

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

ANDRE K. GREEN,  
Petitioner,

v.

LOUIS S. FOLINO,<sup>1</sup> *et al.*,  
Respondents.

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: CIVIL ACTION  
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: NO. 03-674  
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**Memorandum and Order**

YOHN, J.

July \_\_, 2006

Petitioner Andre K. Green, a prisoner at State Correctional Institution Greene in Waynesburg, Pennsylvania, has filed a motion seeking leave to amend his habeas corpus petition with a new claim alleging that his due process and fair trial rights were violated by his trial judge's failure to recuse himself. Green's motion also seeks an order holding his habeas proceedings in abeyance pending the exhaustion of state remedies for the new claim. For the reasons that follow, the court will grant Green's motion.

**I. Factual and Procedural History<sup>2</sup>**

Green was convicted on October 17, 1996 of second-degree murder and attempted robbery following a jury trial in the Court of Common Pleas for Northampton County, Pennsylvania. He was sentenced to a mandatory term of life imprisonment. Following his conviction, Green appealed to the Superior Court of Pennsylvania, which affirmed his

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<sup>1</sup> Green originally brought suit against William Stickman, the former superintendent of State Correctional Institution Greene. Stickman has been replaced as superintendent by Folino.

<sup>2</sup> This recitation of facts is drawn largely from the court's November 8, 2004 Memorandum and Order.

judgment of sentence on October 14, 1997. *Commonwealth v. Green*, 704 A.2d 1117 (Pa. Super. Ct. 1997). Green then filed a petition for allowance of appeal with the Supreme Court of Pennsylvania, which was denied on March 12, 1998. *Commonwealth v. Green*, 712 A.2d 285 (Pa. 1998).

On February 26, 1999, Green filed a *pro se* petition pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), *see* 42 Pa. Cons. Stat. §§ 9541-9546. The PCRA court appointed counsel, who filed briefs stating that she would pursue some, but not all, of Green's claims. She later filed two additional documents, a "no merit brief," in which she recommended dismissal of two of the three claims raised in the initial petition, and a brief in support of the third claim. A PCRA hearing was held on May 5, 1999. On August 20, 1999, the PCRA court issued an order vacating the appointment of counsel, having determined that appointed counsel's representation of Green was inadequate to ensure a fair review of his claims. The court appointed new counsel, who withdrew in November 1999, citing a conflict of interest. A third lawyer was appointed, and a second PCRA hearing was held on December 23, 1999.

Green's counsel at the second PCRA hearing sought to introduce three new claims, but respondents, having had no prior notice of the additional claims, objected. Sustaining the objection, the court denied Green's motion to have the new claims considered at the December 23 hearing. On December 30, 1999, the court issued an order denying relief as to the claims argued at the December 23 hearing, but granting Green leave to submit an amended petition raising the three new claims.

From that point, Green's counsel pursued the petition on two separate tracks: he filed an appeal in Superior Court from the December 30 order; and he filed an amended petition in

PCRA court raising the three new claims. The Superior Court quashed the appeal from the December 30 order on the ground that the order was not final and appealable because issues remained for the PCRA court to decide. A hearing was held in PCRA court on May 24, 2001 to address the new claims in the amended petition. On June 29, 2001, the amended PCRA petition was denied. A timely appeal was filed in Superior Court, and the order of the PCRA court was subsequently affirmed on March 25, 2002. A petition for allowance of appeal in the Supreme Court of Pennsylvania was denied on August 14, 2002.

Green filed his federal *pro se* habeas corpus petition on January 29, 2003, beyond the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(1). He asserted seven grounds for relief, two relating to his right to a fair trial, four relating to his right to effective assistance of counsel, and one relating to his right to file a habeas corpus petition without governmental obstruction. For the seventh and final ground, he alleged that prison staff had prevented him from filing a timely petition by confiscating his legal papers and failing to return them to him for a period of several months.

On April 6, 2003, Green supplemented his petition to include an additional ground for relief relating to his right to a fair trial. Respondents argued that the entire petition should be dismissed as time barred. The court appointed Green's present counsel and held an evidentiary hearing on June 25, 2004. Thereafter, in a November 8, 2004 Memorandum and Order, the court ruled that the claims in Green's original petition were timely based on the application of equitable tolling. The court also ruled that the April 6, 2003 amendment was time barred unless it related back to the original petition. The court then remanded the case to the magistrate judge to resolve Green's claims on the merits.

On November 22, 2005, Green filed a Motion to Amend Habeas Petition and Hold Habeas Proceedings in Abeyance Pending Exhaustion of State Remedies [hereinafter “Motion to Amend”]. He argued that while researching a supplemental memorandum of law, he discovered the existence of a new claim – “a violation of [his] due process and fair trial rights based on the failure of the trial judge [the Honorable William F. Moran] in the underlying state court prosecution to recuse himself from those proceedings given that the judge had previously (and perhaps concurrently) presided over child custody proceedings concerning the Commonwealth’s principal witness against Petitioner, Chante Frank.” (Motion to Amend ¶ 6(c).) Frank, who was then sixteen years old, was with Green at the time of the killing. At trial, she identified Green as the perpetrator.

Green’s claim is based on Judge Moran’s previous exposure to Frank. According to Green, Frank has been the subject of child custody proceedings since 1983, when she was three. (Motion to Amend, Ex. A ¶ 51.) Green claims that in 1992, Judge Moran presided over an action concerning Frank’s custody status. (*Id.*) Green also alleges that on June 27, 1995, Judge Moran held a hearing concerning Frank’s dependency and custody status, and authorized the Pennsylvania Department of Human Services to release Frank from a residential program to a transitional living arrangement pending her return to the custody of her parents. (*Id.* at ¶ 52.) Approximately seven months later, Frank, who was then in her mother’s custody, was involved in the incident underlying Green’s conviction. Green states he has been unable to determine the full extent of Judge Moran’s interaction with Frank, because the court file of the proceedings is not publicly accessible. (*Id.* at ¶ 54.)

In total, Green’s November 22, 2005 motion seeks three things: (1) leave to amend his

habeas petition to include a claim arguing that Judge Moran should have recused himself from Green's trial<sup>3</sup>; (2) leave to withdraw the second and third claims from his original habeas petition and the claim set forth in the April 6, 2003 amendment; and (3) an order staying the proceedings and holding them in abeyance pending the exhaustion of state remedies. The respondents filed an answer, agreeing that Green should withdraw the three meritless claims, but arguing that leave to amend should be denied because the new claim is time barred and has been waived.

On February 24, 2006, the magistrate judge issued a report and recommendation. The magistrate judge recommended that Green's motion be granted and that the case be held in abeyance pending state court exhaustion of the claim. The respondents have not filed any objections to the report and recommendation.

## **II. Legal Standard**

Pursuant to 8 U.S.C. § 636(b)(1), a federal court may refer petitions to a magistrate judge to undertake consideration of the petition. The magistrate judge should ultimately submit to the district court a "report as to the facts and [a] recommendation as to the order" regarding the appropriate disposition of the petition. The district court is directed to independently consider and review *de novo* the magistrate judge's report and recommendation. *See id.*

In the absence of objections, however, the federal court is not statutorily required to review a magistrate judge's report before accepting it. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985). However, "the better practice is to afford some level of review to dispositive legal issues raised by the report." *See Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987).

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<sup>3</sup> Green acknowledges that this is a new claim and has not attempted to graft it onto one of his prior claims as a "clarification or amplification."

### III. Discussion

#### A. Amendment

The Federal Rules of Civil Procedure apply to motions to amend habeas corpus petitions. *Riley v. Taylor*, 62 F.3d 86, 89 (3d Cir. 1995). Rule 15(a) provides that “a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”<sup>4</sup> “The purpose of Rule 15 ‘is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities.’” *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000) (quoting 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1471 (2d ed. 1990) (2000 Supp.)). However, “[w]hile . . . leave to amend should be ‘freely given,’ a district court has the discretion to deny this request if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party.” *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Nonetheless, the Third Circuit has stated that “ordinarily delay alone is not a basis to deny a motion to amend.” *United States v. Duffus*, 174 F.3d 333, 337 (3d Cir. 1999).

In their answer, the respondents argue that “the factual predicate for the claim that petitioner now seeks to assert was known to petitioner and/or his counsel at the time his case was being handled in the trial court prior to verdict and thereafter and if not known, was discoverable through the exercise of due diligence.” (Respondents’ Answer 3.) This is because, the

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<sup>4</sup> Rule 15(a) also provides that a party may amend its pleading once as a matter of course at any time before a responsive pleading is filed. In this case, the respondents have already filed a responsive pleading, so this provision is inapplicable.

respondents argue, “the trial judge, the Honorable William F. Moran, issued a number of court Orders regarding dependency, delinquency and other issues regarding Chante Frank in the Juvenile Court of Northampton County and provided materials to both the Commonwealth of Pennsylvania and defense counsel which included numerous references to Judge Moran’s involvement in proceedings involving Chante Frank in the Juvenile Division of the Court of Common Pleas of Northampton County.” (*Id.*) While the respondents did not phrase it as such, the argument is one of futility: respondents argue that the amendment cannot succeed because it is barred by the statute of limitations and has been waived.<sup>5</sup> *See, e.g., Garvin v. City of Philadelphia*, 354 F.3d 215, 222 (3d Cir. 2003) (stating that an “amendment of her complaint would have been futile because the amended complaint could not have withstood a motion to dismiss on the basis of the statute of limitations”); *Cowell v. Palmer Twp.*, 263 F.3d 286, 296 (3d Cir. 2001) (noting that failure to overcome the time bar of a statute of limitations renders a proposed amendment futile).

An “[a]mendment of the complaint is futile if the amendment will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a renewed motion to dismiss.” *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988) (citing *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 125 (3d Cir. 1983)). Accordingly, “[i]n assessing “futility,” the district court applies the same standard of legal sufficiency as applies

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<sup>5</sup> The respondents have not argued that the new claim is substantively meritless. The court has reservations about the merits of a claim attempting to hang a due process violation on the fact that a trial judge who presided over a jury trial was previously exposed to a witness in another proceeding. However, the court is hesitant to deny leave to amend when Green has not had the opportunity to research the details of the claim because the records of the exposure are not yet available to him.

under Rule 12(b)(6).” *In re Alpharma Inc. Sec. Litig.*, 372 F.3d 137, 153-54 (3d Cir. 2004) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997)). In ruling on a motion to dismiss under 12(b)(6), the court must consider whether “under any reasonable reading of the pleadings, the plaintiffs may be entitled to relief, and . . . must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom.” *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). Courts will grant a motion to dismiss “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

The respondents’ contention that the new claim is time barred and/or waived is based on the same assertion: that Green either knew, or with the exercise of reasonable diligence could have known, of this claim’s existence at the time of his trial. However, waiver and statute of limitations are both affirmative defenses, Fed. R. Civ. P. 8(c), and the Third Circuit has explained that “with some exceptions, affirmative defenses should be raised in responsive pleadings, not in pre-answer motions brought under Rule 12(b).” *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 657 (3d Cir. 2003). This is because such defenses raise factual questions, and “[t]he facts necessary to establish an affirmative defense must generally come from matters outside of the complaint.” *Id.*; see also *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 498 (3d Cir. 1985) (“[T]he applicability of the statute of limitations usually implicates factual questions as to when plaintiff discovered or should have discovered the elements of the cause of action; accordingly, defendants bear a heavy burden in seeking to establish as a matter of law that the challenged claims are barred.”); *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002) (“If the [time] bar is not apparent on the face of the complaint, then it may not afford the

basis for a dismissal of the complaint under Rule 12(b)(6).”) (internal quotation marks omitted). Here, there is a factual dispute about whether Green discovered (or could have discovered) the factual predicate of this claim more than one year prior to bringing this motion. He argues that he only discovered the claim recently, and that he could not have discovered it earlier with the exercise of due diligence. The respondents, of course, argue otherwise. The resolution of this issue will require a detailed inquiry into the competing factual allegations, an inquiry that is premature at this juncture.<sup>6</sup> Therefore, the motion to amend will not be denied due to futility.

The respondents have not argued that they would be prejudiced by allowing this amendment. The Third Circuit has “consistently recognized . . . that ‘prejudice to the non-moving party is the touchstone for the denial of an amendment.’” *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) (quoting *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993)). Further, there is no evidence that Green has demonstrated “undue delay, bad faith or

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<sup>6</sup> Further, even if the court were to consider the documents – which include transcripts of hearings and orders by the trial court – proffered by the respondents in opposition to Green’s motion, it would still decline to rule that the amendment is futile. The records include an April 12, 1996 order, in which the trial court granted Green’s motion to inspect Frank’s juvenile delinquency file, but ruled that it would first review all other Juvenile Court files and records and only provide Green with those that the court deemed material. (Respondents’ Exhibit A, April 12, 1996 Opinion and Order.) Further, in a transcript of a September 10, 1996 conference, there is a statement that Green’s lawyer, before the court order, reviewed “the files” at the Juvenile Court. (Respondent’s Exhibit A, Transcript of Sept. 10, 1999 Conference, at 5.) While the latter admission does put Green’s claim that he has only recently become aware of this issue in doubt, the statement is not clear about which records Green’s lawyer saw and whether those records identified Judge Moran.

Green has filed a habeas motion in state court raising the recusal claim and it may well be that the factual issues will be developed there, where they more properly should be, both as to when Green could have discovered the factual predicate of the recusal claim through the exercise of due diligence and what the specific facts are with reference to that factual predicate.

dilatory motives.” Accordingly, the court will grant Green leave to amend his habeas petition.<sup>7</sup>

## **B. Stay and Abeyance**

When Green amends his habeas petition with the new claim, another procedural obstacle will arise. Because Green has not exhausted his state remedies as to the new claim, upon amendment his petition will become mixed; that is, it will include both exhausted and unexhausted claims. *See, e.g., Crews v. Horn*, 360 F.3d 146, 147 (3d Cir. 2004). Under AEDPA, subject to certain exceptions, “[a]n application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1). Thus, as it stands, the court cannot grant Green’s amended habeas petition even if it would determine it had merit. *See Crews*, 360 F.3d at 154. Green has anticipated this problem, however, and requests that the court stay the proceedings and

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<sup>7</sup> The magistrate judge determined that Green’s new claim is timely because it relates back to his prior claims under Fed. R. Civ. P. 15(c)(2). While the court accepts the magistrate judge’s ultimate conclusion – that Green should be granted leave to amend his habeas petition – the court does not agree with this portion of its reasoning. Because the claim that the trial judge should have recused himself is “an entirely new claim or new theory of relief,” it does not relate back under Rule 15(c)(2). *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000); *see also Mayle v. Felix*, 125 S. Ct. 2562, 2566 (2005) (stating that an amended habeas petition “does not relate back (and thereby escape AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth”). Moreover, Green did not allege that the new claim related back; rather, he claimed that the new count is timely under 28 U.S.C. § 2244(d)(1)(D) because less than one year has passed since “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” Because Green alleges that the new claim is independently timely, he need not rely on the relation-back provision. *See United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000) (stating that “[a] party may . . . attempt to raise and to relate back a new claim which *would otherwise* have been barred by the statute of limitations) (emphasis added); *Abu-Jamal v. Horn*, No. CIV. A. 99-5089, 2001 WL 1609761, at \* 7 (E.D. Pa. Dec. 18, 2001) (stating “[a]fter all, recourse to the relation back doctrine is necessary in the habeas context only when the proposed amendment follows the expiration of the statute of limitations contained in 28 U.S.C. § 2244(d)(1)”).

place them in abeyance pending exhaustion of his state remedies for the new claim.<sup>8</sup>

The Supreme Court has expressly approved the use of stay-and-abeyance procedures. *Rhines v. Weber*, 544 U.S. 269, 278 (2005). In *Rhines*, the Court acknowledged that its traditional approach toward mixed petitions – which required courts to dismiss the mixed petitions without prejudice so that petitioners could first present the unexhausted claims to the state court – exposed petitioners with mixed petitions to the “risk of forever losing their opportunity for any federal review of their unexhausted claims.” *Id.* at 275. The Court recognized that because AEDPA’s statute of limitations is not tolled during the pendency of the federal petition, *see Duncan v. Walker*, 533 U.S. 167, 181-182 (2001), by the time the district court ruled on exhaustion and dismissed the petition, it would be difficult (and at times impossible) for the petitioner to refile the petition within the limitation period, *Rhines*, 544 U.S. at 275. The Court desired to ameliorate these harsh results, while remaining faithful to the “twin purposes” of AEDPA: “encouraging finality” and “streamlining federal habeas proceedings” by requiring exhaustion. *Id.* at 276-77. Based on these considerations, the Court approved of the stay-and-abeyance procedure, but “only in limited circumstances.” *Id.* at 277. The Court held that “it 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.”

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<sup>8</sup> In Green’s instant motion, he first asked the respondents to waive the exhaustion requirement. (Motion to Amend ¶ 8.) The respondents refused to do so, and on January 10, 2006, Green filed a post-conviction relief motion in the Pennsylvania Court of Common Pleas raising the recusal claim.

In this case, the three factors detailed in *Rhines* militate toward placing Green's proceedings in abeyance. First of all, Green did<sup>9</sup> have good cause for his failure to exhaust his state remedies. While the courts are divided on the precise definition of "good cause,"<sup>10</sup> compare *Hernandez v. Sullivan*, 397 F. Supp. 2d 1205, 1206-07 (C.D. Cal. 2005) (the court "look[ed] to procedural default case law for guidance in determining whether Petitioner has demonstrated the requisite 'good cause' for failing to exhaust his unexhausted claims prior to filing this habeas action"), with *Bryant v. Greiner*, No. 02Civ.6121(RMB)(RLE), 2006 WL 1675938, at \*5 (S.D.N.Y. June 15, 2006) (finding that compared to the *Hernandez* line of cases, "a somewhat lesser showing of cause is needed"), with *Briscoe v. Scribner*, No. CIVS04-2175FCDGGHP, 2005 WL 3500499, at \*2 (E.D. Cal. Dec. 21, 2005) (stating that "for a satisfactory showing of good cause, the court will simply require a prima facie case that a justifiable, legitimate reason exists which warrants the delay of federal proceedings while exhaustion occurs"), the Supreme Court has provided an example of a situation that will satisfy the requirement. In *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005), the Court ruled that a state postconviction petition rejected by the state court as untimely is not "properly filed," and thus does not toll the statute of limitations under 28 U.S.C. § 2244(d)(2). In *Pace*, the petitioner argued that such a ruling was unfair, because "a petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never properly filed, and thus that his federal habeas petition is time barred." *Pace*, 544 U.S. at 416 (internal quotation marks omitted).

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<sup>9</sup> For the purposes of this discussion, the court will accept Green's allegation that the new claim is newly discovered.

<sup>10</sup> The Third Circuit has not yet been called upon to define this term.

In response, the Supreme Court explained:

A prisoner seeking state postconviction relief might avoid this predicament, however, by filing a “protective” petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted. *See Rhines v. Weber*, 544 U.S. 269 (2005). 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*, 544 U.S. at 416. Here, Green has employed the very tactic suggested by the Supreme Court. Generally, the Pennsylvania Post Conviction Relief statute requires that petitions be filed within one year of the date judgment becomes final. 42 Pa. Cons. Stat. § 9545(b)(1). However, the statute includes an exception for instances where “the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence,” § 9545(b)(1)(ii); in such a case, the petitioner must file within sixty days of the date that the claim could be filed, § 9545(c). This case implicates the exception, because Green filed the PCRA petition more than one year after his judgment became final. The court concludes that Green does have “reasonable confusion” about whether his state filing will be deemed timely: the state court’s timeliness evaluation will require a detailed factual inquiry into when, with the exercise of due diligence, he could have ascertained the existence of his claim. This is not a case where the state petition is clearly timely, *see Harris v. Beard*, 393 F. Supp. 2d 335, 339 (E.D. Pa. 2005) (ruling that the petitioner did not have reasonable confusion about the timeliness of his state petition when it was filed within one year from the date his conviction became final); indeed, the respondents have argued that the federal petition, which is subject to a similar period of limitations, is untimely. Thus, Green has good cause to file a protective petition in federal court.

Considering the second factor described in *Rhines*, the newly discovered claim is potentially meritorious. While Green has been unable to determine the exact dimensions of the claim because the relevant records are not yet available to him, a judge's failure to recuse himself can constitute a due process violation. See *United States ex rel. Perry v. Cuyler*, 584 F.2d 644, 647 (3d Cir. 1978). Thus, the claim is potentially meritorious. See *Bartelli v. Wynder*, No. Civ.A. 04-CV-3817, 2005 WL 1155750, at \*2 (E.D. Pa. May 12, 2005) (stating that because the petitioner's "claims allege violations of [his] constitutional rights that could serve as grounds for granting a writ of habeas corpus if supported by sufficient facts . . . the claims are not plainly meritless"); *Webster v. Kearney*, No. Civ. 04-361JFF, 2006 WL 572711, at \*5 (D. Del. March 8, 2006) ("[I]liberally construing" the allegations and concluding that they were not clearly non-meritorious).

Finally, there is no evidence that Green has engaged in intentionally dilatory tactics; rather, he claims that he brought this claim as soon as he discovered it. The respondents have not proffered any evidence to the contrary, and this is not a case where he is facing capital punishment and thus has a motive to delay, see *Rhines*, 544 U.S. at 277-78. Accordingly, the court will grant Green's motion to place his proceedings in abeyance pending the exhaustion of state remedies on the new claim.

An appropriate order follows.

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

ANDRE K. GREEN,  
Petitioner,

v.

LOUIS S. FOLINO, *et al*,  
Respondents.

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: CIVIL ACTION  
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: NO. 03-674  
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**Order**

AND NOW on this \_\_\_\_\_ day of July 2006, upon consideration of petitioner Andre K. Green's Motion to Amend Habeas Petition and Hold Habeas Proceedings in Abeyance Pending Exhaustion of State Remedies (Doc. No. 51), the respondents' answer and memorandum of law, and the petitioner's reply, and after review of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport, and no objection having been filed, it is hereby ORDERED that:

- (1) The Recommendation is APPROVED;
- (2) Petitioner's Motion to Amend is GRANTED, and an amendment shall be filed within 10 days of the entry of this Order;
- (3) Petitioner's Motion to Hold Habeas Proceedings in Abeyance Pending Exhaustion of State Remedies is GRANTED; and
- (4) This case shall be placed on the civil suspense docket pending petitioner's exhaustion of his new claim in state court.

IT IS FURTHER ORDERED that, within thirty days of the conclusion of the state court proceedings, including the conclusion of any appellate proceedings related thereto, petitioner's counsel shall notify the court that those proceedings are concluded and the case is ready to proceed in this court.

/s William H. Yohn Jr., Judge

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William H. Yohn Jr., Judge