

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

DON RAY ADAMS : CIVIL ACTION
 :
 v. :
 :
 FRANK D. GILLIS, et al. : NO. 00-4257

MEMORANDUM AND ORDER

Norma L. Shapiro

July 31, 2003

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioner Don Ray Adams ("Adams") was convicted of murder in the first-degree, murder in the second-degree, and possessing an instrument of crime; on November 12, 1992 he was sentenced to life imprisonment. The Pennsylvania Superior Court affirmed the convictions and allocatur was denied by the Supreme Court of Pennsylvania on July 6, 1995.

Adams filed his first federal habeas petition on January 25, 1996; it was referred to Magistrate Judge M. Faith Angell ("Judge Angell"), who recommended relief be denied as to all five claims.¹ Adams submitted a written letter challenging Judge Angell's Report and Recommendation ("initial R&R"), which the court filed as an objection. In addition to the written objection, Adams filed a "Motion to Amend a 28 U.S.C. § 1983

¹Adams argued the following: (1) Insufficient evidence to support conviction for second degree murder under 18 Pa. C.S.A. § 2502(b); (2) verdict against weight of evidence; and, (3)-(5) ineffective assistance of counsel.

Habeas Corpus Petition and to Hear Supplemental Arguments”² on September 25, 1996.³ The primary basis for the motion to amend was a claim of actual innocence; however, in addition to this assertion, the motion also contained four new claims for relief. Defendants were permitted to respond to the objection and reply to the motion to amend, and the matter was remanded to Judge Angell for a supplemental Report and Recommendation.

On February 25, 1997, Judge Angell submitted a second Report and Recommendation (“second R&R”), in which she recommended that Adams’ § 2254 petition be denied and dismissed without prejudice for failure to exhaust state remedies. In lieu of objections to the Report and Recommendation, Adams submitted to the court supplemental arguments. On consideration of the initial R&R, the second R&R, Adams’ supplemental arguments and the response thereto, the court approved and adopted Judge Angell’s

²The motion is labeled incorrectly; 42 U.S.C. § 1983 is inapplicable to habeas relief. Adams’ petition was one for relief under 28 U.S.C. § 2254.

³By this time, Congress had passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), materially modifying the requirements and standards applicable to the pursuit of habeas relief. Significantly, § 2244(d) imposed a one-year statute of limitations on state prisoners seeking federal relief. Regarding prisoners like Adams, whose convictions became final before the AEDPA was signed into law on April 24, 1996, the Court of Appeals has held their petitions timely so long as filed before April 23, 1997. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998) (one-year grace period for petitioners whose convictions final before the passage of AEDPA).

recommendation. See Adams v. Gillis, 1997 U.S. Dist. LEXIS 4782, *3 (E.D. Pa. Apr. 8, 1997) (Shapiro, S.J.).

The five claims originally raised in this habeas corpus petition were exhausted in state court when the Supreme Court of Pennsylvania denied allocatur on July 6, 1995. The Magistrate Judge discussed each of these exhausted claims and correctly concluded they were insufficient to grant federal habeas corpus relief for the reasons stated in her [initial] Report and Recommendation.

The additional claims asserted by petitioner's supplemental materials have not been exhausted. They have never been raised in state court and cannot now be considered by this court. Petitioner must seek further state collateral review and exhaust state remedies, or establish there are none, as to each of his claims before they may be considered by the federal court. These claims will be dismissed without prejudice to review, if necessary, after state remedies have been exhausted.

Id. at *3-4.

Subsequently, Adams returned to state court in an attempt to exhaust his additional claims through Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S. § 9541, et seq. After receiving notice the PCRA court intended to dismiss his petition as untimely pursuant to 42 Pa. C.S. § 9545(d)(1) (one year filing requirement for PCRA petitions), Adams filed a pro se objection contending the PCRA time limit infringed unconstitutionally upon state habeas review. Counsel was appointed to explore the issue, and an amended petition was filed on Adams' behalf on January 16, 1998. In response, the Commonwealth filed a motion to dismiss.

In an unpublished opinion dated September, 18, 1998, the PCRA court held the time-limit constitutional; "The provision of the PCRA which requires a petition to be filed within one year of the date the judgment becomes final is a regulation which is reasonably calculated to ensure the finality and the integrity of the criminal justice system." Commonwealth v. Adams, July Term, 1991, Nos. 4382-4388, slip op. at 3 (C.C.P. Philadelphia County, September 18, 1998). Though it noted that several exceptions to the one-year deadline exist to guard against prejudice, the PCRA court concluded that none were applicable in Adams' case and dismissed the petition as untimely. Id. at 4. The Superior Court affirmed without opinion, and the Supreme Court denied allocatur on March 16, 2000, see Commonwealth v. Adams, 753 A.2d 814 (Pa. 2000) (table).

Thereafter, Adams returned to federal court to seek relief. He filed the instant petition on August 21, 2000 (Paper #1), raising the following claims:

- (1) Direct appellate counsel ineffective for failing to argue trial counsel was ineffective in failing to request cautionary instruction regarding evidence Adams committed an uncharged assault;
- (2) Direct appellate counsel ineffective for failing to argue trial counsel was ineffective in failing to object to hearsay testimony regarding Adams' possession of a gun prior to the shooting;
- (3) Direct appellate counsel ineffective for failing to argue trial counsel was ineffective in failing to object to inadmissible opinion testimony by a lay witness;
- (4) Direct appellate counsel ineffective for failing to

argue trial counsel was ineffective in failing to establish the Commonwealth's star witness was in jail on the day the crime was committed;

(5) Appellate counsel ineffective for failing to argue trial counsel was ineffective for failing to exclude evidence of a defense witness' prior conviction;

(6) Direct appellate counsel ineffective for failing to "properly frame the issue on appeal that trial counsel was ineffective for failing to object to repeated statements by witnesses that a third person told them that Petitioner shot the victims, as this was inadmissible hearsay and severely prejudicial to Petitioner's case";

(7) Direct appellate counsel ineffective for failing to argue trial counsel was ineffective in failing to present evidence that the state's central witness.

Donna Benjamin, suffered from "acute psychosis"; and,

(8) The Commonwealth knew, or should have known, that this witness suffered from psychosis at the time of the incident and failed to disclose the information to Adams.

Petition at 9-10.

The petition was referred by this court to Judge Angell for a Report and Recommendation ("R&R"). Despite Adams' protestation that "it would be fundamentally unfair for this [c]ourt to permit the Commonwealth to prevail on its request for dismissal of the present federal habeas action as untimely when it previously asserted a defense of failure to exhaust state remedies,"

(Petitioner's Reply, 6) on March 14, 2002, Judge Angell issued an R&R recommending Adams' petition for habeas relief be denied, and that no certificate of appealability issue. (Paper #26.)

Because Adams' conviction became final on October 6, 1995, he had until April 23, 1997, to file a timely federal petition; the instant petition was filed, Judge Angell found, more than three

years out of time. (R&R, 7.)

After concluding that neither statutory nor equitable tolling were warranted, Judge Angell reviewed Adams' claim of actual innocence. Although the United States Supreme Court has yet to address whether actual innocence is available to overcome a statute of limitations bar, see McLaughlin v. Moore, 152 F. Supp. 2d 123 (D. N.H. 2001), Judge Angell noted that the Supreme Court of the United States has recognized two circumstances under which a claim of actual innocence may be invoked to circumvent an otherwise procedurally barred claim:

The first situation in which a claim of 'actual innocence' might arise occurs when a petitioner acknowledges that his trial was fair and free of constitutional defects but, because he claims to be actually innocent of the crime of conviction, says the punishment imposed on him violates the Eighth Amendment. See Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). The second occurs when a petitioner claims that his criminal trial was tainted in some manner that violates the Constitution (e.g., ineffective assistance of counsel) and argues that because he is actually innocent of his crime of conviction, the court should excuse his failure to adhere to the procedural rules applicable to habeas corpus petitions and, instead, consider the merits of his constitutional claims. See Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

(R&R, 8) (quoting McLaughlin, 152 F. Supp. 2d at 129. Judge Angell determined Adams' claim of actual innocence is encompassed by the latter category:

His constitutional claims are based upon his assertion that the ineffectiveness of his direct appeal counsel

and the alleged withholding of the Brady information, denied him the full range of protection provided by the Constitution. This has come to be known as a 'gateway' claim of actual innocence. (citation to Schlup). Mr. Adams' claim of actual innocence depends on the validity of his Strickland and Brady claims. The claim is 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.' (citation omitted).

(R&R, 8-9.)

In Schlup, the Supreme Court held that a habeas petitioner claiming actual innocence and asserting ineffective assistance of counsel is entitled to habeas review if the petitioner can: 1) "support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial," 513 U.S. at 324, and 2) show that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence," id. at 327. The standard "requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence⁴, no juror, acting reasonably,

⁴Evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence. Schlup, 513 U.S. at 328. "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient

would have voted to find him guilty beyond a reasonable doubt." Id. at 329. "This standard is higher than that required for prejudice, which requires only a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 333 (O'Connor, J., concurring). So, the proper inquiry here regards whether Adams has presented new evidence to warrant the conclusion that, had counsel raised all the ineffectiveness claims alleged and had the Commonwealth disclosed the witness' alleged psychosis, no reasonable juror would have convicted him of murder. (R&R, 9.) In rejecting Adams' claim of actual innocence, Judge Angell concluded:

Mr. Adams presents no such evidence. Initially, he submits two self-serving letters he has written himself.

Also included in his submission is a four-page document entitled 'Jail Track (Philadelphia)' which appears to be a copy of a printout concerning Donna Benjamin's interactions with, presumably, the Philadelphia Police Department. Petitioner has highlighted entries that seem to indicate special treatment for 'acute psychosis' from February 10, 1989 through March 6, 1989 and July 27, 1992, through December 17, 1992. This can hardly be called newly acquired reliable scientific evidence revealing that Ms. Benjamin is, as Petitioner states, 'a mental patient'. I also note that copies of this document are contained in the state record of Mr. Adams' PCRA proceedings, and that the subject of Ms. Benjamin's psyche was not unknown to defense counsel at the time of trial. This does not qualify as new reliable exculpatory evidence that would make it more

to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." Id. at 316 (emphasis in original).

likely than not that no reasonable juror would find Mr. Adams not guilty of his crimes of conviction.

Mr. Adams urges the court to 'refer to the Certified Court Records' and read numerous police reports, which he has listed. He also submits two additional police statements-those of Andry Gant and Derrick Rawls. Mr. Gant, a fourteen year old boy, tells the police that he 'heard that it was Donray who shot the victims.['] Mr. Gant was not at the scene at the time of the shooting; he just 'heard it around every one is talking about.' See Police Investigation Interview Record of Andry Gant. Derrick Rawls clearly states in his police report that he did not see the face of the shooter. Neither these 'new' statements nor the police reports already in the record provide the new reliable evidence required to proceed with a claim of actual innocence.

The remaining documents are letters written by friends and acquaintances of Mr. Adams to him and to others. The authors of these letters express their support of Petitioner, but no provides exculpatory scientific evidence, trustworthy eyewitness accounts of the crime, or critical physical evidence.

(R&R, 10-11.)

Adams, objecting to the R&R, essentially raises three claims: (1) the Commonwealth waived its right to assert the AEDPA statute of limitations defense; (2) under 28 U.S.C. § 2244(d), time during which a "properly filed" state application is pending tolls the AEDPA statute of limitations; and, (3) pursuant to Federal Rule of Civil Procedure 15(c), his instant petition should relate back to his 1996 petition.

II. DISCUSSION

1. Waiver of Statute of Limitations

In his written objection, Adams relies on Robinson v. Johnson, 283 F.3d 581, vacated, reh'g en banc granted, Robinson

v. Johnson, 283 F.3d 582, vacated, reh'g by original panel granted, Robinson v. Johnson, 283 F.3d 594 (3d Cir. 2002). In Robinson's original panel decision, the Court of Appeals held that the Commonwealth had waived its affirmative defense of the statute of limitations under the AEDPA when it did not assert it at the "earliest practicable moment." Robinson, 283 F.3d at 589. Adams argues the Commonwealth waived AEDPA's statute of limitations defense here when, in late 1996, it urged this court to remand his original petition to the state courts for lack of exhaustion rather than dismiss it for procedural default. The Commonwealth cannot raise the AEDPA statute of limitations now, Adams argues, because it failed to raise it at the "earliest practicable moment." Id.

By order dated August 14, 2002, the court placed this action in administrative suspense: "The merit of Adams' argument may depend on the outcome of the rehearing in Robinson. The original decision, on which he relies, was vacated en banc and has no precedential value." (Order of Aug. 14, 2002.) The Court of Appeals issued its decision on November 18, 2002, see Robinson v. Johnson, 313 F.3d 128 (3d Cir. 2002); thereafter, the parties filed briefs regarding its effect on Adams' petition for relief (Papers ## 32 & 35).

In Robinson, petitioner's first federal habeas petition was dismissed for failure to exhaust state remedies; petitioner

exhausted and then filed a second petition in federal court. The Commonwealth challenged the second petition because petitioner had not received permission to file a second, or successive, petition. The Commonwealth did not raise the AEDPA statute of limitations defense. It was only after the Court of Appeals found that Robinson's petition was not a successive petition precluded by 28 U.S.C. § 2244(b)(3), and remanded the action, that the Commonwealth raised the defense to the district court in their answer.

The Court of Appeals, after concluding that a state respondent could waive the limitations defense, considered when in a habeas proceeding the defense should be considered waived. The Court concluded that "affirmative defenses under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter." 313 F.3d at 137 (emphasis added).

Under the relevant facts of Robinson, the Court of Appeals held, the Commonwealth's failure to raise the defense sooner did not constitute a waiver. Id. at 141. Because the Commonwealth's initial response, challenging the petition on successiveness grounds, was the equivalent of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(6), the affirmative limitations defense did not need to be raised contemporaneously.

Id. at 139.

Equally important is the recognition that AEDPA places the defense of successiveness on a different level than other affirmative defenses, such as the statute of limitations. Practically speaking, it is unique. Second or successive petitions for habeas relief have always faced significant obstacles to consideration in the federal courts because they are, for the most part, wasteful of judicial time and effort. The passage of AEDPA in 1996 strengthened these obstacles by creating a special screening process for the consideration of second or successive petitions, often referred to as a 'gatekeeping' mechanism.' ...

Review of the language of § 2244(b)(3)(A) makes apparent the threshold nature of the inquiry into successiveness. The statute provides:

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Robinson argues that there is no significance to the statute's introduction to this requirement with the word 'before.' We are not persuaded. No other defense is accompanied by this statutory imperative, and it is apparent that the statutory structure gives priority to the successiveness challenge.

Robinson, 313 F.3d at 139 (internal citations omitted). The Court of Appeals concluded the Commonwealth's assertion of the limitations defense in its first pleading subsequent to the petition's remand was timely. Id. at 141.

Here, the Commonwealth challenged Adams' first petition not on successiveness grounds, but for failure to exhaust. The Robinson court's conclusion that the Commonwealth did not waive the limitations defense by failing to raise it contemporaneously

with the successiveness issue hinged on the jurisdictional and threshold nature of the successiveness issue. Id. at 139. The plain language of § 2254(b) of the AEDPA suggests that, unlike successiveness, exhaustion is not jurisdictional:

(b)(1) 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; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2254(b)(2) (emphasis added). See also Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992) (pre-AEDPA case in which the Court of Appeals said, "Exhaustion is not a jurisdictional requirement, but rather a rule of comity ... "). However, after the passage of the AEDPA, the Court of Appeals has stated:

Standing alone, section 2544(b)(2) does not provide a standard for determining when a court should dismiss a petition on the merits rather than requiring complete exhaustion. ... We note that section 2544(b)(2) does not provide the district court with the authority to grant relief on the merits where the petitioner fails to exhaust state remedies. Thus, a strict reading of

the statute compels us to conclude that if a question exists as to whether the petitioner has stated a colorable federal claim, the district court may not consider the merits of the claim if the petitioner has failed to exhaust state remedies and none of the exceptions set forth in sections 2544(b)(1)(B)(i) and (ii)⁵ applies.

Lambert v. Blackwell, 134 F.3d 506, 515 (3d Cir. 1997) (vacating and remanding grant of writ of habeas corpus) (emphasis added).

See also Jones v. Morton, 195 F.3d 153, 156 (3d Cir. 1999)

(2254(b)(2) is properly invoked only when it is perfectly clear that the applicant does not raise even a colorable federal

claim); but see Christy v. Horn, 115 F.3d 201, 206-07 (3d Cir.

1997) ("in rare cases exceptional circumstances of peculiar

urgency may exist which permit a federal court to entertain an

unexhausted claim"). Thus, absent extraordinary circumstances, a

federal court can only entertain a petition including unexhausted claims where those claims are without merit; the court is

prohibited from granting merit-based relief. In this way,

exhaustion is a threshold issue akin to successiveness, and the

Court of Appeals should conclude that when the Commonwealth

raised the limitations defense in response to Adams' second

federal habeas petition, it did so at the "earliest practicable moment." 313 F.3d at 137.

⁵The court assumes the Court of Appeals intended to refer to the exceptions found at § 2244(b)(2)(B)(i) and (ii), as section 2254(b)(1) does not contain any subparts. See 28 U.S.C. § 2254(b) (requirements for hearing successive petitions).

Even if the appellate court were to deem exhaustion wholly unlike successiveness, Adams' claim of waiver still fails. Adams filed his first habeas petition in January, 1996, before passage of the AEDPA; there was no limitations defense to raise and therefore, no waiver. It was the Commonwealth's failure to raise the limitations defense in response to the "Motion to Amend," filed in September, 1996, after the passage of AEDPA and in which he raised four new claims for relief, that could result in a waiver of that defense, Adams argues. But Adams' "Motion to Amend," filed with a written objection to the initial R&R, was not a new petition for relief.

Despite remanding the "Motion to Amend" and the claims therein to Judge Angell for a supplemental Report and Recommendation, after the Commonwealth responded to Adams' additional claims, the court treated all Adams' claims as comprising one petition. A single opinion dismissed the petition without prejudice as required by Rose v. Lundy, 455 U.S. 509, 522 (1982) (a "mixed" petition, one with exhausted and unexhausted claims, must be dismissed without prejudice). See Adams v. Gillis, 1997 U.S. Dist. LEXIS 4782, *3 (E.D. Pa. Apr. 8, 1997) (Shapiro, S.J.). Because, in addition to objecting to the R&R, Adams raised new claims, the Commonwealth was afforded the opportunity to respond before a supplemental Report and Recommendation was submitted by Judge Angell; however, the

additional claims were part of the original petition. Because that petition was filed before passage of AEDPA, and before the limitations defense under that statute, the Commonwealth could not have waived the defense.⁶

2. 28 U.S.C. § 2244(d): The "Properly Filed" Requirement

Adams argues that the one-year filing limitation under the AEDPA should not preclude his current petition because he is entitled to statutory tolling under section 2244(d)(2); statutory tolling applies to "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). The issue here regards whether Adams' PCRA application, found untimely by the state court, see Commonwealth v. Adams, July Term, 1991, Nos. 4382-4388, slip op. at 3 (C.C.P. Philadelphia County, September 18, 1998), can nevertheless toll the limitations period as a "properly filed application" under AEDPA.

A petition is "properly filed" under 2244(d)(2) if it fulfills certain procedural requirements known as "conditions to filing." Artuz v. Bennett, 531 U.S. 4, 11 (2000). Explicitly included among those filing requirements are "time limits" imposed on a petition's delivery to the court. Id. at 8. The

⁶Under this rationale, the Court of Appeals' decision in Robinson is inapposite.

Court of Appeals has made clear, "An untimely PCRA petition does not toll the statute of limitations for a federal habeas corpus petition." Merritt v. Blaine, 326 F.3d 157, 165 (3d Cir. 2001). See also Carey v. Saffold, 536 U.S. 214 (2002) ("properly filed" application for collateral review in state court must satisfy the state's timeliness requirement). Since Adams' application was time-barred under state law, it was not "properly filed," and there is no statutory tolling of AEDPA's one-year period of limitations.

Adams' petition does not satisfy any other statutory exception to AEDPA's period of limitations; see § 2244(d)(1)(B)-(D). No state action prevented him from filing the petition; he asserts no claim relying on a new rule of constitutional law retroactively applicable; and the factual predicates upon which his claims are based concern events that took place during his trial proceedings and were discoverable years ago through the exercise of due diligence.

3. Relation Back

Relying on Federal Rule of Civil Procedure 15(c), Adams argues that his current habeas petition, filed August 21, 2000, should relate back to the date of his first habeas petition, filed Jan. 25, 1996. Rule 15 provides, in relevant part:

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original

pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, ...

Fed. R. Civ. P. 15(c). As the Court of Appeals explained in Jones v. Morton, 195 F.3d 153 (3d Cir. 1999):

Traditionally, a statute of limitations is not tolled by the filing of a complaint that is subsequently dismissed without prejudice. ... '[T]ypically, when a complaint (or habeas petition) is dismissed without prejudice, that complaint or petition is treated as if it never existed.' Thus, courts have recognized that, if a petition is dismissed for failure to exhaust state remedies, a subsequent petition filed after exhaustion is completed cannot be considered an amendment to the prior petition, but must be considered a new action."

Id. at 161 (internal citations omitted). See also Baker v. Horn, 210 F. Supp. 2d 592, 609-610 (E.D. Pa. 2002). Adams instant habeas petition does not relate back to the filing date of his original petition.

An appropriate order follows.

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

DON RAY ADAMS	:	CIVIL ACTION
	:	
v.	:	
	:	
FRANK D. GILLIS, et al.	:	NO. 00-4257

ORDER

AND NOW, this 31st day of July, 2003 on consideration of Petition for Writ of Habeas Corpus (Paper #1), Response to Petition-writ of habeas corpus by Respondents (Paper #18), Petitioner's Reply (Paper #25), Magistrate Judge Angell's Report and Recommendation (Paper #26), Objections by Petitioner Don Ray Adams to the Magistrate's Report and Recommendation (Paper #29), and all related filings, and for the reasons stated in the foregoing memorandum of law, it is hereby **ORDERED** that:

1. The Report and Recommendation (Paper #26) is **APPROVED** and **ADOPTED**;
2. Petitioner's Objections to Magistrate Judge's Report and Recommendation (Paper #29) are **OVERRULED**;
3. Petitioner's Petition for Writ of Habeas Corpus (Paper #1) is **DENIED**;
4. There is no probable cause to issue a certificate of appealability;
5. Judgment is entered in favor of respondents and against petitioner; and,

6. The Clerk of the Court shall mark this case closed.

S.J.