

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

ANTHONY ADAMS : CIVIL ACTION  
:   
v. :   
:   
:   
KENNETH K. KYLER, et al. : No. 01-0627

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 15, 2002

Anthony Adams ("Adams"), filing a petition for a writ of habeas corpus pro se under 28 U.S.C. § 2254, seeks relief from his state court conviction for third degree murder, carrying a firearm, and possession of an instrument of a crime ("PIC"). Under Local Rule of Civil Procedure 72.1(b), Adams' petition was referred to Chief Magistrate Judge James R. Melinson for a Report and Recommendation ("R&R"). The R&R concluded the petition should be denied because the federal constitutional claims were procedurally defaulted.

The court, on receiving the R&R, declined to approve it and appointed counsel. Briefing and an evidentiary hearing followed. The issue raised is one of first impression in this court: is a procedural default under Pennsylvania Rule of Appellate Procedure 1925(b) an independent and adequate basis for refusing to consider a federal habeas petition? Because the court answers this question in part in the negative, Adams' petition will be remanded to Chief Magistrate Judge Melinson for further proceedings on the merits.

## I. Procedural History

Adams was convicted on March 18, 1998, following a non-jury trial before Common Pleas Court Judge Glazier. A sentencing hearing on May 12, 1998, resulted in a 240 to 480 month term of incarceration for third degree murder, a consecutive sentence of 30 to 60 months for carrying a firearm, but no sentence for possessing an instrument of a crime.

The court appointed new appellate counsel, J. Michael Farrell, Esquire ("Farrell"), to represent Adams on his direct appeal. Adams nevertheless failed to file a timely appeal.<sup>1</sup> On November 6, 1998, Judge Glazier reinstated Adams' appellate rights nunc pro tunc. On November 13, 1998, Adams filed his direct appeal to the Pennsylvania Superior Court.

On December 8, 1998, Judge Glazier ordered Adams, through Farrell, to submit a Concise Statement of Matters Complained of on Appeal, under Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure ("Rule 1925(b)") within two weeks of the availability of the trial notes of testimony. Rule 1925(b) provides:

**(B) Direction to file statement of matters complained of.**  
If the lower court is uncertain as to the basis for the appeal, the lower court may by order direct the appellant forthwith to file of record in the lower court and serve on

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<sup>1</sup>It is unclear if the appointment pre-dated this failure.

the trial judge a concise statement of the matters complained of on appeal. A failure to comply with such direction may be considered by the appellate court as a waiver of all obligations to the order, ruling or other matter complained of on appeal.

On March 4, 1999, Adams having failed to file a Rule 1925(b) statement, Judge Glazier issued a post-trial opinion. Judge Glazier found that the notes of testimony had been available since February 1, 1999, but that Farrell had not "as per his usual practice" filed a Rule 1925(b) statement on Adams' behalf.<sup>2</sup>

Judge Glazier found that because Adams had failed to file a Rule 1925(b) statement "despite ample opportunity to do so[,] ... all potential issues are waived." Trial Court Op. at 4. Nevertheless, the court analyzed and rejected any claim that the evidence was insufficient for conviction.

Adams had raised three issues on appeal to the Superior Court: (1) ineffective assistance of trial counsel (in four different ways); (2) denial of right to a public trial; and (3) abuse of discretion in sentencing. His brief on appeal contained an unverified statement that Farrell had not received the notes of testimony until March 10, 1999.<sup>3</sup>

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<sup>2</sup>At the evidentiary hearing, Farrell denied that he had previously failed to file a Rule 1925(b) statement with Judge Glazier. See infra n.11.

<sup>3</sup>Farrell never made this claim directly to the trial court on a motion to reconsider, nor did he ask the Superior Court to remand to the trial court to permit him to file a Rule  
(continued...)

On December 10, 1999, the Superior Court held that Adams' claims on appeal had been waived by his failure to file a timely Rule 1925(b) statement with the trial court. Adams then petitioned for allocatur to the Pennsylvania Supreme Court. The petition raised the same three claims made to the Superior Court, but also claimed that the failure to file a Rule 1925(b) statement should be excused.<sup>4</sup> On May 24, 2000, the Supreme Court denied Adams' petition for allowance of appeal without opinion. Adams did not file for collateral review under the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541, et seq.<sup>5</sup>

Adams filed this petition for habeas corpus, pro se, on February 7, 2001. He claimed: (1) ineffective assistance of trial counsel; (2) denial of due process and equal protection; and (3) denial of the right to appeal. The Commonwealth

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<sup>3</sup>(...continued)  
1925(b) statement. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, this court must accept Judge Glazier's factual finding that the notes of testimony were available on February 1, 1999, and the Rule 1925(b) statement was due on February 15, 1999.

<sup>4</sup>Farrell again made an unverified statement that he had not received the notes of testimony until after the trial court opinion was filed. He did not assert that the Rule 1925(b) waiver should be excused because of ineffective assistance of appellate counsel.

<sup>5</sup>Adams had one year from the time the Pennsylvania Supreme Court denied allocatur to file a P.C.R.A. petition; he chose instead to file a federal habeas petition. The time period to file a P.C.R.A. petition has now passed.

responded that the claims were unexhausted and/or procedurally defaulted.

The R&R adopted the Commonwealth's position. Adams objected, and the court refused to adopt or approve the R&R without an evidentiary hearing. Alan J. Tauber, Esquire, was appointed counsel, and given leave to file supplemental arguments on Adams' behalf. An evidentiary hearing was held on July 30, 2002.

## II. Discussion

The principal requirement for habeas review is petitioner's prior exhaustion of all available state remedies. 28 U.S.C. § 2254(b). Federalism concerns require exhaustion; the state must be given a chance to correct its own alleged mistakes before the federal habeas court is asked to do so. See O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999).

To exhaust a claim the petitioner must first "fairly present" it to the highest state court. To "fairly present" a claim, petitioner must assert the factual and legal grounds of the federal claim with sufficient precision to give the state court notice. See Keller v. Larkins, 251 F.3d 408, 413 (3d Cir. 2001). An unexhausted claim is not reviewable by a federal habeas court except in exceptional circumstances.

If a state prisoner presents a federal claim to the state court, but the state court refuses to review that claim on procedural grounds (i.e., the claim was presented out of time), the prisoner's claim is "procedurally defaulted." Ordinarily, procedural default precludes federal habeas review of the defaulted claim. See Wainwright v. Sykes, 433 U.S. 72 (1977).

A claim is only procedurally defaulted if the state procedural rule is independent of federal law and adequately provides the state court with grounds to bypass review of federal issues. A purported procedural default that is not independent and adequate may be disregarded; the claims are to be treated by the federal court as exhausted and ripe for merits based review. See Michigan v. Long, 463 U.S. 1032 (1983).

The "independent and adequate" requirement is based on the Constitution's prohibition against advisory opinions. The federal habeas court's remedy is limited to reversing and remanding on a federal ground. If the state court has decided against petitioner on an independent and adequate state ground, any federal habeas relief would be merely advisory, because it would not change the outcome of the state court decision. See Lambrix v. Singletary, 520 U.S. 518, 523 (1997). However, because the absence of federal review might undermine federal constitutional rights, requiring an independent and adequate

state ground ensures that this does not happen. See Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

If an asserted state ground is not independent of federal law, then a federal habeas writ would not be an advisory opinion, because the federal writ would, through the Supremacy Clause, supersede the state court's determination of federal law. In Michigan v. Long, 463 U.S. 1032, the Supreme Court held that federal court review remains available when the asserted state ground is not independent of federal law. An asserted alternative state ground is not independent of federal law if it:

fairly appears to rest primarily on federal law, or [is] ... interwoven with the federal law, [or when] ... the adequacy and independence of any possible state law ground is not clear from the face of the opinion .... [But if] a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. Long, 463 U.S. at 1041.

When a state court refuses to reach the merits of a federal constitutional challenge because that challenge did not satisfy a state procedural rule, a federal court will defer to that judgment so long as the state procedural rule is "consistently or regularly applied," Johnson v. Mississippi, 486 U.S. 578, 589 (1988), and is "firmly established and regularly

followed." James v. Kentucky, 466 U.S. 341, 348 (1984).<sup>6</sup> If a state Supreme Court occasionally forgives procedural default, but applies it in the "vast majority" of cases, then the federal habeas court ordinarily should give the state rule preclusive effect. See Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989).

A procedural default 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." Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996). Adequacy is evaluated as of the date of the default. Id. at 684.

If a procedural default is both independent and adequate, a federal habeas court may still undertake merits based review if the petitioner demonstrates "cause" for the default and resulting "prejudice," Edwards v. Carpenter, 529 U.S. 446, 451 (2000), or the petitioner shows that the federal court's refusal to hear the claim would result in a "miscarriage of justice." Wainwright, 433 U.S. at 91. To show cause, a petitioner must

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<sup>6</sup>There is an exception of limited relevance here. Consistently applied rules of long-standing may be disregarded if they are applied in an "exorbitant" and seemingly capricious manner. Lee v. Kemna, 122 S. Ct. 877, 885 (2002), citing Davis v. Wechsler, 44 S. Ct. 13, 14 (1923) (Holmes, J.) ("Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

show that a factor "external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman v. Thompson, 501 U.S. 722, 753 (1991). To show prejudice, the petitioner must prove that errors at trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray v. Carrier, 477 U.S. 478, 494 (1986).

If a petitioner can not demonstrate cause and prejudice excusing procedural default, he may invoke the "fundamental miscarriage of justice" exception to the rule. Schlup v. Delo, 513 U.S. 298, 324 (1995). A fundamental miscarriage of justice exists where the petitioner can demonstrate actual innocence through new evidence. Petitioner must prove that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Calderon v. Thompson, 523 U.S. 538, 559 (1998).

Exhaustion applies even where the petitioner claims that the ineffectiveness of his counsel created the procedural default precluding merits-based review. A habeas petitioner can not claim that procedural default was caused by ineffective assistance of counsel without first presenting that claim to the state courts. Edwards, 529 U.S. at 525. If, as here, the petitioner can no longer properly file a state court claim of ineffective assistance of counsel, it is procedurally defaulted.

Murray, 477 U.S. 478. This second procedural default also precludes federal habeas review so long as it rests on independent and adequate state grounds.

Adams' habeas petition raises three grounds: (1) ineffective assistance of trial counsel; (2) denial of due process and equal protection; and (3) denial of a right to appeal. Of these claims, the first and second were presented to the state court but were held procedurally defaulted when Adams' appellate counsel failed to file a timely Rule 1925(b) statement of matters complained of on appeal. The third, not having been presented to the state courts, is unexhausted and procedurally defaulted.

The Commonwealth asserts that Adams' procedural default precludes merits-based review of the first two claims of his habeas petition and review of the third claim is barred because it is unexhausted.

Chief Magistrate Judge Melinson's R&R, assuming that the procedural default was based on independent and adequate state grounds, concluded that Adams could neither establish cause and prejudice nor a fundamental miscarriage of justice.

A. Independent State Grounds

Adams claims that because Pennsylvania's waiver rules are subject to a miscarriage of justice exception should there be a

serious constitutional violation, the 1925(b) Rule is not independent of federal law. See Lambert v. Blackwell, 134 F.3d 506, 520-21 (3d Cir. 1997) (Pennsylvania waives PCRA rules when presented with miscarriage of justice claims like ineffective assistance of counsel).

Because the state courts did not provide any analysis of Adams' waiver, the court considers the Pennsylvania Supreme Court treatment of Rule 1925(b) more generally. In Commonwealth v. Johnson, 565 Pa. 51 (2001), the Pennsylvania Supreme Court addressed the merits of an ineffective assistance of appellate counsel claim even though it was not included in a Rule 1925(b) statement of matters complained of on appeal. According to the Pennsylvania Supreme Court, this waiver of Rule 1925(b) was necessary to give appellate counsel an incentive to raise claims of their own ineffectiveness, and because the Rule's policy objective is to help trial judges address in their post-trial opinions the objections contained in Rule 1925(b) statements. Id. Nowhere does Johnson even mention the federal Constitution, or provide an analysis of the miscarriage of justice exception. Id. The waiver inquiry was directed to the Pennsylvania policy about Rule 1925(b), not the substance of the claims asserted.

No Pennsylvania court deciding whether to waive a Rule 1925(b) procedural default has analyzed the Rule in relationship

to substantive federal law. Therefore, a Rule 1925(b) default is independent of Adams' substantive claims.

B. Adequate State Grounds

Judge Glazier found that Adams' counsel failed to file a Rule 1925(b) statement within two weeks of the availability of the notes of trial testimony. This factual conclusion must be respected under AEDPA. See supra n.3. The notes of testimony were available on February 1, 1999; two weeks thereafter was February 15, 1999, the date of the procedural default under Rule 1925(b). The issue is whether this February 15, 1999, default is an adequate state ground.

Pennsylvania appellate courts have applied Rule 1925(b)'s waiver provision inconsistently. See Rivera v. Miranda, 2001 WL 1173977, at \*8, 2001 U.S. Dist. LEXIS 15818, at \*21 (E.D. Pa. Oct. 2, 2001). The Pennsylvania Supreme Court originally interpreted Rule 1925(b) in a permissive manner, in accord with its plain language. Failure to file a Rule 1925(b) statement originally required waiver "only where failure to file a statement or omission from a statement of issues raised on appeal defeats effective appellate review." Commonwealth v. Silver, 499 Pa. 228, 238 (1982) ("[t]he waiver provision of Rule 1925(b) is clearly discretionary."); see also Commonwealth v. Rodriguez, 674 A.2d 225, 227 n.3 (Pa. 1996) (same).

Despite these authorities, some Pennsylvania courts began applying Rule 1925(b) to waive appellate rights routinely for failure to comply with the Rule. See, e.g., Commonwealth v. Phillips, 601 A.2d 816, 822-23 (Pa. Super. Ct. 1992) (failure to file Rule 1925(b) statement deemed waiver unless "strong public interest outweighs the need to protect the judicial system from improperly preserved issues."). However, in 1994, this trend shifted when Pennsylvania courts began to apply Pennsylvania Rule of Criminal Procedure 1410. Rule 1410(B)(1)(c) states: "Issues raised before or during trial shall be preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues." Courts found that Rule 1410 superceded the requirements of Rule 1925(b); failure to file a Rule 1925(b) statement no longer resulted in a waiver. See, e.g., Commonwealth v. Monroe, 678 A.2d 1208 (Pa. Super Ct. 1996) (excusing failure to file Rule 1925(b) statement because of Rule 1410 and because the record adequately preserved issues on appeal); Commonwealth v. Cortes, 659 A.2d 573 (Pa. Super. Ct. 1995) (no automatic waiver for failure to file Rule 1925(b) statement).

Then the Pennsylvania Supreme Court, deciding Commonwealth v. Lord, 553 Pa. 415 (1998), on October 28, 1998,<sup>7</sup> held the requirements of Rule 1925(b) survived Rule 1410:

from this date forward, in order to preserve their claims for appellate review, Appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived.

Despite this mandate, only one week later the Pennsylvania Superior Court, without discussing Lord, undertook merits review of an issue not raised in a Rule 1925(b) statement because the record adequately allowed consideration. See Commonwealth v. Eddings, 721 A.2d 1095, 1098 n.5 (Pa. Super. Ct. Nov. 6, 1998) (discussing jury racial bias issue, despite absence of that issue in the Rule 1925(b) statement, because certified record allowed review).

Following Eddings, three cases addressing the effect of a failure to file a Rule 1925(b) statement, or failure to file an issue in such a statement, have further challenged the clarity of Lord's prospective rule.

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<sup>7</sup>The decision issued 224 days after Adams' conviction; 9 days before his appellate rights were reinstated nunc pro tunc; 16 days before he filed his direct appeal; 41 days before Judge Glazier ordered Farrell to file a Rule 1925(b) statement; 110 days before Farrell failed to file a timely Rule 1925(b) statement; 127 days before Judge Glazier issued his post-trial opinion; and 408 days before the Superior Court denied Adams' appeal.

In Commonwealth v. Shaffer, 763 A.2d 411, 412 n.1 (Pa. Super. Ct. 2000), appellate counsel sought to raise issues of ineffective assistance of trial counsel. Trial counsel, filing the Rule 1925(b) statement, had neglected to assert his own deficiency. The court held that because appellate counsel had raised the issue of trial counsel's ineffectiveness "at the first opportunity to do so," appellant's failure to include the ineffectiveness argument in a Rule 1925(b) statement would be excused. Shaffer, 763 A.2d at 412 n.1.

In Johnson, 565 Pa. 51, the Pennsylvania Supreme Court held that where appellate counsel failed to include an issue in a Rule 1925(b) statement, and later claimed this failure constituted ineffective assistance of counsel, that claim should be addressed on its merits by the Superior Court (after appointment of new appellate counsel), notwithstanding the absence of the ineffectiveness claim from the Rule 1925(b) statement. Johnson, 565 Pa. at 60.

Finally, in Commonwealth v. Davalos, 779 A.2d 1190 (Pa. Super. Ct. 2001), the Superior Court addressed the merits of a claim of ineffective assistance of trial counsel despite a total failure to file any Rule 1925(b) statement under a trial court order. The court held that Johnson's "attempt to clarify" Lord meant that a claim of ineffective assistance of trial counsel

was reviewable on appeal, even if it had not been presented in a Rule 1925(b) statement. Davalos, 779 A.2d at 1192.

The Supreme Court has recently granted a petition to review another case interpreting Rule 1925. See Commonwealth v. Frazier, 798 A.2d 1273 (Pa. 2002). The court will resolve the following issue:

Whether the Superior Court erred in holding that Petitioner's claims were waived because he did not file a statement of matters complained of on appeal as set forth in Pa.R.A.P 1925(b)?<sup>8</sup>

The issue here is whether any of Adams' claims before this court were procedurally defaulted on an adequate state ground.

1. Ineffective Assistance of Trial Counsel

At the time of Adams' procedural default (February 15, 1999) the Lord rule, itself a departure from existing precedent, was 110 days old. The rule was not then "firmly established and regularly followed," James v. Kentucky, 466 U.S. at 348, and was not "consistently or regularly applied." Johnson v. Mississippi, 486 U.S. at 589. The only reported case applying Rule 1925(b) between October 28, 1998, and February 15, 1999, was Eddings, and that excused a failure to include an issue in a Rule 1925(b) statement despite Lord's mandate. Soon after, the Supreme Court and the Superior Court considered the Lord rule,

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<sup>8</sup>The Superior Court opinion is unpublished and unavailable.

but nevertheless reached the merits of appeals raising issues of ineffective assistance of counsel not raised in Rule 1925(b) statements. See Johnson, 565 Pa. 51; Shaffer, 763 A.2d at 412 n.1; and Davalos, 779 A.2d 1190. The precise timing of the procedural defaults in Johnson, Shaffer, and Davalos, in relation to Lord, is not known. Even so, the "state courts' refusal in this instance is [not] consistent with other decisions." Doctor, 96 F.3d at 683-84.

Under these circumstances, the Superior Court denial of merits-based review of Adams' claims was not based on a firmly established state rule, and is not an adequate procedural bar to federal habeas review. If Adams claims of ineffective assistance of trial counsel have merit,<sup>9</sup> then relief must be available notwithstanding Rule 1925(b).

## 2. Denial of Due Process, Equal Protection

Adams asserts that the trial court sentenced him "beyond the guideline, and used a non-existent method," and he was "denied his right to a public trial," in violation of due process and equal protection.

Lord's rule has not been undermined with respect to claims other than those of ineffective assistance of counsel. The Supreme Court in Johnson reaffirmed the importance of Rule 1925(b) when evaluating "substantive" objections to proceedings

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<sup>9</sup>The court takes no position on this issue.

in the trial court. Johnson, 565 Pa. at 59. Except for denials of ineffective assistance of counsel, Lord has been consistently followed. See, e.g., Commonwealth v. Kimble, 756 A.2d 78 (Pa. Super. Ct. 2000) (refusal to review sufficiency of evidence and sentencing issues where appellant had not filed a timely Rule 1925(b) statement). Interests of federalism require this court to adhere to the Lord bright line test until there is substantial evidence it is not being applied consistently. Where there are no Pennsylvania cases after Lord reviewing claims for due process, equal protection, or sentencing violations not raised in Rule 1925(b) statements, Adams' default of these claims on February 15, 1999, is an adequate state procedural bar to federal habeas review.

These claims are precluded by Adams' failure to include them in a properly filed Rule 1925(b) statement.

### 3. Denial of Right to Appeal

Adams asserts that he was unable to file a state appeal because of his appellate counsel's ineffectiveness. This claim is unexhausted; it was not been presented to the state courts.<sup>10</sup> Additionally, this court lacks the power to compel the state courts to hear Adams' appeal.

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<sup>10</sup>It is also now procedurally defaulted. See supra n.5. Adams does not assert that this procedural default is not independent and adequate.

C. Cause and Prejudice

Adams lacks cause and prejudice to excuse procedural default of his due process claims. Prejudice must be external to his defense and not, as he claims, the ineffectiveness of counsel itself. See Edwards, 529 U.S. at 525 (2000). There is no evidence that Judge Glazier appointed Farrell personally, and no evidence that Farrell had previously failed to file Rule 1925(b) statements before Judge Glazier's court.<sup>11</sup> Although Judge Glazier's opinion could be read to suggest that he knew of Farrell's likely ineffectiveness before appointing him, there is insufficient evidence of record to establish that the state court deliberately appointed counsel for petitioner who would fail to comply with the state's appellate rules.

If Adams established that Judge Glazier appointed Farrell knowing that he would sit on his client's rights, then he would have established cause (and likely prejudice) for his procedural default. Judge Glazier's opinion, while itself providing evidence supporting Adams' claim of cause, is subject to

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<sup>11</sup>Farrell was the appellate counsel in Commonwealth v. Rodriguez. In that 1996 case, appellant was not ultimately prejudiced by failure to file a Rule 1925(b) statement with the trial court. See Rodriguez, 674 A.2d 225, 227 n. 3 (Pa. 1996) (upholding Superior Court's reversal of trial court's dismissal of post-trial motions for failure to comply with Rule 1925(b)). The identity of the trial court judge in Rodriguez is unknown. It is unclear if, as here, Farrell was the attorney whose negligent failure to file a Rule 1925(b) statement resulted in a procedural default.

multiple interpretations. The court can not conclude, as a matter of law, that Adams has established state court action as external cause prevented him from complying with Rule 1925(b).

D. Fundamental Miscarriage of Justice

Adams makes no claim of actual innocence based on newly discovered evidence. Therefore, no fundamental miscarriage of justice will result from his being denied federal habeas relief on grounds two and three of his petition.

**III. Conclusion**

Having concluded that Adams' is not procedurally barred from a claim of ineffective assistance of trial counsel, the court will remand this action to Chief Magistrate Judge Melinson for an evidentiary hearing on the merits of this claim. Adams second claim is procedurally defaulted, and his third claim is unexhausted and procedurally defaulted; neither may be considered.

The R&R's conclusion that Adams' second and third grounds for relief must be dismissed will be approved. Adams' petition will be remanded to Chief Magistrate Judge Melinson for an evidentiary hearing on his claim of ineffective assistance of trial counsel.

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

ANTHONY ADAMS : CIVIL ACTION  
:   
v. :   
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KENNETH K. KYLER, et al. : No. 01-0627

ORDER

AND NOW, this 15th day of August, 2002, on consideration of Adams' Petition for Habeas Corpus (#1), the Government's Response (#20), the Report and Recommendation of Chief Magistrate Judge Melinson (#21), Petitioner's Objections (#22), Petitioner's Reply (#31), the Government's Sur-Reply (#33), after holding an evidentiary hearing at which all parties had the opportunity to be heard, and for the reasons given in the foregoing memorandum, it is **ORDERED** that:

1. Petitioner's Objections (#22) and Reply (#31) are **SUSTAINED IN PART AND OVERRULED IN PART**. The Report and Recommendation of Chief Magistrate Judge Melinson (#21) is **APPROVED IN PART**.

- A. Chief Magistrate Judge Melinson's conclusions about Adams' second and third claims for habeas relief are **APPROVED**. Adams' second and third claims for habeas relief are **DISMISSED**.
- B. Chief Magistrate Judge Melinson's conclusion that Adams' claim of ineffective assistance of trial counsel is procedurally defaulted is **NOT APPROVED**. This claim was presented to the state courts: the procedural default does not provide an adequate basis for denying federal review on the merits.

2. This action is remanded to Chief Magistrate Judge Melinson for an evidentiary hearing on Adams' claim of ineffective assistance of trial counsel.

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Norma L. Shapiro, S.J.