

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

DAVID ADDAMS	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	
ROBERT MEYERS, et al.	:	No. 03-3789, 03-3790
Respondents.	:	

MEMORANDUM AND ORDER

Norma L. Shapiro

March 16, 2004

Petitioner, David Addams, has filed timely objections to the Report and Recommendation issued by Magistrate Judge Jacob P. Hart on November 14, 2003. Addams v. Meyers, Nos. 03-3789, 03-3790 (E.D. Pa. Nov. 14, 2003) (Report and Recommendation) (“R & R”). The court conducts de novo review of the portions of a magistrate judge's R & R to which specific objections have been filed. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

Background

On December 19, 1996, following a jury trial, Addams was convicted of robbery and possession of an instrument of crime in the Court of Common Pleas of Delaware County, as a result of a robbery in a Burger King. On February 5, 1997, Honorable Kenneth Clouse sentenced Addams to 8 ½ - 20 years’ imprisonment. On March 6, 1997, following a jury trial, Addams was convicted of robbery and possession of an instrument of crime in the Court of Common Pleas of Delaware County, as a result of a robbery in a McDonald’s. Addams appealed the two

convictions, (consolidated for purposes of direct appeal), and on January 6, 1998, the Superior Court affirmed his sentences. The Supreme Court of Pennsylvania denied allocatur on October 6, 1998.

On April 12, 1999, Addams filed petitions for collateral relief pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S. §9541, et seq. to attack both convictions. After appointment of counsel and an evidentiary hearing, the PCRA Court denied relief on August 8, 2000. Addams filed timely appeals from the denials of relief, which were consolidated by the Superior Court. The Superior Court affirmed the PCRA decisions on September 19, 2001. On February 21, 2002 the Supreme Court of Pennsylvania denied allocatur.

On April 8, 2002, Addams filed a second PCRA petition, attacking the Burger King conviction. Retained counsel filed amended petitions. In the Third Amended Petition, counsel attacked the credibility of a Commonwealth witness who testified at the suppression hearing. On July 1, 2003, the PCRA petition was dismissed. Counsel filed an appeal of the denial of PCRA relief on August 11, 2003. That appeal is currently pending in the Superior Court.

Also on April 8, 2002, Addams filed a second PCRA petition attacking the McDonald’s conviction. Judge Clouse dismissed the petition on December 16, 2002. Addams filed an appeal from the PCRA dismissal, but that appeal was dismissed for failure to file the docketing information required by Pa. R.A.P. 3517.

On May 8, 2003, Addams filed a third PCRA petition attacking the McDonald’s conviction. Counsel amended the petition on September 22, 2003. In the amended petition, counsel attacked the credibility of a Commonwealth witness that testified at the suppression hearing in that case. The third PCRA appeal in the McDonald’s case is pending.

On June 24, 2003, Addams filed the instant federal petitions for writs of habeas corpus. The petitions were referred to Magistrate Judge Jacob C. Hart. Addams has since filed motions for leave to file a second amended petition in each of the cases. Because Judge Hart considered the content of these amended petitions as the basis for his R&R, these motions are granted nunc pro tunc. In his R & R, dated November 14, 2003, Judge Hart found each of Addams' Second Amended petitions presented a clearly unexhausted claim. In the Burger King and McDonald's actions, Addams complains the Court of Common Pleas relied on the perjured testimony of a police officer who testified at the suppression hearing. At the hearing Police Officer Bardo testified that in advance of Addams' arrest, he found a note, containing a description of Addams' car and suggesting it had been used in previous robberies, and that the note was the basis for his identification of Addams' car and Addams' subsequent arrest. Addams maintains the note was fabricated after the arrest for use at the suppression hearing. Because Addams asserts these claims in his two pending PCRA petitions, they are unexhausted. Finding the instant petitions contain both exhausted and unexhausted claims and are therefore mixed, and relying on Rose v. Lundy, 455 U.S. 509 (1982), Judge Hart recommended the petitions be dismissed. R&R at 5.

Addams, filing objections to the R & R, claims that Judge Hart improperly found his petitions procedurally barred. While not contesting the procedural history as recited in the R&R, Addams alleges Judge Hart erred in his conclusion that a habeas petition which contains both exhausted and unexhausted claims must be dismissed. He argues that Judge Hart erred in his reliance on Rose v. Lundy, 455 U.S. 509 (1982), a pre-AEDPA case, and should have relied instead on the suggestion of the Court of Appeals in Merritt v. Blaine, 326 F.3d 157, 170 n.10 (2003) that the proper course of action is to stay a habeas petition with exhausted and

unexhausted claims. He maintains Judge Hart properly should have recommended stays, rather than dismissal of the federal habeas petitions, until the claims dually asserted in the PCRA petitions and the instant federal habeas petitions are exhausted.

Discussion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") set a limitations period of one year within which a petitioner may apply for a federal writ of habeas corpus challenging a state court action. See 28 U.S.C. § 2244(d). Additionally 28 U.S.C. §2254 requires exhaustion of remedies available in state court before a federal habeas petition can be granted. Noting the apparent tension between these two procedural requirements, in Merritt v. Blaine, *supra*, the Court of Appeals suggested that when petitioners have filed habeas actions in federal court before they have fully exhausted their state remedies, the appropriate procedure is to stay, rather than dismiss, the action to avoid the risk of jeopardizing the timeliness of the federal petition while waiting for the state claims to be exhausted.

The recent decision in Crews v. Horn, No. 99-9008, 2004 U.S. App. LEXIS 4205 (3d Cir. Mar. 4, 2004) definitively addressed this question. In Crews, considering a timely federal habeas petition containing a mix of exhausted and unexhausted claims dismissed by the district court, the Court of Appeals adopted the position that:

following AEDPA, while it usually is within a district court's discretion to determine whether to stay or dismiss a mixed petition, staying the petition is the only appropriate course of action where an outright dismissal 'could jeopardize the timeliness of a collateral attack.'

Id., at *15-*16. Finding there was a substantial danger Crews would be time-barred from returning to federal court because his petition would be filed after the expiration of the

limitations period if tolling did not apply, the court held:

district courts have the discretion to stay mixed habeas corpus petitions but that, as in this case, when an outright dismissal could jeopardize the timeliness of collateral attack, a stay is the only appropriate course of action.

Id., at *15-*17, *22.

Applying this teaching to the instant action, the appropriate course of action is to stay Addams' habeas petitions. Addams's federal petitions each state a claim included in each of his pending PCRA petitions, i.e., the Court of Common Pleas relied on perjured testimony and fabricated evidence to support his conviction. If the court were to follow Judge Hart's recommendation, and dismiss Addams' petitions, he later might be barred from returning to federal court on the exhausted claims by the one-year limitations period. Although Judge Hart's recommendation was correct at the time it was made, the Court of Appeals holding in Crews v. Horn supercedes his reliance on Rose v. Lundy in recommending that the petitions be dismissed. Accordingly, to prevent that possibility, these proceedings are stayed until Addams' unexhausted claims have been disposed of in state court.

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ORDER

AND NOW, this 16th day of March, 2004 upon careful and independent consideration of the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. §2254, and on review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart and petitioner's objections thereto, it is hereby **ORDERED** that:

1. Petitioner's Motion for Leave to Amend the Complaint in No. 03-3789 (Paper #8) is **GRANTED** nunc pro tunc;
2. Petitioner's Motion for Leave to Amend the Complaint in No. 03-3790 (Paper #8) is **GRANTED** nunc pro tunc;
3. The Report is **NOT APPROVED** and the Recommendation is **NOT ADOPTED**;
4. The Petitions for Writ of Habeas Corpus are **STAYED** for **30** days from the date on which petitioner's pending state PCRA petitions have been terminated;
3. A certificate of appealability will not issue.

Norma L. Shapiro, S.J.