

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

PETRO VEGA,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	NO. 03-cv-5485
EDWARD KLEM, et al,	:	
Respondents	:	

**MEMORANDUM**

**Baylson, J.**

**November 29, 2005**

**I. Introduction**

Petitioner, Petro Vega, filed a pro se Petition for Habeas Corpus on October 1, 2003 in this Court pursuant to 28 U.S.C. § 2254, collaterally challenging his murder conviction. On May 17, 2005, this Court referred the case to Magistrate Judge Diane Welsh (“the Magistrate Judge”). On June 8, 2005, the Magistrate Judge issued a Report and Recommendation (“R&R”) pursuant to 28 U.S.C. § 636(b)(1)(c) suggesting that this Court dismiss the Petition and thus bar it from habeas review. On June 10, 2005<sup>1</sup>, Petitioner filed a Motion for Leave to Amend his Petition pursuant to Federal Rule of Civil Procedure 15(c). On June 20, 2005, Petitioner filed Objections to the R&R. Finally, on September 14, 2005, Petitioner filed a Motion for Leave to File Supplemental Objections. Upon independent and thorough consideration of the administrative record and all filings in this Court, Petitioner’s objections are overruled and the recommendations by the Magistrate Judge are accepted. Furthermore, Petitioner’s Motion to

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<sup>1</sup>Petitioner contends he actually sent this motion on June 7, 2005, a day before the R&R was issued on June 8, 2005. For the purposes of this Memorandum and Order, the court accepts as true that the two did in fact cross in the mail.

Amend is denied and his Motion for Leave to File Supplemental Objections is granted.

## **II. Background and Procedural History**

Following a trial by jury in the Court of Common Pleas for Philadelphia County, the Petitioner was convicted on November 28, 1986 of first degree murder and related offenses for shooting a police officer when trying to flee the scene of an automobile accident. On February 27, 1987, Petitioner was sentenced to life imprisonment plus twenty-seven to fifty-four years. On direct appeal, the Superior Court of Pennsylvania affirmed the conviction on January 26, 1989 and the Pennsylvania Supreme Court denied allocatur on July 27, 1989. On October 27, 1989, the period to seek certiorari from the United States Supreme Court expired. The Petitioner's conviction became final under the terms of Pennsylvania's Post Conviction Relief Act's ("PCRA") statute of limitations. 42 Pa. C.S.A. § 9541 et seq.

Petitioner then began the process of seeking collateral relief in state court. On January 2, 1997, Petitioner filed a PCRA petition, which was dismissed on November 11, 2000. The Superior Court affirmed his decision on April 25, 2002. Finally, on October 2, 2002, the Pennsylvania Supreme Court denied allocatur, terminating his ability to seek relief in state court.

Next, Petitioner sought collateral relief in federal court. In 1989, he filed a petition for Writ of Habeas Corpus (the "1989 petition"), No. 89-cv-7431, in the U.S. District Court for the Eastern District of Pennsylvania.<sup>2</sup> This petition was dismissed on December 21, 1989 for failure to exhaust state remedies. Finally, on October 1, 2003, petitioner filed the instant Petition (the "2003 petition") for Writ of Habeas Corpus.

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<sup>2</sup>Petitioner also filed a habeas petition in 1988, No. 88-cv-3763, which was dismissed for failure to exhaust state remedies on September 7, 1988.

### **III. Parties Contentions**

#### **A. Summary of Magistrate Judge's Report and Recommendation**

The Magistrate Judge recommended in the R&R that Petitioner's habeas corpus petition should be dismissed and a Certificate of Appealability ("COA") denied. First, she concluded that the Petition was barred from habeas review because nine claims were time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (R&R at 9). Next, she found that Petitioner could not premise claim ten, based on allegedly discriminatory peremptory challenges, on Batson v. Kentucky, 476 U.S. 79 (1986), because the Petitioner was not the same race as the stricken jurors. Rather, she noted it was the Supreme Court's decision in Powers v. Ohio, 499 U.S. 400 (1991), decided after Petitioner's conviction became final, which extended the Batson rule to cases where the stricken jurors are of a different race than a defendant. Thus, the Magistrate concluded that claim ten improperly depended on retroactive application on collateral review of the new constitutional rule, in violation of Teague v. Lane, 489 U.S. 288 (1989). (R&R at 5-6). The Magistrate further found the eleventh and final claim, premised on ineffective assistance of counsel for not raising a Batson and/or Powers challenge, lacked merit because the issue had previously been adjudicated by the Superior Court and was not a plainly unreasonable application of clearly established federal law as determined by the United States Supreme Court. Id. at 15. Finally, she recommended that Petitioner's request for leave to pursue discovery be denied. Id. at 19 n.16. The Magistrate did not comment on the Motion to Amend because although Petitioner had sent it, the court had not yet received the motion at the time the R&R was issued.

#### **B. Petitioner's Objections and Other Contentions**

Petitioner states several objections to the Magistrate Judge's R&R. First, "objection is raised" to the Magistrate Judge's conclusion that most of his claims are time-barred, stating that granting his motion to amend would save his claims from untimeliness. Objections at 1. Regarding claim ten, he counters that although he is of a different race than the stricken jurors, he may properly assert a challenge based on Batson alone. Id. at 3. Petitioner asserts that the question of retroactivity is inapposite because Powers did not announce a new rule. Rather, he argues that it was "merely an application" of the old principle that racial discrimination in jury selection was unconstitutional. Id. at 4; Supp. Objections at 2-3. Also, he urges that Powers should be retroactively applied in his case because of the particularly "nefarious practices" of the person who prosecuted his case. Id. Finally, as to claim eleven, Petitioner maintains that based on authority extant at the time of his trial and appeal, it was in fact unreasonable for appellate counsel not to press the issue of discriminatory peremptory challenges. Supp. Objections at 6.

In addition to stating his objections, Petitioner also alleges the government committed certain Brady violations, and requests leave to pursue discovery related to some of his claims that may relate to "factual innocence." P. Memo in Support of Habeas Pet. at 12-13; Objections at 1-2. Also, Petitioner asks for an evidentiary hearing regarding his "excuses for procedural default." Objections at 2. Finally, in a separate Motion to Amend, Petitioner asserts that pursuant to F.R. Civ. P. 15(c), his current habeas application (the "2003 petition") should be treated as "relating back" to one he filed in 1989 (the "1989 petition"). See Pet. M. to Amend. at 1.

#### **IV. Discussion**

##### **A. Standard of Review**

In ruling on objections to the Report and Recommendation of a United States Magistrate

Judge, this Court reviews *de novo* only the findings of the R & R that Petitioner specifically objects to. 28 U.S.C. § 636(b)(1). See also Fed.R.Civ.P. 72.

**B. The Habeas Petition**

**1. Claims One through Nine: Statute of Limitations**

The Magistrate Judge concluded that claims one through nine were time-barred under AEDPA. Petitioner summarily raises objection to this finding. For the reasons set forth below, Petitioner's objection is without merit.

AEDPA provides a strict timetable that sets forth when an application for a Writ of Habeas Corpus must be filed in Federal Court. The Act states:

A 1-year period of limitation shall apply to an application for a Writ of Habeas Corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--  
(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;  
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;  
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or  
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1) (1996). The limitations period is usually started pursuant to subsection (A), when the conviction became final on direct review. However, the Third Circuit has held that if direct review of a criminal conviction ended, as it did here, prior to the Act's effective date, then a prisoner has until April 24, 1997 to commence a habeas action. Burns v. Morton, 134 F.3d 109, 111 (3d Cir.1998). See also Wilson v. Beard, 426 F.3d 653, 663 (3d Cir. 2005) (noting that

any statement in Burns implying the grace period ended on April 23, 1997 is dictum and that petitioners have a full 365 days, or until and including April 24, 1997, to file pursuant to Rule 6(a) of the Federal Rules of Civil Procedure).<sup>3</sup> Additionally, the Act creates a tolling exception, which notes that “[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 shall not be counted toward any period of limitation under this subsection,” 28 U.S.C.S. § 2244(d)(2).

As a threshold matter, the Magistrate Judge concluded that claims one through nine implicate subsection (A). Because all these claims are based on facts the Petitioner knew or should have known at the time his conviction became final on direct review, we agree with the Magistrate’s conclusion. Thus, accounting for the grace period following AEDPA’s enactment and tolling while his PCRA petition was pending, the Petitioner had until January 22, 2003 to file these claims in federal court.<sup>4</sup>

Petitioner Vega filed the instant habeas petition on October 1, 2003, more than eight months after the statute of limitations expired. Therefore, the Magistrate Judge recommended

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<sup>3</sup>AEDPA took effect on April 24, 1996. Thus, the April 24, 1997 deadline reflects a one-year grace period following the Act’s effective date.

<sup>4</sup>Because Petitioner’s conviction became final prior to AEDPA’s enactment, the one-year statute of limitations began on April 24, 1996, AEDPA’s effective date. Accordingly, Plaintiff had until April 24, 1997 to file his habeas petition. Burns, 134 F.3d at 111; Wilson, 426 F.3d at 663. However, Petitioner filed a PCRA petition on January 2, 1997, after allowing the federal statute of limitations to run for 253 days (8 months and 9 days). This tolled the statute of limitations until October 2, 2002, when the Pennsylvania Supreme Court denied Petitioner’s allowance of appeal for collateral relief. Hence, with 112 days left in the one-year limitations period, Petitioner had until January 22, 2003 to submit claims one through nine of his habeas petition. To the extent that the Magistrate Judge stated that Petitioner had until January 25, 2003, the court disagrees with her calculation. We note, however, that this is irrelevant because the grace period deadline is not at all dispositive in this case.

dismissing claims one through nine based on the running of the statute of limitations.

Petitioner summarily raises objection to the Magistrate Judge's conclusion, stating that granting his motion to amend would save his claims from untimeliness.<sup>5</sup> See Objections at 1. As discussed *supra*, Petitioner's motion to amend is denied. As Petitioner raises no other specific objections, and the Magistrate's calculations regarding timeliness are supported by the record, we approve her conclusion that these claims are time-barred.

## **2. Claims Ten and Eleven: Peremptory Strikes of Potential Jurors**

Claims ten and eleven raise claims related to the purported exclusion by the government of potential jurors on account of their race at Petitioner's criminal trial. Primarily, Petitioner relies on a widely publicized videotape in which the prosecutor in his case, former Assistant District Attorney ("ADA") Jack McMahon, discusses various techniques for jury selection during a 1987 training.<sup>6</sup> This tape, which was released on March 31, 1997, shows McMahon repeatedly advising his audience to use peremptory strikes to keep certain categories of African-Americans from serving on criminal juries, in apparent violation of Batson. Wilson v. Beard, 426 F.3d 653, 657-58 (3d Cir. 2005); Commonwealth v. Basemore, 744 A.2d 717, 729-32 (Pa. 2000).<sup>7</sup> During

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<sup>5</sup>Petitioner's motion to amend attempts to "relate back" his 2003 petition to the one he filed in 1989, before the statute of limitations expired.

<sup>6</sup>After the R&R was issued, but before this court ruled on Petitioner's objections, the Third Circuit decided the Wilson case. Therefore, this court relies in part on the Wilson court's detailed recitation of the facts concerning former ADA McMahon's actions. Wilson, 426 F.3d at 656-59.

<sup>7</sup>The Third Circuit came to precisely this conclusion with regard to other defendants prosecuted by McMahon. See Wilson, 426 F.3d at 670 (affirming the district court's grant of a writ of habeas corpus to a petitioner prosecuted by McMahon in 1984 because the videotape, coupled with evidence of numerous peremptory strikes of African-Americans, gave rise to an "almost unavoidable inference that the prosecutor engaged in prohibited discrimination");

*voir dire* at Petitioner Vega’s trial, the Commonwealth purportedly struck a number of African-American venire persons. In claim ten, petitioner urges that this evidence, coupled with evidence on the tape, together gives rise to an inference of invidious discrimination in violation of his Equal Protection and Due Process rights. The eleventh claim asserts that direct appellate counsel was ineffective for failing to challenge McMahon’s use of peremptory challenges at the Petitioner’s trial.

**b. Claim Ten: Impermissibly Relies on Retroactive Application of a New Constitutional Rule**

First, we note that we agree with the Magistrate Judge that claims ten and eleven were timely asserted.<sup>8</sup> However, we also concur that claim ten is without merit because it impermissibly relies on retroactive application on collateral review of the new constitutional rule articulated in Powers, which is barred by Teague and progeny. For the reasons set forth by the Magistrate Judge, Petitioner’s objections that he may properly assert a challenge based on Batson alone and that Powers did not announce a new rule are overruled.

On April 30, 1986, before Petitioner’s trial, the Supreme Court in Batson announced the

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Basemore, 744 A.2d at 731-32 (Pennsylvania Supreme Court holding that there is “no question that the practices described in the transcript [of the McMahon tape] support an inference of invidious discrimination”).

<sup>8</sup>The Magistrate Judge properly noted that, “in the exercise of due diligence,” the factual predicate of claims ten and eleven could not have been discovered until the tape was publicly released by the Philadelphia District Attorney’s Office. 28 U.S.C. § 2244(d)(1)(D). (R&R at 4, citing Basemore, 875 A.2d 350, 351 (Pa.Super. 2005)). The videotape was released on March 31, 1997 and “received widespread attention on local newscasts on April 1st, 2nd, and 3rd.” Wilson, 426 F.3d at 660. At that time, however, the Petitioner had a PCRA petition pending and it remained so until October 3, 2002, when the PA Supreme Court denied allocatur (R&R at 10). Thus, the Magistrate Judge correctly found that Petitioner had until October 3, 2003 to submit claims ten and eleven of his habeas petition. Claims ten and eleven of the instant habeas petitioner, filed on October 1, 2003, were therefore timely.

now familiar rule that the Equal Protection Clause forbids a prosecutor from removing jury venire members of the *defendant's race* for racially discriminatory reasons. Batson, 476 U.S. at 89, 96 (emphasis added). Five years later, and two years after Petitioner's conviction became final on direct review, the Powers Court held that a defendant may challenge peremptory strikes of venire persons of a *different* race than him or herself. Powers, 499 U.S. at 416.

Finding that the Petitioner is Hispanic, while the stricken jury venire persons at his trial were African-American, the Magistrate Judge concluded that Batson is inapplicable and that Petitioner could only advance claim ten pursuant to Powers. However, the Magistrate also found that Powers established a "new constitutional rule." Thus, she found that claim ten is barred by Teague, in which the Supreme Court held that "[a] new constitutional rule[ ] of criminal procedure will not be applicable to those cases which have become final before the new [rule is] announced." Teague, 489 U.S. at 310.

Petitioner objects on three grounds. First, he asserts that although of a different race than the stricken jurors, he may properly assert a challenge based on Batson alone. Objections at 3. Second, Vega asserts that Powers did not announce a new rule, but rather was "merely an application" of the old principle that racial discrimination in jury selection was unconstitutional. Thus, he argues the question of retroactivity is inapposite. Objections at 4; Supp. Objections at 2-3. Third, he urges that "given the nefarious practices of prosecutor McMahan," Powers should be retroactively applied in his case. Id. None of these contentions is a correct statement of the law.

Although Batson had been decided before Petitioner's trial, the Court clearly limited its application to those defendants who could demonstrate that the "prosecutor has exercised

peremptory challenges to remove from the venire members of the *defendant's race*.” Batson, 476 U.S. at 96 (emphasis added). It was only two years *after* Petitioner’s conviction became final that Powers for the first time permitted challenges of peremptory strikes of venire persons of a *different* race than the defendant. Powers, 499 U.S. at 416; See also Riley v. Taylor, 277 F.3d 261, 284 n.8 (3d Cir. 2001) (noting that the “Supreme Court did not extend the Batson holding to apply regardless of whether the defendant and excluded juror were of the same race until its opinion in Powers.”). Despite Petitioner’s assertion, the court agrees with the Magistrate Judge that Batson alone does not provide grounds for relief.

Moreover, although neither the Third Circuit nor the Supreme Court have decided whether Powers articulated a “new rule,” every federal circuit court of appeal that has squarely confronted the issue has concluded that it is. See Nguyen v. Reynolds, 131 F.3d 1340, 1351-52 (10th Cir. 1997); Jones v. Gomez, 66 F.3d 199, 202-04 (9th Cir. 1995); Van Daalwyk v. United States, 21 F.3d 179, 180 (7th Cir. 1994); Farrell v. Davis, 3 F.3d 370, 372 (11th Cir. 1993); Echlin v. LeCureux, 995 F.2d 1344, 1351 (6th Cir. 1993); Holland v. McGinnis, 963 F.2d 1044, 1053 (7th Cir. 1992). We are persuaded by this unanimous assessment and therefore agree with the Magistrate Judge that Powers articulated a new rule within the meaning of Teague. Therefore, regardless of how “nefarious” ADA McMahon’s practices may have been (and we agree they were indeed improper), Petitioner simply lacks grounds to pursue claim ten. Accordingly, we find Petitioner’s objections to be without merit and concur with the Magistrate Judge that claim ten must be dismissed.

**c. Claim Eleven: Neither Contrary to, nor an Unreasonable Application of Clearly Established Federal Law**

The Magistrate Judge concluded that claim eleven must be dismissed because the

Pennsylvania Superior Court had already considered the issue and its decision was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. Petitioner objects that in fact it was unreasonable for his appellate counsel not to press the issue of discriminatory peremptory strikes. The court disagrees.

Pursuant to the AEDPA, a federal court is precluded from granting habeas relief on any claim decided in a state court unless the state court's adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 404-05 (2000); Fountain v. Kyler, 420 F.3d 267, 272-73 (3d Cir. 2005)

The Magistrate Judge noted that claim eleven was raised by the Petitioner during his PCRA appeal. At that time, the Pennsylvania Superior Court held that counsel could not have been ineffective because the Supreme Court had not yet extended Batson to allow a defendant to challenge racially-motivated peremptory strikes of venire persons of a different race. (R&R at 16, citing Comm. v. Vega, No. 3308 EDA 2000, slip op. at 6 (Pa. Super. April 25, 2002)). Given that at the time of Petitioner’s direct appeal, the Supreme Court had not yet decided Powers, the Magistrate Judge concluded that the Superior Court’s decision can not be seen as either “contrary to” or an “unreasonable application” of Supreme Court precedent.

Despite this, Petitioner objects that based on authority extant at the time of his trial and appeal, it was in fact unreasonable for appellate counsel not to press the issue of discriminatory peremptory challenges. Supp. Objections at 6. The court cannot agree. As the Superior Court noted, “in 1986 and under the facts as presented, no viable challenge to the jury selection process existed.” Vega, No. 3308 EDA 2000, slip op. at 6. There was and is no precedent — and

certainly no Supreme Court authority — even suggesting that a petitioner has a viable ineffective assistance of counsel claim based on an attorney’s failure to raise a claim which lacked merit. Moreover, the Magistrate Judge aptly noted that the Third Circuit has specifically held that under such circumstances the petitioner would *not* have a claim. (R&R at 17, citing Parrish v. Fulcomer, 150 F.3d 326, 328-39 (3d Cir. 1998)). Counsel also has no duty to anticipate changes in the law. Id. (citing Govt. of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)). Accordingly, the Magistrate Judge correctly concluded that the Superior Court’s adjudication of the Petitioner’s ineffective assistance of counsel claim was neither contrary to nor an unreasonable application of Supreme Court law. Petitioner’s objections are overruled and claim eleven must be dismissed.

### **3. Request for Leave to Pursue Discovery**

In his May 25, 2005 Memorandum as well as in his Objections to the R&R, Petitioner also requests leave to pursue discovery related to claims one, five, six, seven and eight. P. Memo in Support of Habeas Pet. at 12-13; Objections at 1-2. Petitioner contends that the government’s failure to produce at least one piece of evidence constituted a Brady violation that may relate to “factual innocence.” Id. Also, in his Objections, Petitioner asks for an evidentiary hearing regarding his “excuses for procedural default.” Objections at 2.

The Magistrate Judge recommended denying these requests. (R&R at 19 n.16). She explained that the discovery only concerns the first nine claims, all of which are time-barred, and discovery would not change that conclusion. Id. Although Petitioner correctly cites the proposition that district courts in limited circumstances may, congruent with AEDPA, conduct hearings regarding petitioners’ excuses for procedural default, Cristin v. Brennan, 281 F.3d 404,

413 (3d Cir. 2002), Cristin does not support Petitioner's argument. Procedural default involves failure to fairly present federal claims in state court and bars the consideration of those claims in federal court by means of habeas corpus. Id. at 410. Here, however, Petitioner's claims one through nine are barred not because of state procedural default, but because he did not prescribe to the statute of limitations proscribed by *AEDPA*, a federal statute. Even if Petitioner could surmount the procedural default hurdle, his claims would still be time-barred.

Further, *AEDPA* places strict restrictions on federal courts' ability to conduct evidentiary hearings "if the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). The only exceptions are if: (A) the claim relies on-- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Id.

In this case, Petitioner asserts no new rule of constitutional law which relates to the claims on which he seeks discovery. He also has not explained why he did not know, or could not have learned through due diligence, the facts which he now claims to know. Even if he could satisfy 2254(e)(2)(A), Petitioner's bold assertion that discovery could lead to "factual innocence" does not rise to the level of "clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Id. Therefore, Petitioner's requests for leave to pursue discovery and for an evidentiary hearing

must be denied.

#### **4. Certificate of Appealability**

At the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a certificate of appealability (“COA”) should issue.

Under AEDPA, “a COA may not issue unless the applicant has made a substantial showing of the denial of a constitutional right.” Slack v. McDaniel, 529 U.S. 473, 483 (2000) (quoting 28 U.S.C. § 2253(c)). The test with respect to whether there is a denial of a constitutional right is whether “reasonable jurists could debate” the outcome. Id. at 484. When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, “a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.” Slack, 529 U.S. at 484.

Here, Petitioner requests a COA. Objections at 5. For the reasons set forth above and in light of the aforementioned Third Circuit decisions invoking AEDPA’s period of limitation as a procedural bar, a reasonable jurist could not conclude that the Court would be incorrect in dismissing claims one through nine as time-barred. See Slack, 529 U.S. at 484; see, e.g., Woods v. Kearney, 215 F. Supp. 2d 458, 464 (D. Del. 2002) (finding that COA should not issue where habeas petition was barred by the one-year period of limitation under § 2244(d)(1)); Thomas v. Carroll, 2002 WL 1858778, at \*4 (D. Del. July 30, 2002) (same).

As to claims ten and eleven, the Petitioner has failed to make a substantial showing of the denial of any constitutional right. The tenth claim was dismissed because it offends the Teague rule of non-retroactivity. This court came to this conclusion based on the uniform precedent of

all circuit courts of appeal that have considered the non-retroactivity of Powers, the basis of Petitioner's claim. Therefore, reasonable jurists could not debate the court's conclusion. Finally, this court dismissed claim eleven because the Pennsylvania Superior Court's decision on the matter was neither contrary to nor an unreasonable application of Supreme Court precedent. Given that there is no Supreme Court precedent even suggesting that a petitioner has a viable ineffective assistance of counsel claim based on an attorney's failure to raise a claim which lacked merit, no reasonable jurist could find it debatable that the court was correct in its ruling.

Accordingly, a COA should not issue.

### **C. Motion to Amend**

In a separate Motion to Amend, Petitioner asserts that pursuant to F.R. Civ. P. 15(c), his current habeas application (the "2003 petition") should be treated as "relating back" to the one filed in 1989 (the "1989 petition"). See Pet. M. to Amend. at 1. Because a petitioner may not amend and relate back a new petition to a previously dismissed one, Petitioner Vega's motion is denied.

The Federal Rules of Civil Procedure provide that, after a responsive pleading has been filed, a party "may amend a pleading by leave of court" but that such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Applying Rule 15(a), federal courts have uniformly given preference for liberal leave to amend. See, e.g., Long v. Wilson, 393 F.3d 390, 400 (3d Cir. 2004).

In the context of habeas petitions, Rule 11 of the Rules Governing Habeas Corpus Cases Section 2254 states: "the Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under

these rules.” Third Circuit case law further clarifies that a motion to amend a habeas petition is governed by Federal Rule of Civil Procedure 15, subject to the one-year AEDPA limitations period. United States v. Thomas, 221 F.3d 430, 435-36 (3d Cir. 2000). As in any ordinary civil proceeding, therefore, a district court cannot permit a party to amend a habeas petition to add an entirely new claim or new theory of relief after the one-year limitations period has expired. Id. at 436.

Critically, a petitioner may not amend and relate back a new petition to a previously dismissed habeas corpus petition because “typically, when a complaint (or habeas petition) is dismissed without prejudice, that complaint or petition is treated as if it never existed.” Jones v. Morton, 195 F.3d 153, 160-61 (3d Cir. 1999) (internal citations omitted). In Jones, the Third Circuit held that when a habeas petition is dismissed for lack of exhaustion, a later petition filed after the limitations period has run is a new action and cannot be considered an amendment to the prior petition. Id. at 160-61. Therefore, in that case, the court dismissed as time-barred a petitioner’s third habeas petition and rejected his contention that the filing date should “relate back” to either of two earlier petitions that were filed and dismissed prior to AEDPA’s enactment.

Petitioner Vega asserts that his 2003 petition can be amended and “related back” to his 1989 petition. See Pet. M. to Amend. at 1. If the newest petition relates back, he argues, it would be inappropriate to dismiss any claims as time-barred. Acknowledging that the 1989 petition was dismissed without prejudice as unexhausted more than fifteen years ago, Petitioner nonetheless asserts that he is entitled to amend because of the general liberal amendment policy and because his request is not in bad faith or motivated by an improper motive. Id. at 1, 3.

Settled legal principles require the Court to deny Petitioner's request to amend his 2003 habeas petition. Notwithstanding the permissive amendment policy noted by Petitioner, the relation back doctrine is inapplicable when, as here, the earlier petition was dismissed for lack of exhaustion. Jones, 195 F.3d at 160-61. According to his own motion, the 1989 petition was dismissed — and thus closed — in 1989, more than fifteen years ago. See Pet. M. to Amend. at 1. In short, there is simply nothing for the amendment to relate back to. Jones, 195 F.3d at 160-61. To decide otherwise would undermine AEDPA's principal purpose: to "curb the abuse of the statutory writ of habeas corpus." H.R. Rep. No. 104-518, at 111 (1996), reprinted in 1996 U.S.C.A.N. 944, 944. Were Vega's motion to be granted, many other petitioners would likely similarly file frivolous, knowingly unexhausted habeas petitions within the statute of limitations. They could then wait years, even decades, before returning to federal court after finally exhausting their state remedies, all without running afoul of AEDPA's limitations period. See Graham v. Johnson, 168 F.3d 762, 780 (5th Cir. 1999) (denying petitioner's motion for recall of a previous habeas case). Such interpretation would obviously "eviscerate" the statute of limitations and thwart Congress' intent in enacting AEDPA. Id.

For the reasons stated above, Petitioner's motion to amend his 2003 habeas petition to relate back to the 1989 petition is denied.

#### **IV. Conclusion**

For the foregoing reasons, Petitioner's objections will be overruled, the Magistrate Judge's R & R will be approved and adopted, and the petition for writ of habeas corpus will be denied and dismissed. As Petitioner has failed to make a substantial showing of the denial of any constitutional right, a certificate of appealability will not issue. Furthermore, Petitioner's

requests for leave to pursue discovery and for an evidentiary hearing will be denied. Finally, Petitioner's Motion to Amend is denied and his Motion to File Supplemental Objections is granted.

An appropriate order follows.

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

PETRO VEGA,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	NO. 03-cv-5485
EDWARD KLEM, et al,	:	
Respondents	:	

**ORDER**

AND NOW, this        day of November, 2005, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation of the United States Magistrate Judge Diane Welsh pursuant to 28 U.S.C. § 636(b)(1)(c), it is hereby

**ORDERED**

1. The Petitioner's Motion for Leave to Amend (Doc. No. 14) is DENIED.
2. The Petitioner's Motion for Leave to File Supplemental Objections (Doc. No. 19) is GRANTED.
3. The Petitioner's Objections to the Report and Recommendation (Doc. No. 17) are OVERRULED;
4. The Report and Recommendation (Doc. No. 13) is APPROVED and ADOPTED;
5. The petition for writ of habeas corpus (Doc. No. 1) is DISMISSED; and
6. A certificate of appealability is not granted.

**BY THE COURT:**

s\Michael M. Baylson

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**MICHAEL M. BAYLSON, U.S.D.J.**