

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

JOSE VILLOCH	:	CIVIL ACTION
	:	
v.	:	NO. 05-1913
	:	
SUPERINTENDANT OF SCI	:	
HUNTINGDON, et al.	:	

Diamond, J.

February 15, 2005

MEMORANDUM

Jose Villoch, acting *pro se*, seeks relief from his state court convictions on the ground of ineffective assistance of counsel. See 28 U.S.C. § 2254; Pet. at 9. The Magistrate Judge has recommended that I deny the writ, concluding that Villoch failed properly to exhaust his ineffectiveness claims in state court. Villoch objects to this conclusion. For the reasons that follow, I respectfully disagree with the Magistrate Judge and recommit the matter to the Magistrate Judge for an adjudication on the merits.

BACKGROUND

The Report and Recommendation includes an accurate summary of this matter's procedural history. See Rep. & Rec. at 1-4, Pet. Obj. at 1-2. In 2001, a Pennsylvania state court jury convicted Villoch of second and third degree murder, robbery, aggravated and simple assault, and related offenses. The Berks County Common Pleas Court sentenced Villoch to consecutive terms of life imprisonment and six to twelve years. On October 4, 2002, the Pennsylvania Superior Court affirmed the judgments of sentence; Petitioner did not seek *allocatur*. See Commonwealth v. Villoch, 815 A.2d 1132 (Pa. Super. 2002) (table).

On October 27, 2003, Villoch, acting *pro se*, sought relief under the Pennsylvania Post

Conviction Relief Act. See 42 Pa. Cons. Stat. §§ 9541 et seq. In his PCRA petition, Villoch raised several claims, including that ineffective assistance of counsel for failing to:

- (1) investigate the Commonwealth's case,
- (2) present evidence of Villoch's innocence,
- (3) investigate the other known suspects,
- (4) present Villoch's alibi defense,
- (5) investigate Villoch's alibi witness, and
- (6) raise any of these issues on appeal.

On October 28, 2003, the PCRA Court appointed counsel to represent Villoch, and on February 16, 2004, counsel filed both a request to withdraw and a no-merit letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (1988) and Commonwealth v. Turner, 544 A.2d 927 (1988). On March 24, 2004, the court granted counsel's request. On April 21, 2004, the court dismissed the PCRA petition, explaining its decision to allow counsel's withdrawal, and noting that it had "conducted [its] own independent review of the record and also determined that [Villoch]'s petition is meritless." Commonwealth v. Villoch, PCRA No. 1076-00, at 4 (Berks C.C.P. June 22, 2004). The court also ruled that Villoch had raised no material issues of fact that would necessitate an evidentiary hearing. Id. at 6.

On November 30, 2004, the Superior Court affirmed the dismissal. See Commonwealth v. Villoch, 869 A.2d 16 (Pa. Super. 2004) (table); Commonwealth v. Villoch, No. 782 MDA 2004 (Pa. Super. Ct. Nov. 30, 2004). The Superior Court observed that Villoch was not entitled to an evidentiary hearing because he had not attached to his PCRA petition the required certification of the witnesses he intended to call at such a hearing. Villoch, No. 782 MDA 2004, at 6 (Pa. Super. Ct. Nov. 30, 2004) (citing 42 Pa. C.S.A. § 9545(d)(1)). The Superior Court also noted that "a PCRA Court may decline to hold a hearing if the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence." Id. at 7. Finally, the Superior Court "examined each of the issues raised in appellant's PCRA petition in

light of the record in order to determine whether the PCRA [C]ourt erred . . . and f[ou]nd no error in the PCRA [C]ourt's decision." Id. Again, Villoch did not seek *allocutur*.

Villoch filed the instant Petition on January 2, 2005 by giving it to prison officials. See Burns v. Morton, 134 F.2d 109, 113 (3d Cir. 1998) (deeming habeas petitions filed when given to prison officials, not when received by the Court). Villoch again asserts ineffective assistance of counsel:

I had a strong/powerful alibi defense and the lawyer never contacted my alibi witness although I did, clearly, tell him to do this. . . . The problem was made worse when the PCRA counsel filed a Finley letter without once communicating with me in person or by phone.

See Pet. at 9. The Petition was transferred to the Eastern District of Pennsylvania on April 26, 2005.

On July 19, 2005, I referred this case to the Magistrate Judge, who issued a Report and Recommendation on November 10, 2005. The Magistrate Judge determined that: (1) the Petition was not time-barred, and (2) Villoch's claim had been improperly exhausted at the state level due to procedural default. See Rep. & Rec. at 6, 14. On January 5, 2006, Villoch objected to the Report and Recommendation with respect to procedural default. See Pet. Obj. at 2-9.

STANDARD OF REVIEW

The extent of my review of a Magistrate's Report and Recommendation is entirely committed to my discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa. 1994); see also Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). I must review *de novo* those portions of the Report to which objection is made. 28 U.S.C. § 636 (b)(1)(c) (2004). See generally Goney, 749 F.2d at 7. I may "accept, reject or modify the

recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b); see also 28 U.S.C. § 636 (b)(1)(c). I am obligated to construe Villoch’s *pro se* contentions liberally to ensure the maximum possible review. See, e.g., Hunterson v. DiSabato, 308 F.3d 236, 243 (3d Cir. 2002).

DISCUSSION

The Report and Recommendation as to the timeliness of Villoch’s petition is plainly correct, and I will adopt it. See Goney v. Clark, 749 F.2d at 7. I cannot, however, adopt the Report and Recommendation with respect to exhaustion and procedural default.

A state prisoner must exhaust his claims in state court before they may be considered in a federal habeas proceeding. Picard v. Connor, 404 U.S. 270, 275 (1971). When the state court denies relief on state procedural grounds, the exhaustion requirement is satisfied. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000). Procedural default, however, is considered “improper” exhaustion, and bars federal habeas relief because the petitioner has not “fairly presented” his claim to the state courts. Bronshtein v. Horn, 404 F.3d 700, 707, 725 (3d Cir. 2005) (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991); Picard, 404 U.S. at 275); Slutzker v. Johnson, 393 F.3d 373, 381 (3d Cir. 2004) (citing Coleman, 501 U.S. at 729-30). A petitioner has “fairly present[ed]” his claim in state court if he has “present[ed] a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.” Id. (quoting McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999)).

The Magistrate Judge reasoned that by failing to attach the required witness certification to his PCRA petition, Villoch prevented the Pennsylvania courts from “reaching the merits of the constitutional claim.” Accordingly, the Magistrate Judge concluded that the state courts dismissed Villoch’s claims “based on 42 Pa. C.S.A. § 9545(d)(1),” the procedural rule requiring

certification of witnesses. See Rep. & Rec. at 14. I respectfully disagree. Both the PCRA and Superior Courts reviewed the merits of the claims Villoch sought to raise. The PCRA Court analyzed each of Villoch's allegations in detail, and determined that they were not supported by the record. See Villoch, PCRA No. 1076, at 5–7 (Berks C.C.P. June 22, 2004). The PCRA Court based its denial of an evidentiary hearing on the absence of any material factual issues, rather than on Villoch's failure to comply with the PCRA's procedural requirements. Indeed, the PCRA Court did not mention 42 Pa. C.S.A. § 9545(d)(1) in its opinion. See id. The Superior Court, too, examined each of Villoch's claims and determined that they were meritless. Villoch, No. 782 MDA 2004, at 3–5. Although the Superior Court discussed the § 9545(d)(1) requirement, it did so only to affirm the PCRA Court's denial of an evidentiary hearing. Id. There is no requirement that a PCRA Court hold an evidentiary hearing before considering the merits of a petitioner's claim. Commonwealth v. Brown, 767 A.2d 576, 584 (Pa. Super. 2001). That is what the state courts did here: without holding an evidentiary hearing, they addressed the merits of Villoch's claims — including the ineffectiveness claim he seeks to raise before me.

In these circumstances, I believe Petitioner has properly exhausted his ineffectiveness claim. Accordingly, I respectfully decline to adopt the Report and Recommendation and recommit the matter to the Magistrate Judge for a determination on the merits. An appropriate Order follows.

BY THE COURT.

Paul S. Diamond, J.

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ORDER

AND NOW this 15th day of February, 2006, upon consideration of the Petition for a Writ of Habeas Corpus (Doc. No. 3), the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport (Doc. No. 10), Petitioner’s Objections (Doc. No. 13), Defendant’s Response to Petitioner’s Objections (Doc. No. 16), and all related submissions, it is hereby **ORDERED** that the matter is recommitted to Magistrate Judge Rapoport for consideration of the merits of Petitioner’s claim. See 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b).

BY THE COURT.

Paul S. Diamond, J.