

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

KENNETH WILLIAMS	:	
	:	
Petitioner,	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD T. VAUGHN, Mr.; DISTRICT ATTORNEY FOR LEHIGH COUNTY; and, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	NO. 95-7977
	:	
Respondents.	:	

DuBOIS, J.

October 18, 2002

ORDER AND MEMORANDUM

ORDER

AND NOW, this 18th of October, 2002, upon consideration of Petitioner's Motion to Reactivate Habeas Corpus Proceedings (Document No. 32, filed July 23, 2002), Respondents' Answer to Petitioner's Motion to Reactivate Habeas Corpus Proceedings (Document No. 35, filed August 30, 2002), Petitioner's Reply to Respondents' Answer in Opposition to Petitioner's Motion to Reactivate Habeas Corpus Proceedings (Document No. 37, filed September 11, 2002), Respondents' Sur-Reply in Further Opposition to Petitioner's Motion to Reactivate Habeas Corpus Proceedings (Document No. 39, filed September 24, 2002), and Petitioner's Brief Response to Respondents' Sur-Reply (Document No. 40, filed September 27, 2002), **IT IS ORDERED** that, for the reasons set forth in the following Memorandum, Petitioner's Motion to Reactivate Habeas Corpus Proceedings is **DENIED WITHOUT PREJUDICE** to petitioner's right to file a habeas corpus petition upon exhaustion of his state remedies.

IT IS FURTHER ORDERED that a certificate of appealability will not issue on the ground that petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c).

MEMORANDUM

Before the Court is petitioner's Motion to Reactivate Habeas Corpus Proceedings ("Motion to Reactivate"), brought pursuant to 28 U.S.C. § 2254, in which he alleges that inordinate delay by the Commonwealth of Pennsylvania in processing his post-conviction petition renders the state remedy effectively unavailable and excuses the requirement that he exhaust state remedies. See Wojtczak v. Fulcomer, 800 F.2d 353, 354 (3d Cir. 1986). The Court finds, for the reasons set forth below, that the delay in adjudicating petitioner's post-conviction collateral claims is insufficient to excuse exhaustion. Therefore, petitioner's Motion to Reactivate is denied without prejudice to petitioner's right to file a second amended habeas corpus petition in this Court after exhaustion of state remedies.

I. BACKGROUND

On October 3, 1985, petitioner Kenneth Williams ("Williams" or "petitioner") was found guilty of murder in the first degree, robbery, theft by unlawful taking or disposition, and receiving stolen property by a jury in the Court of Common Pleas of Lehigh County ("Common Pleas Court" or "state court"). See Commonwealth v. Williams, 640 A.2d 1251 (Pa. 1994). On October 4, 1985, the jury returned a verdict of death for that murder, and a sentence of death was imposed on June 29, 1990. The case arose out of the fatal shooting of Edward Miller, a trucker with whom petitioner had been traveling on or about October 20, 1983.

The Supreme Court of Pennsylvania affirmed the verdict and sentence on August 9, 1994. On December 26, 1995, Williams filed a petition for state post-conviction collateral relief pursuant to the Pennsylvania Post Conviction Relief Act (“PCRA”), 42 Pa. Cons. Stat. Ann. § 9541 et seq. The next day, on December 27, 1995, Williams filed a petition for writ of habeas corpus in this Court.

Williams’ PCRA petition was voluntarily discontinued on January 31, 1996; he then filed a second petition for relief under the PCRA on January 9, 1997. By Order dated February 4, 1997, this Court granted Williams’ motion to extend the time for amending the habeas corpus petition he filed on December 27, 1995. The amended petition was filed on February 14, 1997. On October 20, 1997, petitioner’s second PCRA filing of January 9, 1997 was stayed by Order of Judge Carol K. McGinley of the Common Pleas Court pending a decision on the amended habeas corpus petition filed in this Court on February 14, 1997.

By Memorandum and Order dated March 16, 1998, this Court dismissed petitioner’s amended habeas corpus petition for failure to exhaust state remedies because it was a mixed petition – it contained both exhausted and unexhausted claims. See Williams v. Vaughn, 3 F. Supp. 2d. 567 (E.D. Pa. 1998). To eliminate any risk that Williams would be barred from re-filing a habeas petition in federal court after exhausting his state remedies, the Court dismissed his amended petition without prejudice to his right to file a second amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion. Id. at 569.

The Court later denied, on May 8, 1998, respondents’ Motion to Alter or Amend the March 16, 1998 judgment pursuant to Federal Rule of Civil Procedure 59(e). See Williams v. Vaughn, No. Civ. A. 95-7977, 1998 WL 23846 (E.D. Pa. May 8, 1998). Respondents then filed

a Notice of Appeal to the Court of Appeals, but withdrew the appeal by letter dated April 22, 2002. Respondents' withdrawal of the appeal was accepted by the Court of Appeals by Order on May 3, 2002.

After this Court's dismissal of Williams' amended habeas corpus petition, he filed a Motion to Compel the Commonwealth to Respond to Petitioner's Motion to Vacate Stay of PCRA Proceedings and for the Commonwealth to Answer Petitioner's PCRA Petition in state court on November 13, 1998. In response, on November 25, 1998, that court vacated its stay of October 20, 1997. Following briefing on the issue of previous litigation – only those claims that have been previously litigated on direct appeal can be presented under the PCRA¹ – and subsequent briefing on whether any issues were ripe for summary adjudication, the Common Pleas Court conducted evidentiary hearings on May 15-17, 2000 and October 3-4, 2000. Pet.'s Mtn. ¶ 27.

The evidentiary hearings in state court were followed by the submission of post-hearing memoranda by both parties (petitioner filed on January 16, 2001; respondents filed on March 30, 2001). *Id.* On December 31, 2001, the state court issued an order notifying petitioner that it would dismiss his PCRA proceedings within twenty days unless he requested a hearing on the proposed dismissal. The court's accompanying opinion explained that his PCRA petition was a "second" petition which was barred by the PCRA's statute of limitations.²

¹ See 42 Pa. C.S. §§ 9543(3) and 9544(a).

² The PCRA's statute of limitations was amended in 1995, requiring that all petitions be filed "within one year of the date the judgment becomes final" 42 Pa. C.S. § 9545(b)(1). A judgment is final under the PCRA "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." 42 Pa. C.A. § 9545(b)(3). Under a provision

Petitioner responded to the December 31, 2001, state court order by filing a Request for Oral Argument Pursuant to Pa. R. Crim. P. 909³ and Response to the Court's Notice of Intent to Dismiss on January 18, 2002. Petitioner asserted, inter alia, his "frustration" that the threshold question of the timeliness of his second petition was not addressed until the conclusion of the proceedings, and thereby requested that the state court make alternative findings on the merits of his claim. Pet.'s Mtn. ¶ 30. On March 8, 2002, the state court granted oral argument and ordered a response to petitioner's pleading; respondents filed their Reply to Petitioner's Response to the Court's Notice of Intent to Dismiss on April 22, 2002. Oral argument was held on April 24, 2002; on August 30, 2002, after the Motion to Reactivate was filed, the state court dismissed petitioner's post-conviction petition as barred under the PCRA's statute of limitations.⁴

Petitioner appealed this decision to the Pennsylvania Supreme Court; the appeal is presently pending. Resps' Sur-Reply at 4.

which was enacted at the same time as the PCRA's new statute of limitations in 1995 and which became effective on January 16, 1996, a petitioner has one year from that effective date to file his or her first PCRA petition, regardless of when judgment became final. See Penn. Gen. Ass. Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 3(1). In this case, Williams filed a PCRA petition on January 9, 1997, less than a year from the effective date of the amendment. The Common Pleas Court, however, determined that this petition was a second PCRA petition and thus, untimely, because it followed Williams' earlier PCRA petition filed on December 26, 1995, which was voluntarily withdrawn on January 31, 1996.

³ Rule 909 contains a mandatory requirement that oral argument must be afforded to a petitioner following the issuance of a court's notice of intent to dismiss, but prior to the actual dismissal of a capital post-conviction petition.

⁴ The court also denied petitioner's request for alternative findings for want of jurisdiction. See Commonwealth v. Kenneth J. Williams, No. 981 of 1984 slip opinion at 7 (Lehigh C.P. August 30, 2002) ("[T]he rule on jurisdiction is clear: a prisoner must file his or her PCRA Petition within the time limits set forth in the PCRA in order for the court to have jurisdiction over the matter...") (internal quotations and citations omitted).

Petitioner contends in his Motion to Reactivate that the forty-one months – the period of time between the state court’s order to vacate its stay of petitioner’s post-conviction proceedings on November 25, 1998, and the date petitioner filed his Motion to Reactivate on July 23, 2002 – is inordinate delay sufficient to excuse petitioner of the requirement that he exhaust his claims in state court prior to presenting them in federal court, especially in light of the state court’s “failure” to decide the question of timeliness at the commencement of the PCRA proceedings. Pet.’s Mtn. ¶ 41. Petitioner also asserts, *inter alia*, that he faces further significant time delays as his claims continue through the state court system. Pet.’s Mtn. ¶¶ 39, 40.

Respondents filed an Answer to Petitioner’s Motion to Reactive (Document No. 35, filed August 30, 2002), claiming that the petitioner’s post-conviction proceedings were not languishing in state court for forty-one months, and that the state court “has acted expeditiously as scheduling would permit,” Resp.’s Reply at 7. Therefore, respondents take the position that the forty one month period is insufficient to render relief effectively unavailable to the petitioner, thereby barring his federal claims for failure to exhaust. Petitioner filed a Reply to Respondents’ Answer to Petitioner’s Motion to Reactivate (Document No. 37, filed September 11, 2002). In accordance with this Court’s Order of September 13, 2002, respondents’ filed a Sur-Reply in Further Opposition to Petitioner’s Motion to Reactivate (Document No. 39, filed September 24, 2002), to which petitioner responded in his Brief Response to Respondents’ Sur-Reply (Document No. 40, filed September 27, 2002).

II. DISCUSSION

A state prisoner must give the state courts a fair opportunity to act on post-conviction claims prior to presenting those claims to a federal court in a habeas corpus petition. Rose v.

Lundy, 455 U.S. 509, 518 (1982). Before seeking federal habeas relief, a prisoner is required to present each of his claims to the state’s highest court. Story v. Kindt, 26 F.3d 402, 405 (3d Cir. 1994), cert. denied, 513 U.S. 1024 (1994). A claim which has not been pursued in all available state court proceedings has not been exhausted.⁵ See 28 U.S.C. § 2254(c) (stating that a prisoner has not exhausted his remedies in state court “if he has the right under the law of the State to raise, by any available procedure, the question presented”); Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002) (holding that the exhaustion doctrine “requires that the prisoner present his federal habeas claims at all levels of state court adjudication”).

Exhaustion is not jurisdictional; it is a matter of comity. See Rose, 455 U.S. at 515. Exhaustion “serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner’s federal rights.” Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986); Coleman v. Thompson, 501 U.S. 722, 731 (1991) (“[I]n a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner’s federal rights.”).

⁵ 28 U.S.C. § 2254(b) provides:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

In order to exhaust a claim, it must have been “fairly presented” to the state courts, meaning that the claim heard by the state courts was the “substantial equivalent” of the claim asserted in the habeas petition. See, e.g., Picard v. Connor, 404 U.S. 270, 275, 278 (1971); O’Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (requiring that federal courts “ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts”) (emphasis in original).

Petitioner relies on Wojtczak v. Fulcomer, 800 F.2d 353 (3d. Cir. 1986), in arguing that exhaustion of state remedies is excused in this case because of the forty one month delay in processing his second PCRA petition. In Wojtczak, thirty-three months had passed between the petitioner's PCRA filing and his federal habeas filing. Wojtczak, 800 F.2d at 354. During this time, the state court had appointed five different attorneys to represent the petitioner, all of whom were permitted to withdraw their appearance. Id. at 355. None of these court-appointed attorneys were able to secure a hearing on petitioner's PCRA filing in the Common Pleas Court; at the time of his federal petition, the state court had yet to hear his post-conviction claims. Under such circumstances, the Third Circuit held that the thirty-three month period constituted "inexcusable or inordinate delay by the state in processing claims for relief," which rendered the state remedy effectively unavailable to protect the rights of the petitioner under 28 U.S.C. § 2254(b). Id. at 354. Accordingly, that court excused exhaustion of petitioner's state remedies and directed the district court to entertain his federal habeas filing. Id. at 356.

In addition, petitioner relies on Cristin v. Brennan, in asserting the "continuing vitality of the doctrine of excusing exhaustion when delay is inordinate." Pet.'s Brief ¶ 37. In Cristin, twenty seven months elapsed between the filing of a PCRA petition and the filing of a federal habeas petition. Cristin, 281 F.3d at 411. During that period, the state court held an oral argument and scheduled an evidentiary hearing which was eventually waived. Id. The PCRA petition was finally decided one week after Cristin filed his federal habeas petition. Id. The Third Circuit determined that the twenty-seven month delay was not inordinate and did not render relief for Cristin "effectively unavailable." Id. Indeed, the court found that "unlike Wojtczak, in which only marginal progress had been made during the thirty-three month

pendency of the PCRA petition, the state courts were responsive to Cristin’s case, had held argument, and offered a hearing. Cristin only awaited a ruling.” Id.

While the Court agrees with petitioner’s assertion of the “continuing vitality” of the doctrine of inordinate delay and exhaustion, it finds the instant case to be distinguishable from Wojtczak and analogous to Cristin. The court in Wojtczak excused the petitioner from having to continuously “wait for the [state] court system to process his petition.” Wojtczak, 800 F.2d at 356 (emphasis added). Unlike Wojtczak where the lower state court had not heard the post-conviction claims in a period of thirty three months, several hearings and oral argument were conducted by the lower state court throughout the forty one month period at issue in this case. Petitioner’s claims in this case have been processed; between the time the state court vacated its stay and the filing of the Motion to Reactivate, the Common Pleas Court took a number of affirmative steps – conducting a hearing on the issue of previous litigation and holding two evidentiary hearings and oral argument. What remained to be done by that court at the time the Motion to Reactivate was filed was the issuance of a ruling; that came approximately six weeks after the filing of the Motion to Reactivate. In the same way that Cristin distinguished Wojtczak, in part due to the “activity” of the state court, see id., this Court concludes that the activity of the state court in addressing petitioner’s PCRA claim is sufficient to distinguish Wojtczak from the instant case.

As mentioned above, the Common Pleas Court dismissed Williams’ PCRA claims on August 30, 2002. That decision is on appeal to the Pennsylvania Supreme Court. Resps’ Sur-Reply at 4. Under these circumstances, and because petitioner has not demonstrated inordinate delay sufficient to excuse exhaustion, the Court denies the Motion to Reactivate without

prejudice to petitioner's right to file a habeas corpus petition in this Court after exhaustion of state remedies.

III. CONCLUSION

For the foregoing reasons, petitioner's Motion to Activate Habeas Corpus Proceedings is denied without prejudice to petitioner's right to file a second amended habeas corpus petition upon exhaustion of state remedies.

BY THE COURT:

JAN E. DUBOIS, J.