

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

LESLIE CHARLES X. BEASLEY, : CIVIL ACTION
 : NO. 90-4711
 Petitioner, : :
 : :
 v. : :
 : :
THOMAS FULCOMER ET AL., : :
 : :
 Respondents. : :

ORDER-MEMORANDUM

And Now, this 5th day of November, 1997, following oral argument with counsel for the parties, and upon consideration of petitioner's amended petition for writ of habeas corpus (doc. no. 43), and the response of the respondents thereto (doc. no. 51), and the reply of petitioner (doc. no. 57), and the motion of respondents to extend time to file a supplemental response to petitioner's reply (doc. no. 59), and the motion of respondents for adjudication of preliminary procedural issues (doc. no. 60), and the response of petitioner thereto (doc. no. 62), it is hereby **ORDERED** that the petition is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust state remedies. It is **FURTHER ORDERED** that no certificate of appealability is to be issued. It is **FURTHER ORDERED** that the motions of respondents to extend time to file a supplemental response and for adjudication of preliminary procedural issues are **DENIED AS MOOT**. The Order is based upon the following reasoning:

1. This is a death penalty case. Presently before the Court is petitioner's request for a writ of habeas corpus pursuant to 28

U.S.C. § 2254. In 1981, the petitioner was convicted of first-degree murder by a jury in the Court of Common Pleas of Philadelphia County for shooting and killing a police officer. On January 16, 1997, the same day on which he filed the instant amended petition for a writ of habeas corpus, the petitioner filed his third petition in the Court of Common Pleas of Philadelphia County for post-conviction relief pursuant to the Pennsylvania Post-Conviction Relief Act, 42 Pa. C.S. § 9541 et seq ("PCRA"). On October 1, 1997, the Common Pleas court denied petitioner's third PCRA petition.¹ Petitioner has advised the Court that he has recently filed a notice of appeal from that order with the Pennsylvania Supreme Court.

2. In light of Banks v. Horn, 1997 WL 578904 (3d Cir. Sept. 19, 1997), the Court will dismiss the instant habeas corpus petition without prejudice as a mixed petition.

3. The exhaustion requirement for state habeas prisoners is codified at 28 U.S.C. § 2254(b) and (c). "Simply stated, these sections require a petitioner to exhaust all means of relief available under state law before filing a federal habeas petition." Hull v. Freeman, 932 F.2d 159, 164 (3d Cir. 1991) (citing Landano v. Rafferty, 897 F.2d 661, 668 (3d Cir.), cert. denied, 111 S.Ct 46 (1990)). The exhaustion requirement "addresses federalism and comity

¹The Common Pleas Court issued the following one-sentence order: "And Now, to wit this 1st day of October, 1997, it is hereby ORDERED and DECREED that the Defendant's Petition for Post-Conviction Relief is DENIED without the necessity for a hearing."

concerns by 'afford[ing] the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary.'" Toulson v. Beyer, 987 F.2d 984, 986 (3d Cir. 1993) (internal citations omitted).

4. "To satisfy the exhaustion requirement, the claims included in a federal [habeas] petition must be fairly presented to the state courts." Id. at 987. In this regard, "[t]he habeas petitioner bears the burden of proving that he has exhausted all available state remedies." Id. If a habeas corpus petition contains exhausted and unexhausted claims, the Supreme Court has held in Rose v. Lundy, 455 U.S. 509 (1982) that the petition must be dismissed as a mixed petition. See Rose v. Lundy, 455 U.S. 509, 522 (1982).

5. However, "[a] petition containing unexhausted but procedurally barred claims in addition to exhausted claims, is not a mixed petition requiring dismissal under Rose." Toulson, 987 F.2d at 987. "Although the unexhausted claims may not have been presented to the highest state court, exhaustion is not possible because the state court would find the claims procedurally defaulted." Id. (citing Coleman v. Thompson, 111 S.Ct. 2546, 2555, 2557 n.1 (1991)); Castille v. Peoples, 489 U.S. 346, 351 (1989) ("requisite exhaustion may nonetheless exist. . . if it is clear that [petitioner's] claims are now procedurally barred under [state] law."). In such circumstances, "[t]he district court may not go to the merits of the barred claims, but must decide the merits of the claims that are exhausted and not barred." Id.

(citing Teague v. Lane, 489 U.S. 288 (1989)).

6. In Banks v. Horn, 1997 WL 578904 (3d Cir. Sept. 19, 1997), the Commonwealth contended that under the 1995 amendments to the PCRA, 42 Pa. C.S. §§ 9545(b)(1)² and (2), any second PCRA petition which the habeas petitioner filed more than a year from the date of judgment in the state court was barred as untimely. The Third Circuit, however, rejected the Commonwealth's argument based upon the following reasoning:

While it is true that the text of the 1995 amendments support these contentions [by the Commonwealth], it is not clear that these contentions are dispositive. The Commonwealth does not refer us to a single Pennsylvania Supreme Court case applying the PCRA as amended in 1995 to support its views. . . . In the circumstances, we are not confident that the Pennsylvania Supreme Court, even in the face of the 1995 amendments to the PCRA, will abandon its practice of reaching the merits of claims in PCRA petitions in capital cases regardless of the failure of the petition to meet the appropriate procedural criteria. Consequently, applying Toulson, we cannot find that the review of [the petitioner's] unexhausted claims has been foreclosed.

Banks, 1997 WL 578904 at *9. The Third Circuit in Banks reversed the order of the district court denying the petition on the merits and remanded the case to the district court with instructions to dismiss the case without prejudice as a mixed petition under Rose v. Lundy, 455 U.S. 509 (1982).

²Section 9545(b)(1) provides in relevant part:

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final. . .

7. In a footnote at the conclusion of Banks, however, the Third Circuit suggested that in the future under certain circumstances it may reach a different result on the state procedural bar issue:

It is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of Johnson v. Mississippi, 486 U.S. 578, 589 (1986). That time, however, has not yet been reached.

Banks, 1997 WL 578904 at *10 n.3.

8. The Court concludes that this case is controlled by the teachings of Banks.³ Here, like Banks, the Commonwealth "does not

³To support its position that the Court need not dismiss the habeas corpus petition as a mixed petition on exhaustion grounds because it would be futile to invoke the state procedure, the Commonwealth refers the Court (1) to the Pennsylvania Supreme Court's Order of August 11, 1997, and (2) to the amendments to Rule 1500 of the Pennsylvania Rules of Criminal Procedure which now provide for the same one-year statute of limitations period as found under 42 Pa. C.S. § 9545(b)(1). While it acknowledges that no case has been decided by the Pennsylvania Supreme Court on the issue, the Commonwealth nevertheless contends that these actions by Pennsylvania Supreme Court show that the Pennsylvania Supreme Court intends to "enforce the one year statute of limitations in the 1995 amendments to the PCRA in both capital and non-capital cases." Doc. no. 60 at 5. Moreover, the Commonwealth speculates in this regard that the Third Circuit decided Banks without having considered the recent actions taken by the Pennsylvania Supreme Court. But see Banks v. Horn, 1997 WL at *9 (specifically mentioning Pennsylvania Supreme Court's Order of August 11, 1997 captioned In re: Suspension of the Capital Unitary Review Act etc., No. 224, in which the Pennsylvania Supreme Court suspended permanently the Capital Unitary Review Act pursuant to its administrative powers).

Second, as to the amendments to Rule 1500, while acknowledging that the state trial court summarily denied the petitioner's third PCRA petition in the Order of October 1, 1997,

refer [the Court] to a Pennsylvania Supreme Court case applying the PCRA as amended in 1995 to support its views." Banks, 1997 WL 578904 at *9. Nor can the Court say with confidence that the day yet has arrived when the Pennsylvania Supreme Court "consistently and regularly" applies the 1995 amendments to the PCRA in capital cases which would establish a procedural bar to petitioner's third PCRA petition for purposes of federal habeas review. While it would be desirable for the Pennsylvania Supreme Court to address at an early date the uncertainty pointed out in Banks as to whether the 1995 amendments to the PCRA bar as untimely any second or subsequent PCRA petitions filed more than one year after a judgment of conviction becomes final⁴, this has not yet occurred. Accordingly, the petition for writ of habeas corpus will be

nevertheless, the Commonwealth contends that the state court record indicates that one of the grounds for dismissal by the state trial court was that the petition was untimely.

⁴Because petitioner's conviction became final long before the enactment of the 1995 amendments to the PCRA, petitioner cannot under the newly amended statute file his third PCRA petition within one year from the date of when his conviction became final. Accordingly, the state procedural bar issue in this case is whether a PCRA petitioner, who has filed a second or subsequent PCRA petition and whose conviction became final prior to the effective date of the 1995 amendments to the PCRA, must file his PCRA petition within one year from the date that the applicable amendments took effect. Under a federal statute containing a similar provision, the Third Circuit has held that "for a [habeas] petitioner [who has filed a motion to vacate the judgment of conviction and sentence under 28 U.S.C. § 2255] whose conviction became final prior to the effective date of the [Antiterrorism Effective Death Penalty Act ("AEDPA")], [28 U.S.C. § 2255] allows a reasonable period of time, not to exceed one year, [from the date the AEDPA took effect on April 24, 1996], for the filing of a habeas corpus petition." (emphasis added). United States v. Urrutia, No. 97-7951, slip op. at 2 (3d Cir. Sept. 15, 1997) (unpublished).

dismissed without prejudice as a mixed petition.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.