

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

BRUCE A. COOPER : CIVIL ACTION  
Petitioner, :  
 :  
v. :  
 :  
JAMES PRICE, et al. :  
Respondents. : No. 98-3009

MEMORANDUM AND ORDER

J. M. KELLY, J.

JANUARY , 2003

Presently before the Court is a Motion to Extend Time to File Notice of Appeal Nunc Pro Tunc filed by Petitioner Bruce A. Cooper ("Petitioner"), requesting that this Court grant him an extension of time within which to file a notice of appeal to the United States Court of Appeals for the Third Circuit from a final order of this Court.<sup>1</sup> The District Attorney of Philadelphia County, on behalf of herself, Warden James Price and the Attorney General of the Commonwealth of Pennsylvania (collectively, the "Respondents"), filed their response thereto in the form of a Response to Petitioner's Motion to Extend Time Under Fed. R. App. P. 4(a)(5). While Respondents do not dispute the form of relief requested by Petitioner, they disagree with the legal rationale for granting such relief. For the reasons set forth below, this

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<sup>1</sup> Petitioner's instant motion follows from his receipt of a letter from the Clerk for the Third Circuit informing him that the Third Circuit may lack appellate jurisdiction over his appeal for the reason that his notice of appeal was not filed within the time prescribed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

Court **GRANTS** Petitioner's motion.

### I. PROCEDURAL HISTORY

On October 2, 2002, this Court issued a Memorandum and Order denying Petitioner's petition for writ of habeas corpus as untimely filed and rejecting Petitioner's claim of equitable tolling, without reaching the merits of Petitioner's claims. The October 2, 2002 Order, however, inadvertently omitted a determination as to whether a certificate of appealability ("COA") should issue to Petitioner as required by the Third Circuit's Local Appellate Rule 22.2.<sup>2</sup> As a result, on or about October 14, 2002, this Court received a letter from Petitioner's counsel, Edward F. Borden, Jr., Esquire ("Mr. Borden"), requesting that this Court comply with Local Appellate Rule 22.2.<sup>3</sup> On October 16, 2002, this Court amended its previous Order to state that a COA should issue to Petitioner.

On October 24, 2002, Respondents filed a Petition for Immediate Reconsideration of this Court's October 16, 2002

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<sup>2</sup> Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit requires that at the time a final order denying a habeas petition is issued, the district judge should make a determination as to whether a COA should issue. 3d Cir. R. 22.2.

<sup>3</sup> The letter indicated that copies of the letter were sent to Assistant District Attorney John Goldsborough, Esquire, Donna G. Zucker, Esquire and Michele S. Davidson, Esquire, all of whom are listed as counsel to Respondents on this Court's docket.

Amended Order, contending that this Court failed to comply with 28 U.S.C. § 2253(c)(3)<sup>4</sup> by failing to state that Petitioner made a substantial showing that he was denied a constitutional right. Consequently, Respondents urged this Court to vacate our Amended Order issuing Petitioner's COA. On November 5, 2002, this Court denied Respondents' Petition for Immediate Reconsideration.<sup>5</sup>

On November 19, 2002, Petitioner filed a notice of appeal

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<sup>4</sup> Pursuant to § 2253(c), a COA may issue to a habeas petitioner in accordance with the following requirements:

- (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -
  - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
  - (B) the final order in a proceeding under section 2255.
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

<sup>5</sup> In deciding Respondents' Petition for Immediate Reconsideration, this Court considered, among other pleadings, Respondents' letter reply, which was delivered both to chambers and to Petitioner, but not filed with the Clerk of this Court. In the interest of full briefing on the issues, and because no prejudice would result to the parties, this Court sua sponte filed and docketed Respondents' letter reply. We point out this fact for the reason that this Court will again file and docket a paper, albeit nunc pro tunc, in the interests of correcting the record so that it accurately reflects the proceedings that actually took place and of resolving the jurisdictional dilemma discussed infra.

with the Third Circuit. Subsequently, in a letter dated December 2, 2002 from Marcia M. Waldron ("Ms. Waldron"), Clerk for the Third Circuit, to Mr. Borden, Petitioner's counsel, it was suggested that the Third Circuit may lack appellate jurisdiction over Petitioner's appeal. Ms. Waldron indicated that the final appealable order is this Court's October 2, 2002 Order, and that Petitioner failed to file his notice of appeal within 30 days of entry of that order as required by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.<sup>6</sup> The instant motion followed.

## II. DISCUSSION

In support of his instant motion for a protective extension of time to file his notice of appeal, Petitioner argues that Rule 4(a)(5)(A) of the Federal Rules of Appellate Procedure allows a district court to extend the time to file a notice of appeal provided that: (a) a motion is filed within 30 days of the time otherwise provided by the rule and (b) the party shows excusable neglect or good cause. See Fed. R. App. P. 4(a)(4)(A)(iv). Without more than a brief recitation of some relevant docket entries, Petitioner contends that excusable neglect and good

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<sup>6</sup> According to Rule 4 of the Federal Rules of Appellate Procedure, a notice of appeal must be filed within 30 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(A). However, when a motion for reconsideration under Rule 59 of the Federal Rules of Civil Procedure is filed, the time to file an appeal runs from the date of entry of the order disposing of such motion. Fed. R. App. P. 4(a)(4)(A)(iv).

cause are present in this case. Petitioner further contends that, should this Court grant his request, the 30-day period would not have expired until December 2, 2002, and his notice of appeal filed on November 19, 2002 would have been deemed timely filed.

Respondents agree with the Petitioner's request, but provide this Court with a different rationale than that articulated by Petitioner. Respondents contend that Petitioner's motion as presented does not satisfy the dual requirements for an extension of time, and that this Court should instead consider as excusable neglect and good cause the discrepancy between the papers filed and recorded on the docket and what papers were actually considered in disposing of this case. We are inclined to agree. Also, it appears that Respondents consulted with Petitioner prior to filing their response to his motion, and that both parties now collectively agree as to the relief requested.<sup>7</sup> Based on the rationale presented by Respondents, and agreed upon by

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<sup>7</sup> In their response, Respondents assert that:

After consultation and agreement with counsel for petitioner, both parties are in agreement that the following paragraphs outline the approach they wish this Court to take. Petitioner and respondents believe that if this approach is taken, the intent of this Court and the parties will be effectuated, and that his Notice of Appeal will be considered timely filed . . .

(Response to Pet.'s Motion to Extend Time at 5.) Petitioner does not dispute Respondents' representation.

Petitioner, we will permit Mr. Borden's October 14, 2002 letter to be filed and docketed nunc pro tunc as a Motion for Reconsideration.

Nunc pro tunc, which, in Latin, means "now for then," describes a doctrine that permits acts to be done, after the time they should have been done, with a retroactive effect. Thus, an act nunc pro tunc is an entry made now of something actually previously done to have the effect of the former date, but previously omitted through inadvertence or mistake. Barden v. Keohane, 921 F.2d 476, 477 n.2 (3d Cir. 1990) (citing Black's Law Dictionary) (quotations omitted); see also Maksymchuk v. Frank, 987 F.2d 1072, 1075 n.2 (4th Cir. 1993) ("Nunc pro tunc merely describes inherent power of court to make its records speak the truth, i.e., to correct record at later date to reflect what actually occurred . . . .").

It appears that the Clerk for the Third Circuit determined, based ostensibly upon the entries on this Court's docket report, that this Court's October 2, 2002 Order is the final appealable order from which Petitioner should have filed a notice of appeal. See Fitzsimmons v. Yeager, 391 F.2d 849 (3d Cir. 1968). Significantly, however, this Court took further action subsequent to the October 2, 2002 Order after we received Mr. Borden's October 14, 2002 letter. In response to the letter, we issued an Amended Order on October 16, 2002 granting the relief requested,

however, without explicit mention of that letter. To clarify the record for appeal, we now characterize Mr. Borden's October 14, 2002 letter as a proper motion for reconsideration as it was both timely filed and requested appropriate relief on reconsideration.

A motion for reconsideration seeks to "correct manifest errors of law or fact or to present newly discovered evidence."

Harsco Corp. v. Zlotnick, 779 F.2d 906, 909 (3d Cir. 1985).

Thus, a motion for reconsideration "addresses only factual and legal matters that the Court may have overlooked." Glendon

Energy Co. v. Bor. of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa.

1993) (citation omitted). An additional jurisdictional hurdle,

the Federal and Local Rules of Civil Procedure require that

motions for reconsideration be served and filed within 10 days of

the entry of judgment. Fed. R. Civ. P. 59(e) ("Any motion to

alter or amend a judgment shall be filed no later than 10 days

after entry of the judgment."); E.D. Pa. R. 7.1(g) ("Motions for

reconsideration . . . shall be served and filed within ten (10)

days after the entry of the judgment, order, or decree

concerned."). Mr. Borden's letter was a proper motion for

reconsideration as it requested that this Court address a legal

matter that we had overlooked, and it was timely delivered to

this Court and to Respondents within the 10-day period prescribed

by Rule 59(e), as calculated pursuant to Rule 6(a), of the

Federal Rules of Civil Procedure.<sup>8</sup> However, Mr. Borden's failure to file his letter with the Clerk of this Court is not fatal, as this Court previously provided a similar courtesy, discussed supra at n.5, to Respondents. Nor is it fatal that Mr. Borden's letter did not take the form of a formal motion for reconsideration. See Graco Children's Prods. v. Regalo Int'l, 77 F. Supp. 2d 660, 661 n.1 (E.D. Pa. 1999) (overlooking formal motion requirement and permitting a less formal filing such as a letter). Because the letter satisfies the requirements for a motion for reconsideration, and since no prejudice will result to the parties, this Court will file and docket nunc pro tunc Mr. Borden's October 14, 2002 letter as a Motion for Reconsideration. In addition, that this Court issued an Amended Order on October 16, 2002, clearly in response to Mr. Borden's October 14, 2002 letter requesting relief, further evidences this Court's intent to treat Mr. Borden's letter as a Motion for Reconsideration. Thus, the period of time within which Petitioner should have filed his notice of appeal was tolled by this Court's October 16, 2002 Amended Order.

The time period within which a notice of appeal should have been filed was further tolled by Respondents' Petition for

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<sup>8</sup> Rule 6(a) states in pertinent part: "When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Fed. R. Civ. P. 6(a).

Immediate Reconsideration, which was timely filed on October 24, 2002. While this Court denied Respondents relief on reconsideration, Respondents request that this Court correct an alleged error of law was well within the purview of a motion for reconsideration. In addition, Respondents' Petition for Immediate Reconsideration was timely filed pursuant to Rule 59(e), as calculated by Rule 6(a), of the Federal Rules of Civil Procedure. In response to Respondents' timely filed Petition for Immediate Reconsideration, this Court entered an Order on November 7, 2002. Thus, this Court's November 7, 2002 Order further tolled the time within which Petitioner had to file his notice of appeal.

### **III. CONCLUSION**

Since this Court's decision to file and docket nunc pro tunc Mr. Borden's October 14, 2002 letter as a timely filed Motion for Reconsideration conforms both Respondents' subsequent Petition for Immediate Reconsideration and Petitioner's notice of appeal with the applicable time requirements prescribed by the Federal Rules of Civil Procedure and Appellate Procedure, we believe that the jurisdictional quandary, as indicated by Ms. Waldron's letter, is resolved. In any event, should the Clerk for the Third Circuit disagree with this Court's assessment of the jurisdictional issue, we also **GRANT** Petitioner's request for an

extension of time pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure for the good cause indicated above.

IN THE UNITED STATES DISTRICT COURT  
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BRUCE A. COOPER	:	CIVIL ACTION
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v.	:	
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JAMES PRICE, et al.	:	
Respondents.	:	No. 98-3009

**O R D E R**

**AND NOW**, this            day of January, 2003, upon careful consideration of the Motion to Extend Time to File Notice of Appeal Nunc Pro Tunc filed by Petitioner Bruce A. Cooper ("Petitioner") (Doc. No. 56) and the response thereto, in the form of a Response to Petitioner's Motion to Extend Time Under Fed. R. App. P. 4(a)(5) (Doc. No. 57), filed by Respondents, the District Attorney of Philadelphia County, Warden James Price and the Attorney General of the Commonwealth of Pennsylvania, it is **ORDERED** that:

1. The Clerk of Court will file and docket nunc pro tunc the letter dated October 14, 2002 from Edward F. Borden, Jr., Esquire, Petitioner's counsel, as a Motion for Reconsideration.
2. Petitioner's Motion for Reconsideration was timely filed within the 10-day period prescribed by Rule 59(e), as calculated under Rule 6(a), of the Federal Rules of Civil Procedure.
3. This Court's Amended Order of October 16, 2002 granted

Petitioner's Motion for Reconsideration filed nunc pro tunc.

4. In the alternative, Petitioner's Motion to Extend Time to File Notice of Appeal is **GRANTED**.

BY THE COURT:

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JAMES MCGIRR KELLY, J.