage of justice in that the petitioner is “actually innocent.” *See Schlup v. Delo*, 513 U.S. 298, 320-22 (1995); *Coleman*, 501 U.S. at 750-51; *Cabrera*, 175 F.3d at 311.

Rinaldi allowed almost seven years to pass between the date his judgment of conviction became final and the filing of his PCRA petition. Because his delay worked to the prejudice of the Commonwealth, he defaulted his right to have the state courts consider the merits of his claims. At issue is whether he can show cause for the default.

To prevail, a federal habeas petitioner must show that his failure to comply with state procedural rules was not attributable to him. *See Murray*, 477 U.S. at 488; *Coleman*, 501 U.S. at 753; *Cabrera*, 175 F.3d at 311. Federal courts insist on a showing that an influence external to petitioner caused his failure to comply with the state court procedural rule. *See Murray*, 477 U.S. at 488; *Coleman*, 501 U.S. at 753; *Cabrera*, 175 F.3d at 311. For example, a petitioner may demonstrate cause by showing that the government created an impediment to his ability to comply with the rule, or by showing that the legal or factual basis for his claim was unavailable previously. *See Murray*, 477 U.S. at 488. It will not suffice for a plaintiff to demonstrate inadvertence or ignorance. *See id.*

In this matter, Rinaldi has alleged only ignorance. The Commonwealth avers that “[p]etitioner had no valid reason or explanation for not pursuing his claims in court before the attorneys’ files were lost or destroyed and memories faded.” *See Ans.* ¶ 21 at 4. Rinaldi denies this, responding that:

At the time of final judgment by the Pennsylvania Supreme Court in 1987, the Post-Conviction Hearing Act had no limitations as to when a petitioner could file for relief. *Based on this understanding of the law*, petitioner was unaware that any delay in filing could be construed as prejudicial to Respondents.

*See Reply* ¶ 21 at 2 (emphasis added). Rinaldi's ignorance of the change in law, however, does not rise to the level of "cause" necessary to permit this court to consider the merits of his petition.<sup>11</sup> *See Murray*, 477 U.S. at 488; *Coleman*, 501 U.S. at 753. Rinaldi does not aver that anyone hindered his ability to file his petition or that any factor external to himself led to his misunderstanding. In fact, he admits that he knew the basis of his claims at the time his conviction became final. *See Tr. of Oct. 26, 1994 C.P. Ct. Del. Cty. PCRA Hr'g* at 13. Also, he knew that legal counsel would be appointed if he was unable to afford counsel. *See id.* at 11-14. Because Rinaldi has failed to allege an external impediment which prevented him from timely presenting his PCRA petition, there is no question of cause. *See Moscato v. Federal Bureau of Prisons*, 98 F.3d 757, 762 (3d Cir. 1996). I conclude that Rinaldi has not demonstrated cause for failure to comply with Pennsylvania's procedural rules.<sup>12, 13</sup>

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<sup>11</sup> Accepting Rinaldi's argument would freeze his procedural rights from the time of his incarceration. *See supra*, note 6.

<sup>12</sup> Because Rinaldi has failed to aver or demonstrate cause for his default, I do not reach the question whether he could show prejudice therefrom. *See Moscato*, 98 F.3d at 762; *Caswell v. Ryan*, 953 F.2d 853, 863 (3d Cir. 1992).

<sup>13</sup> Rinaldi neither argues nor briefs the issue of actual innocence. Moreover, a review of the record reveals that the essential question for the jury was one of credibility. *See Trial Tr. I* at 84-96; *Pet.* at 18 (This is a "case where virtually the only issue is the credibility of the Commonwealth's witness versus that of the defendant."). To show actual innocence, a habeas "petitioner must demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *See Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995) (citations omitted)). The additional impeachment evidence Rinaldi identifies does not meet that burden.

### III. FEDERAL RULE 9(a) FOLLOWING 28 U.S.C. § 2254

Federal Rule 9(a) following 28 U.S.C. § 2254 provides:

A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

*See* Rule 9(a) Foll. 28 U.S.C. § 2254 (1994).

Because I have determined that the court will not review the merits of Rinaldi's claims in light of his state court procedural default, I will not conduct a Rule 9(a) inquiry.<sup>14</sup>

### CONCLUSION

Rinaldi was convicted of first-degree murder and criminal conspiracy on November 18, 1982. On September 22, 1987, his judgment of conviction became final. At that time, the law in Pennsylvania was that prejudicial delay in filing a petition for post-conviction relief was relevant to the merits of the petition but did not permit dismissal on procedural grounds. Eight months later, the state legislature amended the law and provided explicitly that prejudicial delay in filing a PCRA petition should cause the petition to be dismissed without regard to its merits. Rinaldi alleges that he waited until 1994 to file his PCRA petition because he did not believe that he

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<sup>14</sup> First, in so doing, I have favored only one federal question over another. *See supra* note 4. Second, I remain mindful that considerations of comity require proper deference to independent and adequate state procedural rules. *See supra*, Part II.



Petition for Writ of Habeas Corpus (Doc. No. 1), respondent's Answer thereto (Doc. No. 4), petitioner's Reply to Respondent's Answer (Doc. No. 5), the Magistrate Judge's Report and Recommendation (Doc. No. 6), and petitioner's Objections thereto (Doc. No. 7), as well as the state court record submitted, it is hereby ORDERED AND DECREED that the Petition is DISMISSED. No certificate of appealability shall issue.<sup>1</sup>

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William H. Yohn, Jr., Judge

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<sup>1</sup> Rinaldi has not made a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2) (1994 & 1999 Supp.).