

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

MELVIN E. IMES,  
Petitioner,

v.

GEORGE PATRICK, *et al*,  
Respondents.

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CIVIL ACTION

NO. 03-4657

**Memorandum and Order**

YOHN, J.

June \_\_\_\_, 2005

Petitioner Melvin E. Imes, a prisoner at the Montgomery County (PA) Correctional Facility, has filed a *pro se* “motion for leave to supplement 28 U.S.C.A. § 2255 motion – federal.” For the following reasons, petitioner’s motion will be denied.

**FACTUAL & PROCEDURAL BACKGROUND**

On May 17, 2000, petitioner was convicted in the Montgomery County Court of Common Pleas on drug and weapons charges, and on September 18, 2000, he was sentenced to three to six years imprisonment on the drug charges and a concurrent two to four years on the gun charge. Petitioner filed post-sentence motions in the Common Pleas Court, but they were denied. Petitioner appealed, but on August 7, 2002, the Pennsylvania Superior Court affirmed the convictions and sentences. Petitioner appealed again, however, and on April 9, 2003, the Pennsylvania Supreme Court reversed the order of the Superior Court by way of the following order:

AND NOW this 9th day of April, 2003, the Petition for Allowance of Appeal is granted. The order of the Superior Court is hereby REVERSED. See Commonwealth v. Mason, 397 A.2d 408 (Pa. 1979).

*Commonwealth v. Imes*, 820 A.2d 701 (Pa. 2003). *Mason* dealt only with the gun crime of which petitioner was convicted,<sup>1</sup> and so the Pennsylvania Supreme Court ostensibly reversed only that conviction.

Meanwhile, on January 8, 2001, after he was sentenced but before his post-sentence motions had even been ruled upon, petitioner filed a petition for writ of habeas corpus in this court pursuant to 28 U.S.C. § 2254. On October 26, 2001, I dismissed the petition without prejudice for failure to exhaust state court remedies.

After the Pennsylvania Supreme Court's reversal of the gun conviction, petitioner filed a petition for writ of habeas corpus in the Montgomery County Court of Common Pleas. By order dated September 8, 2003, and by agreement of the Commonwealth and petitioner, the court treated said petition as a petition to modify the sentence *nunc pro tunc* and modified petitioner's sentence on the drug convictions to essentially "time served," with the addition of three years of probation. No appeal was taken from that order.

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<sup>1</sup> In *Mason*, the defendant was charged with and tried for several crimes, including alteration of a firearm in violation of 18 Pa. Cons. Stat. § 6117. *Mason*, 397 A.2d at 410. At the conclusion of the Commonwealth's case, the defendant demurred, and the trial court sustained the demurrer. *Id.* The Pennsylvania Supreme Court affirmed the "demurrer on the ground that insufficient evidence was introduced to establish beyond a reasonable doubt that the defendant violated section 6117 of the Crimes Code." *Id.* The court found that "[n]o evidence was introduced indicating when the crime of obliteration occurred," there was no "evidence presented establishing when or the circumstances in which [the defendant] came into possession of the firearm," and "[t]he Commonwealth presented no evidence that [the defendant] had the technical capacity to effect the crime with which he was charged." *Id.* at 411.

Meanwhile, on August 12, 2003, after the Pennsylvania Supreme Court reversed the gun crime conviction but before the modification of petitioner's sentence, petitioner filed another petition for writ of habeas corpus in this court pursuant to 28 U.S.C. § 2254, seeking relief from his convictions on the drug charges. Once again, however, the petition was dismissed for failure to exhaust state court remedies.

On April 5, 2004, petitioner was arrested in Montgomery County on an involuntary manslaughter charge involving the death of his mother. Just three weeks later, a violation of probation charge was filed based upon this arrest, and a detainer was lodged. On March 8, 2005, petitioner entered an Alford plea<sup>2</sup> in the Montgomery County Court of Common Pleas and was sentenced to fifteen to thirty months imprisonment, plus two years of consecutive probation, effective April 4, 2004. A probation violation hearing was scheduled for April 14, 2005, but it was continued at the request of petitioner's counsel. The hearing is now scheduled for July 14, 2005.

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<sup>2</sup> The Pennsylvania Supreme Court has described an Alford pleas as follows:

The Alford plea derives its name from the U.S. Supreme Court decision in *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970). The Court in *Alford* explained that most guilty pleas consist of an express admission of guilt and that the plea of nolo contendere is regarded as a tacit admission of guilt. When a criminal defendant is unable or unwilling to admit participating in acts constituting a crime, but the record contains strong evidence of guilt, that defendant may conclude that a guilty plea is in his or her best interests. 400 U.S. at 37, 91 S.Ct. at 167. Thus, the person entering an Alford plea claims innocence, but consents to the imposition of a prison sentence.

*In re Investigating Grand Jury*, 544 A.2d 924, 925 n.2 (Pa. 1988).

Petitioner is currently serving his sentence for involuntary manslaughter at the Montgomery County Correctional Facility, and he has a detainer lodged against him as a result of the violation of probation charge that was filed against him after he was arrested on the involuntary manslaughter charge.

On April 1, 2005, petitioner filed the pending motion. A response has been filed.

### **DISCUSSION**

Petitioner titles his motion as a “motion for leave to supplement 28 U.S.C.A. § 2255 motion – federal,” but the court will assume that he seeks to supplement the § 2254 petition he filed in this court on August 12, 2003 and that was dismissed for failure to exhaust state court remedies. With the pending motion, petitioner apparently seeks to add to the previously dismissed petition a challenge to the legality of the detainer that has been lodged against him on the violation of probation charge. Petitioner seems to contend that for several reasons, including that the sentence of three years of probation was imposed “without any formal hearing on the record,” his conviction on the drug charges and the sentence of probation on those charges were invalid. Thus, the argument goes, the subsequent detainer that was lodged on the violation of probation charge is also invalid.

There is, of course, no § 2254 petition to supplement, because the previously filed petition was dismissed on December 30, 2003, and no appeal was taken.

Moreover, once again, petitioner has failed to exhaust state court remedies. The petition that petitioner seeks to supplement was dismissed for failure to exhaust, and petitioner has taken no action in the state courts to exhaust his remedies since that time.

In addition, as respondents point out, petitioner is beyond the time limit for filing a petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, *et seq.* The PCRA imposes a one-year statute of limitations. 42 Pa. Cons. Stat. § 9545(b). Petitioner's conviction on the drug crimes became final on October 8, 2003 – thirty days after the date of the order of the Montgomery County Court of Common Pleas modifying the sentence and imposing the three years of probation. *See* 42 Pa. Cons. Stat. § 9545(b)(3) (stating that "a judgment becomes final . . . at the expiration of time for seeking [direct] review"); Pa. R. App. P. 903 (stating that a notice of appeal "shall be filed within 30 days after the entry of the order from which the appeal is taken"). Thus, petitioner had until October 8, 2004 to file a PCRA petition. He never did so.

Failure to present federal habeas claims to the state courts in a timely fashion results in procedural default. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)). "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman*, 501 U.S. at 732 (quoting 28 U.S.C. § 2254(b)). Like petitioners who have failed to exhaust their state remedies, however, "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Id.* This doctrine of procedural default, therefore, ensures that state prisoners cannot evade the exhaustion requirement of § 2254 by defaulting their federal claims in state court.

Thus, absent a showing that default should be excused, this court is barred from reviewing a petitioner's claims. As the Supreme Court made explicit in *Coleman*, procedural default can be excused in only two ways:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

*Id.* at 750. To show "cause," petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).<sup>3</sup> To show "actual prejudice," a petitioner must demonstrate that the alleged errors "so infected the entire trial that the resulting conviction violates due process." *United States v. Frady*, 456 U.S. 152, 168-69 (1982).

The second manner in which a petitioner's procedural default can be excused – the "fundamental miscarriage of justice" exception – "will apply only in extraordinary cases, i.e., 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . .'" *Werts v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000) (quoting *Murray*, 477 U.S. at 496). "[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). To establish such a claim, a petitioner must "support his allegations of constitutional error with new reliable evidence – whether it be exculpatory

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<sup>3</sup> Examples of "cause" include a showing that "the factual or legal basis for a claim was not reasonably available to counsel," that "some interference by officials made compliance impracticable," or that "some external impediment prevented counsel from constructing or raising the claim." *Murray*, 477 U.S. at 488-92.

scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 321-22 (1995). Further, actual innocence “does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty.” *Id.* at 329.

Petitioner has put forth no explanation for his failure to timely file a PCRA petition, let alone an “external impediment” to his constructing or raising his claims. In addition, petitioner has failed to show “actual prejudice,” in that he has simply made conclusory allegations regarding the imposition of the three years of probation on the drug charges. Finally, petitioner has made no claim that he was actually innocent of the drug crimes, as his claims regarding the imposition of probation are largely procedural. Thus, because petitioner has shown neither cause, nor prejudice, nor that a fundamental miscarriage of justice would result from the denial of this motion, the court concludes that petitioner’s claims are procedurally defaulted for purposes of habeas review in this court. Petitioner’s motion to supplement his previously filed habeas petition must therefore be denied.

### **CONCLUSION**

For all of the above stated reasons, petitioner’s “motion for leave to supplement 28 U.S.C.A. § 2255 motion – federal” is denied.

An appropriate order follows.

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**Order**

And now, this \_\_\_\_\_ day of June 2005, upon consideration of petitioner’s “motion for leave to supplement 28 U.S.C.A. § 2255 motion – federal” and the response thereto, it is hereby ORDERED that the motion is DENIED.

To the extent that petitioner’s motion can be considered a supplement to his prior § 2254 petition or a new § 2254 petition, petitioner has failed to make a substantial showing of a denial of a constitutional right, and there is, therefore, no ground to issue a certificate of appealability.

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William H. Yohn, Jr., Judge