

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

RYAN KERWIN, )  
Petitioner )  
 ) CIVIL ACTION  
 v. )  
 )  
BEN VERNER, et al., ) NO. 02-6760  
Respondents )  
 )

**Padova, J.**

**MEMORANDUM**

**August \_\_, 2003**

Before the Court is Ryan Kerwin's pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). For the reasons that follow, the Court adopts the Report and Recommendation of Chief Magistrate Judge James R. Melinson, and dismisses the Petition in its entirety without prejudice.

**I. BACKGROUND**

On April 28, 1999, Petitioner Ryan Kerwin was convicted on assault charges. About the same time, Petitioner pled guilty to reckless endangerment, and was found guilty in a non-jury trial of being a felon in possession of a firearm. On June 11, 1999, Petitioner was sentenced to a term of four and one-half to nine years on all of the charges. According to the state court record, the charges stemmed from a November 4, 1998 incident, in which Petitioner, after arguing with his roommate, Ken Good, struck Good in the head with a hammer, causing a skull fracture. With the help of his friend, Dan Pellicone, Petitioner left his Bucks County apartment, tossed the hammer in neighboring woods, and was driven

to a wooded area in Middletown Township. When Pellicone returned to the apartment to pick up Petitioner's girlfriend, Katie Ireland, the police were already there. After interviewing Pellicone and Ireland, the police located the hammer. The hammer later tested positive for Good's DNA. Pellicone also informed the police of Petitioner's location.

On January 12, 1999, after receiving a tip from an anonymous informant, the police located Petitioner and Ireland at a Red Roof Inn in Langhorne, Pennsylvania. When Ireland opened the door to the room, Petitioner hid in the bathroom and refused to come out. As Detective Tegge approached the bathroom with his gun drawn, he observed Petitioner with a gun in his hands. After repeated orders to drop the gun, Petitioner eventually complied and was arrested.

Petitioner did not initially file a direct appeal of his conviction. On April 12, 2000, Petitioner filed a pro se petition for collateral relief under Pennsylvania's Post Conviction Relief Act (the "PCRA"), 42 Pa. C.S.A. § 9541, et seq. Appointed counsel filed an amended petition and, following a hearing on June 27, 2000, Petitioner's appellate rights were reinstated nunc pro tunc. Thereafter, Petitioner filed a direct appeal in which he raised the following claims: 1) insufficiency of the evidence to support a conviction for aggravated assault; 2) ineffective assistance of trial counsel for failing to challenge a juror; 3) ineffective assistance of trial counsel for failing to object to the

prosecutor's opening and closing remarks; and 4) trial court error for precluding trial counsel from impeaching the credibility of the victim. The Superior Court of Pennsylvania affirmed the judgment of sentence in a memorandum opinion. Commonwealth v. Kerwin, No. 2986 EDA 2000 (Pa. Super. Ct. May 8, 2001). The Supreme Court of Pennsylvania denied Petitioner's petition for allowance of appeal. Commonwealth v. Kerwin, No. 406 MAL 2001 (Pa., Oct. 2, 2001).

On July 25, 2002, Petitioner filed the instant pro se petition for a writ of habeas corpus in the Middle District of Pennsylvania, which was subsequently transferred to this district. In his Petition, Petitioner asserts that: 1) he was denied the right to appeal, resulting in inordinate delay; 2) his conviction was obtained by the failure of the prosecution to disclose evidence favorable to him and by the use of coercion; 3) he was denied the right to cross examine and impeach the victim; 4) his conviction was obtained by the use of tampered evidence; 5) his conviction was obtained by the use of perjured testimony; 6) his conviction was obtained through prosecutorial misconduct; 7) he was denied the right to a fair and impartial jury; 8) his guilty plea was involuntary; 9) he was denied the right to a speedy trial; and 10) his sentence is illegal. The Commonwealth filed a response asserting that the claims raised are procedurally defaulted and without merit.

## II. THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court referred this case to Chief Magistrate Judge James R. Melinson for a Report and Recommendation. The Magistrate Judge recommended that the instant Petition be dismissed without prejudice for failure to exhaust state court remedies. The Magistrate Judge noted that Petitioner had only presented four of the claims raised in the instant Petition to the state courts. Consequently, the Magistrate Judge found that the instant Petition was a mixed petition, containing both exhausted and unexhausted claims. See Carpenter v. Vaughn, 296 F.3d 138, 146 (3d Cir. 2002) (“[I]f a petition contains both exhausted and unexhausted claims, it is a ‘mixed’ petition and, unless the petitioner elects to withdraw the unexhausted claim, the entire petition should be dismissed without prejudice, thereby leaving the petitioner free to return to the state courts to exhaust.”) (citing Rose v. Lundy, 455 U.S. 509 (1982)). Petitioner filed timely objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b), the Court will now conduct a de novo determination of the issues raised in Petitioner’s objections.

## III. DISCUSSION

### A. Whether Exhaustion Would Be Futile

Petitioner argues that raising his unexhausted claims in the state court would be futile at this point in the proceedings.

Petitioner therefore argues that exhaustion must be excused, and that this Court has jurisdiction to hear his unexhausted claims.

The United States Court of Appeals for the Third Circuit ("Third Circuit") has held that, "in rare cases certain exceptional circumstances of peculiar urgency may exist which permit a Federal court to entertain an unexhausted claim." Christy v. Horn, 115 F.3d 201, 206-07 (3d Cir. 1997)(citations omitted). Such a situation could exist where state remedies were entirely inadequate to adjudicate the claim, or where exhaustion would be futile. Id. Exhaustion should be excused where ". . .the petitioner has no opportunity to obtain relief in state court, or where the state corrective process is so deficient as to render any effort to obtain relief futile." Lambert v. Blackwell, 134 F.3d 506, 516 (3d Cir. 1997) (citing Evans v. Court of Common Pleas, Delaware County, Pa., 959 F.2d 1227, 1231 (3d Cir. 1992)). Petitioner has failed to establish that the instant case represents such an exceptional circumstance. Petitioner's main argument is that his various attorneys (some of whom have been appointed by the state courts) have failed to file appeals that he has requested. Ostensibly, the appeals that Petitioner wished to have filed would have raised the claims that are unexhausted in this petition. The record reflects that Petitioner has filed multiple ineffective assistance of counsel claims against his attorneys. (See Supplemental Amendment to Petitioner's Objections to Report and Recommendation, dated June

10, 2003). Indeed, Petitioner has a PCRA petition currently pending alleging the ineffectiveness of his current counsel, Tina Mazaheri. (Petitioner's Objections to Report and Reco., at 6th page). Petitioner argues that, because he cannot make his attorneys file appeals on his behalf, any resort to the state system would be entirely futile. However, it is clear from the record that the state courts have heretofore made diligent efforts to grant Petitioner new counsel and preserve his appellate rights in response to Petitioner's complaints about his counsel's ineffectiveness. Indeed, according to Petitioner's own submissions, when Petitioner filed his PCRA Petition on April 12, 2000, and alleged that his trial attorney failed to file a direct appeal, new counsel was appointed, and Petitioner's appellate rights were restored nunc pro tunc. (Habeas Corpus Petition, "Factual History Arguments," at A4-A5). When Petitioner then complained about the inadequacy of his PCRA attorney, new counsel was yet again appointed to represent him in his direct appeal. (Id.) Petitioner has subsequently had at least two additional attorneys appointed to represent him in his direct appeal in the state court system. On December 4, 2001, the Court of Common Pleas of Bucks County granted Petitioner the right to apply for a writ of certiorari with the United States Supreme Court nunc pro tunc. (State Court Record, Ex. B, Court of Common Pleas Order dated December 4, 2001). Accordingly, at this point in the proceedings,

there is no evidence that the state court system has been so delinquent in considering Petitioner's claims that continued resort to the state system would be futile.

#### B. Inordinate Delay

For similar reasons, there is no merit to Petitioner's argument that his failure to exhaust state court remedies should be excused because of inordinate delay in the state court system. The Third Circuit has held that "inexcusable or inordinate delay by the state in processing claims for relief may render the state remedy effectively unavailable." Wojtczak v. Fuocomer, 800 F.2d 353, 354 (3d Cir. 1986). A finding of inordinate delay does not automatically excuse exhaustion; rather, it shifts the burden to the respondent to demonstrate why exhaustion should still be required. Story v. Kindt, 26 F.3d 402, 405 (3d Cir. 1994). Petitioner notes that he was convicted in 1999, and the state courts have not yet considered the unexhausted claims in his Petition. The Third Circuit has held that as little as a thirty-three month delay in deciding a post conviction petition was sufficient for a finding of inordinate delay. Id. However, as the Third Circuit recently noted in Cristin v. Brennan, in cases in which courts sitting in habeas corpus have found inordinate delay, the state courts were found to have taken little or no action on the petitioner's case during the period in which the petitioner's post-conviction appeals were pending. 281 F.3d 404, 411 (3d Cir.

2002). The court in Cristin refused to find inordinate delay based upon a delay of twenty seven months where the "the state courts were responsive to [the petitioner's] case, had held argument, and offered a hearing." Id. Similarly, in this case, the state courts have been responsive to Petitioner's case. As noted, supra, in the four years since Petitioner's conviction, the state courts have appointed new counsel for Petitioner on multiple occasions in response to his complaints, reinstated Petitioner's appellate rights nunc pro tunc, decided Petitioner's direct appeal, and granted Petitioner permission to file for a writ of certiorari with the United States Supreme Court nunc pro tunc. Thus, the Court finds that Petitioner's inordinate delay argument is without merit.<sup>1</sup>

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<sup>1</sup>Petitioner asserts that the failure of his attorneys to file the motions he requests, and the resulting delays, is the result of their corruption and incompetence. The record, however, reveals that the failure of Petitioner's attorneys to act in a timely manner may in fact be due to Petitioner's failure to cooperate with them and respond to their requests. For example, a letter from attorney Tina Mazaheri to Petitioner, dated May 16, 2002, indicates that Ms. Mazaheri instructed Petitioner to fill out and return an enclosed Affidavit in Support of Motion to Proceed for Petition for Writ of Certiorari in Forma Pauperis with the United States Supreme Court. (Ltr. from Tina Mazaheri to Ryan Kerwin, dated May 16, 2002). Apparently, it is Petitioner's failure to return this affidavit that has caused the delay in the filing of the writ. Petitioner asserts that the affidavit that Ms. Mazaheri requested that he sign was not enclosed with her letter. (Petitioner's Objections to Report and Reco., at 5th page). However, Petitioner fails to indicate whether he requested that Ms. Mazaheri send him another copy of the affidavit, and, if he did not, his reasons for failing to do so. Regardless of the reasons for Petitioner's difficulties with his counsel, given the willingness of the state courts to appoint new counsel to represent Petitioner and to

### C. Procedural Default

Moreover, at this point the Court cannot say that Petitioner's unexhausted claims would be procedurally defaulted under state law if he attempted to pursue them in the state courts.<sup>2</sup> The PCRA states that "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42 Pa. C.S.A. § 9544(b). The instant Petition asserts claims which could have been raised on direct appeal, but were not. However, waiver may be excused by a showing of ineffective assistance of counsel. Lambert, 134 F.3d at 521-22. An ineffective assistance of counsel claim can only be made if the defendant had a constitutional right to counsel at the stage of the proceedings where the alleged error was committed. Id. Thus, ineffective assistance of counsel claims generally must be based upon attorney error either at trial or on direct appeal. Id. In this case, Petitioner alleges that his original appellate counsel, his counsel who was assigned to represent him at his PCRA hearing, his counsel who actually represented him on his direct appeal after his

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preserve Petitioner's appellate rights, Petitioner's inordinate delay argument must fail.

<sup>2</sup>If a Petitioner's claims were procedurally defaulted, default would be excused. Stevens v. Delaware Corr. Ctr., 295 F.3d 361, 369 (3d Cir. 2002). However, Petitioner's unexhausted claims would then be dismissed unless the Petitioner could establish either cause and prejudice or a fundamental miscarriage of justice. Id.

appellate rights were restored nunc pro tunc, and his current counsel assigned to represent him in his application for a writ of certiorari from the United States Supreme Court, have all been ineffective. Specifically, Petitioner asserts that Randall Miller, the attorney who represented Petitioner during his direct appeal after his appellate rights were restored, "failed to appeal all of petitioner's cases and claims." (Petitioner's objections to Report and Reco. at 3rd Page). Given the procedural history of this case, this court cannot say with any certainty that the state courts would consider Petitioner's unexhausted claims procedurally defaulted if he chose to pursue them in a PCRA petition. The appropriate course of action is therefore to dismiss the instant Petition without prejudice in order to give the state courts an opportunity to consider Petitioner's unexhausted claims. See Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997) ("[I]n the absence of a state court decision indicating that a habeas corpus petitioner is clearly precluded from state court relief, the district court should dismiss the claim for failure to exhaust even if it is not likely that the state court will consider petitioner's claim on the merits.")

#### **IV. CONCLUSION**

For the foregoing reasons, the Court adopts the Report and Recommendation of Chief Magistrate Judge James R. Melinson. This

Petition is hereby dismissed in its entirety without prejudice. An appropriate order follows.