

I. Legal Standard

A district court judge makes a de novo determination of those portions of a magistrate judge's report and recommendation to which objection is made. 28 U.S.C.A. § 636(b)(1)(C) (West 1993). The judge may accept, reject or modify, in whole or in part, the magistrate's findings or recommendations. Id.

II. Discussion

Petitioner's Objection argues that the Magistrate Judge erred in addressing the merits of his Petition, and that the United States Supreme Court's decision in Rose v. Lundy, 455 U.S. 509 (1982), requires this Court to dismiss the Petition without prejudice because it contains unexhausted as well as exhausted claims. (Obj. at 3, 6-7.) Petitioner argues that he can overcome operation of the statutory waiver of unexhausted claims provided in Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541 et seq. (West 1998), with an assertion of his innocence, and that a state court would entertain his unexhausted claims in a second PCRA petition. (Obj. at 2, 4-5.) Petitioner asks this Court to dismiss his Petition without prejudice so that he may take his unexhausted claims to state court. (Obj. at 6-7.)

The District Attorney argues that state review of the unexhausted claims is foreclosed because the PCRA statute of limitations has expired. (Letter at 1.) That statute provides: "Any petition under this subchapter, including a second or

subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves [any of three conditions, none of which Petitioner asserts here]." 42 Pa. Cons. Stat. Ann. § 9545(b)(1) (West 1998). A "judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." Pa. Cons. Stat. Ann. § 9545(b)(3) (West 1998).

Without stating when the judgment against Petitioner became final or citing to the record, the District Attorney argues that "Petitioner's convictions became final sometime in 1994, when the time for seeking certiorari in the United States Supreme Court expired." (Letter at 1.)

"A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." Sup. Ct. R. 13(1). The Pennsylvania Supreme Court denied Butler's petition for allowance of appeal on October 27, 1994. Commonwealth v. Butler, 655 A.2d 981 (Pa. 1994). There is no indication in the record that Petitioner sought certiorari from the United States Supreme Court. Therefore, the judgment against Petitioner became final on January 25, 1995. Under PCRA,

the date by which Petitioner would have had to file a second PCRA petition to assert unexhausted claims was January 25, 1996. Petitioner's unexhausted claims are therefore foreclosed by the PCRA statute of limitations.

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process . . .

28 U.S.C.A. § 2254(b)(1) (West Supp. 2000).

"All claims that a petitioner in state custody attempts to present to a federal court for habeas corpus review must have been fairly presented to each level of the state courts." Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000). The exhaustion doctrine is rooted in the values of federalism and comity. See Rose v. Lundy, 455 U.S. 509, 515-522 (1982). The doctrine evinces respect for the role of state courts in enforcing federal rights by giving those courts the opportunity to correct alleged constitutional violations before federal intervention. Id. In Lundy, the Supreme Court adopted a "total exhaustion" rule and held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." Id. at 523. Lundy is inapplicable to the Petition before this Court, however, because Petitioner is barred by the PCRA statute of limitations from presenting his unexhausted claims to the state court. "A federal court need not dismiss a

petition for writ of habeas corpus on exhaustion grounds when it would be futile for the petitioner to attempt to invoke the state procedure." Beaty v. Patton, 700 F.2d 110, 112 (3d Cir. 1983).

The analysis of the Petition begins with the question of exhaustion. Petitioner's failure to exhaust his federal claims in state court is excused. "Pursuant to 28 U.S.C. § 2254(b)(1), exhaustion is excused if a return to state court would be futile because of 'an absence of available State corrective process[,] or . . . circumstances exist that render such process ineffective to protect the rights of the applicant.'" Lines, 208 F.3d at 162 (quoting 28 U.S.C. § 2254(b)(1)). Futility is established, inter alia, "where 'exhaustion is not possible because the state court would refuse on procedural grounds to hear the merits of the claims.'" Id. (quoting Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996)).

In this case, Pennsylvania courts would refuse to hear Petitioner's unexhausted claims because they are barred by the PCRA statute of limitations. As it would be futile for Petitioner to return to state court in a second PCRA petition raising the unexhausted claims, the exhaustion requirement is excused.

"[C]laims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner establishes cause and prejudice or a fundamental miscarriage of justice to excuse the default." Id.

at 160 (citing McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999) (internal quotation marks omitted)). Here, however, Petitioner does not seek a review of the merits of his unexhausted claims; he seeks a dismissal of the Petition so that he may present his claims in state court, and he argues that Lundy requires a dismissal.

Lundy does not aid Petitioner. As the United States Court of Appeals for the Third Circuit explained in Beaty:

The Court [in Lundy] held that the prisoner was required to seek available state relief on all his claims before raising them in federal court. There was no suggestion in Lundy that the state courts would not consider the prisoner's claims or that a petition to the state courts would be an empty formality. Indeed, the decision in Lundy is predicated on the Court's desire to preserve the state courts' opportunity to address constitutional challenges to confinement. Thus, nothing in the Supreme Court's opinion in Lundy requires us to dismiss for failure to exhaust when there is, realistically, no state remedy left for the prisoner to pursue.

Beaty v. Patton, 700 F.2d at 112.

In the instant case, the PCRA statute of limitations bars a second collateral petition; therefore, a dismissal of the Petition would be "an empty formality." Id. Therefore, Petitioner's claims are procedurally defaulted, and the Court must dismiss them with prejudice. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Lines, 208 F.3d 153, involving a habeas petition composed entirely of unexhausted claims. Like Petitioner here, the petitioner in Lines had directly appealed his conviction and pursued a collateral attack pursuant to PCRA up to a denial of allocatur by the

Pennsylvania Supreme Court. Lines, 208 F.3d at 157. The petitioner in those proceedings failed to raise any of the claims he brought to the federal habeas court. Id. at 162. The Third Circuit determined that exhaustion would be futile and was excused because the petitioner was "clearly foreclosed" from further state court review. Id. at 165-66. In considering whether the petitioner was foreclosed from a return to state court, the court first commented that it "is obvious that [the petitioner] could not successfully amend a [PCRA] petition that has now been denied for seven years and include within it claims that he could have included when he first filed the petition." Id. at 163-64. The court noted that the only alternative was a second petition under the PCRA and concluded such a petition was barred by the PCRA statute of limitations and by the requirement that claims raised in a PCRA petition must not have been "previously litigated or waived." Id. at 163-66.

As in Lines, Petitioner here cannot amend his initial PCRA petition, review of which the Pennsylvania Supreme Court declined on January 9, 1999. Moreover, the PCRA statute of limitations bars the filing of a second PCRA petition. Petitioner argues that he can overcome the statutory waiver provision; however, the obstacle of the statute of limitations remains.

III. Conclusion

Exhaustion of Petitioner's unexhausted claims is excused as futile because the PCRA statute of limitations bars them from state

court. Those claims therefore are procedurally defaulted, and must be dismissed with prejudice. Accordingly, the Court overrules the Petitioner's Objection and adopts the Magistrate Judge's Report and Recommendation that the Petition be denied and dismissed. An appropriate Order follows.

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

DARRYL BUTLER,	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 00-2718
v.	:	
	:	
PHILIP L. JOHNSON, et al,	:	
Defendants.	:	
	:	

O R D E R

AND NOW, this day of July, 2001, upon consideration of Petitioner's Objection to the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport (Doc. No. 19), **IT IS HEREBY ORDERED** that Petitioner's Objection is **OVERRULED**.

It is further **ORDERED** that:

1. The Report and Recommendation of the Magistrate Judge is hereby **APPROVED and ADOPTED**; and
2. The Petition for Writ of Habeas Corpus is **DENIED and DISMISSED with prejudice** without an evidentiary hearing;
3. A certificate of appealability is **DENIED** for failure to make a substantial showing of the denial of a Constitutional right.

BY THE COURT:

John R. Padova, J.