

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

KEITH BARTELLI,	:	CIVIL ACTION
	:	
Petitioner,	:	
	:	
v.	:	No. 04-CV-3817
	:	
JAMES WYNDER, et al.	:	
	:	
Respondents.	:	

**EXPLANATION AND ORDER**

**Anita B. Brody, J.**

**May 12, 2005**

On August 12, 2004, Petitioner Keith Bartelli (“Bartelli”), who is presently incarcerated at the State Correctional Institution at Dallas, Pennsylvania, petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 8, 2004, Lynne Abraham, District Attorney of Philadelphia County, by Marilyn F. Murray, Assistant District Attorney, and Thomas W. Dolgenos, Chief, Federal Litigation, filed a response to the petition for habeas corpus on behalf of the respondents. On December 17, 2004, Magistrate Judge Thomas J. Rueter issued a Report and Recommendation (“R&R”). The issue before me is how to address the unexhausted claims in Bartelli’s petition for a writ of habeas corpus.

**BACKGROUND**

Although the facts are laid out more fully in the R&R, the following paragraphs present the facts relevant to the current determination. On May 15, 1996, in a bench trial before Judge

Ricardo C. Jackson, the Philadelphia Court of Common Pleas found Bartelli guilty of robbery, aggravated assault, burglary, possessing an instrument of crime, impersonating a public servant, attempted theft, criminal trespass, and recklessly endangering another person. (May 15, 1996, Tr. at 139; May 31, 2000, Opinion at 1-2.) On September 27, 1996, Judge Jackson imposed an aggregate sentence of thirty-nine years reporting probation. (Sept. 27, 1996, Certification of Probation.)

On September 30, 1996, the Commonwealth petitioned for reconsideration of sentence because Judge Jackson had failed to impose a mandatory minimum sentence of three to six years imprisonment on one of the charges. (Commonwealth's Pet. Reconsideration Sentence at 1-2.) On November 16, 1996, Judge Jackson vacated the original sentence and granted the Commonwealth's request for further hearing. (May 31, 2000, Opinion at 2.) On March 24, 1999, Bartelli was sentenced to a total of thirty-one to sixty-two years imprisonment. (March 24, 1999, Tr. at 19-20.)

On April 23, 1999, Bartelli appealed his judgments of sentence to the Superior Court of Pennsylvania. (Notice of Appeal.) On October 3, 2000, this appeal was dismissed for failure to file a brief. (Oct. 3, 2000, Order.) On May 7, 2001, Bartelli filed a petition including several claims pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. C.S. § 9541 et seq. On July 12, 2001, the PCRA court granted Bartelli's request for restoration of his appellate rights nunc pro tunc. (July 12, 2001, Order.)

On August 16, 2001, Bartelli then filed a direct appeal to the Pennsylvania Superior Court. (Application File Appeal Nunc Pro Tunc.) On November 17, 2003, the Pennsylvania Superior court affirmed the judgments of sentence in an unpublished memorandum opinion.

Commonwealth v. Bartelli, No. 2343 EDA 2001 slip op. (Pa. Super. Ct. Nov. 17, 2003). In its opinion affirming Bartelli's sentence, the Pennsylvania Superior Court dismissed Bartelli's claims for ineffective assistance of counsel without prejudice to raise them "in a first PCRA petition." Id. at 14.

On August 12, 2004, Bartelli filed the federal petition for a writ of habeas corpus that is currently before me. Bartelli acknowledges that his petition for a writ of habeas corpus is a mixed petition containing exhausted and unexhausted claims, and he seeks a stay and abeyance in order to exhaust his unexhausted claims. (Pet'r's Application Stay Proceedings at 6-7.)

## **DISCUSSION**

A federal court may not reach the merits of a claim that was not exhausted in state court. See 28 U.S.C. § 2254(b)(1)(A); Rhines v. Weber, 125 S. Ct. 1528, 1533 (2005). Federal courts that are presented with a mixed petition may either dismiss the petition without prejudice to allow the petitioner to exhaust previously unexhausted claims or may "stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims." Rhines, 125 S. Ct. at 1533-34.

The Supreme Court held that "stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." Rhines, 125 S. Ct. at 1535. Shortly after its decision in Rhines, the Supreme Court stated in dicta that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." Pace v. DiGuglielmo, No. 03-9627, 2005 WL 957194, at \*5, 2005 U.S. LEXIS 3705, at \*16 (Apr. 27,

2005). In the present case, Bartelli was reasonably confused about whether he was permitted to raise the unexhausted claims in a PCRA petition given that he had already filed a first PCRA petition and given that under the PCRA issues are waived if they could have been raised by the petitioner in a prior state postconviction proceeding but were not raised in the prior postconviction proceeding. 42 Pa. C.S. § 9544. This confusion was magnified by the fact that the Pennsylvania Superior Court dismissed the claims that Bartelli raised at that time for ineffective assistance of counsel without prejudice to raise them “in a first PCRA petition.” Commonwealth v. Bartelli, No. 2343 EDA 2001 slip op. at 14. Therefore, Bartelli had good cause for his failure to exhaust.

The Supreme Court in Rhines further stated that “the district court would abuse its discretion if it were to grant [the petitioner] a stay when his unexhausted claims are plainly meritless.” Rhines, 125 S. Ct. at 1535. In the present case, Bartelli’s claims allege violations of Bartelli’s constitutional rights that could serve as grounds for granting a writ of habeas corpus if supported by sufficient facts. Therefore, the claims are not plainly meritless.

Finally, the Supreme Court in Rhines stated that district courts must also consider timeliness concerns. Id. The Court stated that “district courts should place reasonable time limits on a petitioner’s trip to state court and back.” Id. In spite of these limitations on the district court’s discretion, the Court affirmed the appropriateness of stay and abeyance in many situations:

[I]t likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed

petition.

Id. (citation omitted).

Therefore, I will order that Bartelli's petition for a writ of habeas corpus be stayed and held in abeyance in order to allow him to exhaust his unexhausted state court claims.

**ORDER**

**AND NOW**, this 12 th day of May 2005, upon careful and independent consideration of the petition for a writ of habeas corpus, the response to the petition for a writ of habeas corpus, the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, Bartelli's Application to Stay Proceedings Before the United States District Court [Motion in Abeyance], and the parties' other filings, it is **ORDERED** that Bartelli's Application to Stay Proceedings Before the United States District Court [Motion in Abeyance] (Docket entry # 19) is **GRANTED** insofar as it seeks to hold his petition for a writ of habeas corpus in abeyance. It is **FURTHER ORDERED** that:

1. Bartelli's petition for writ of habeas corpus is stayed and held in abeyance in order for Bartelli to exhaust his previously unexhausted claims in state court **SO LONG AS** Bartelli pursues his state court remedies before **June 29, 2005, AND SO LONG AS** Bartelli returns to this court and notifies this court of the status of the state court proceedings within **30 days** after the state court exhaustion is completed;
2. Petitioner's first motion for appointment of counsel (Docket entry # 9) is **GRANTED**;
3. Petitioner's second motion for appointment of counsel (Docket entry # 15) is **DENIED** as moot;
4. Petitioner's motion for leave to proceed in forma pauperis (Docket # 10) is **GRANTED**; and
5. I decline to adopt the Report and Recommendation (Docket # 18).

S/Anita B. Brody

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ANITA B. BRODY, J.

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