

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

LAWRENCE LINES : CIVIL ACTION  
Petitioner, :  
 :  
v. :  
 :  
 :  
DAVID LARKIN, WARDEN, :  
Respondent. : No. 97-1500

**MEMORANDUM AND ORDER**

VanArtsdalen, S.J.

November 24, 1997

Petitioner Lawrence Lines is a prisoner currently incarcerated in the State Correctional Facility at Dallas, Pennsylvania. On February 28, 1997, he filed a Petition for Writ of Habeas Corpus (filed document #1). I denied and dismissed his Petition in a Order dated November 10, 1997 (filed document #14). I denied and dismissed his Petition based on Petitioner's failure to exhaust his state court remedies, despite Petitioner's argument that any appeal of certain issues to the Pennsylvania Supreme Court was barred by the state's fugitive forfeiture rule.

Petitioner has filed a Motion for Reconsideration (filed document #15). The current motion, however, does not substantiate a different outcome. Therefore, for the reasons set forth below, Petitioner's motion for reconsideration of my November 10, 1997 Order will be denied.

As stated in my previous Order, absent exceptional circumstances, a federal court will not entertain the claims of a habeas corpus petitioner until the petitioner has exhausted available state remedies. Picard v. Connor, 404 U.S. 270, 275 (1971); Brown v. Cuyler, 669 F.2d 155, 157 (3d Cir. 1982); 28

U.S.C. § 2254(b). A federal habeas corpus petition which includes any unexhausted claims generally must be dismissed without prejudice for failure to exhaust all state-created remedies. Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). A petitioner must exhaust each constitutional claim sought in his habeas petition. Tillett v. Freeman, 868 F.2d 106 (3d Cir. 1989); See 28 U.S.C. § 2254(c).

Exhaustion of state remedies generally requires a petitioner to have fairly presented his constitutional claims to the highest state court. Chaussard v. Fulcomer, 816 F.2d 925, 928 (3d cir.), cert. denied, 484 U.S. 845, 108 s. Ct. 139, 98 L. Ed. 2d 96 (1987); Swanger v. Zimmerman, 750 F.2d 291 (3d Cir. 1984). Although exhaustion does not require that the highest state court actually rule on the merits of a petitioner's claims, it does require that the court be given the opportunity to review them. Bond v. Fulcomer, 864 F.2d 306 (3d Cir. 1989). The state must be given the "initial opportunity to pass upon and correct" alleged violations of a petitioner's constitutional rights. Picard, 404 U.S. at 275, citing Wilwording v. Swenson, 404 U.S. 249, 250, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971).

Petitioner Lines simply has not previously presented his current claims to the Pennsylvania Supreme Court, and it is not clear that the Pennsylvania Supreme Court could not, or would not, have heard Petitioner's claims. Although the Pennsylvania Superior Court ruled that Petitioner's appeal was barred by Pennsylvania's fugitive forfeiture rule, the state supreme court

has not been given the opportunity to correct any alleged error of the lower state court.

Furthermore, each of Petitioner's claims must be exhausted, but Petitioner has yet to exhaust in state court all of the claims presented in his federal habeas petition. The claims Petitioner raises here are different from those he raised in the Pennsylvania Supreme Court either in his first appeal or in his appeal of a collateral petition filed pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9541, et seq. The claims presented on each appeal are not the same. Petitioner initially sought discretionary review by the Pennsylvania Supreme Court on the following two issues:

- (1) Whether the trial court has discretion to hear the post-verdict motions of a defendant who was briefly absent during the pendency of post-trial motions, but who was present for all hearings on those motions, and
- (2) Whether a defendant who is a fugitive for a brief time during the pendency of post-trial motions, but present throughout all post-trial hearings and the appellate process, is forever barred from appellate review.

See Magistrate's Report and Recommendation, p. 4 (filed document #13). He did not raise the substantive issues deemed barred by the Pennsylvania Superior Court.

On March 31, 1993, Petitioner filed a petition seeking collateral relief under the PCRA, raising the following claims for relief:

- (1) Appellate counsel was ineffective for failing to argue that the Superior Court's retroactive application of Commonwealth v. Jones violated Petitioner's due process rights;

(2) Appellate counsel was ineffective for failing to argue that the retroactive application of Commonwealth v. Jones violated the constitutional prohibition against ex post facto laws;

(3) Appellate counsel was ineffective for failing to argue that a five-year delay in Petitioner's sentencing violated his Sixth Amendment right to a speedy trial;

(4) Appellate counsel was ineffective for failing to pursue trial counsel's ineffectiveness for failing to object to the trial court's jury instruction regarding accomplice testimony; and

(5) Petitioner was entitled to a new trial on the basis of after-discovered evidence.

See Magistrate's Report and Recommendation, p. 5. The claims raised in this collateral petition were different from those raised previously in the Pennsylvania Supreme Court. The PCRA petition was dismissed, and Petitioner appealed the denial of his petition to the Pennsylvania Superior Court, which affirmed the dismissal. Petitioner then appealed the dismissal to the Pennsylvania Supreme Court, raising the same claims he raised in his original PCRA petition. Given the opportunity to review the merits of Petitioner's claims, the Pennsylvania Supreme Court, nonetheless, denied allocatur on these claims as well.

Petitioner's federal habeas petition, which is the subject of concern here, was filed in this court on February 28, 1997, seeking federal habeas relief on the following grounds:

(1) Petitioner's due process rights were violated (a) when the prosecutor refused, despite demand, to disclose that a witness had been immunized, and (b) when the prosecutor permitted a witness to perjure himself through his assertions of non-involvement in drug activity

(2) Petitioner was denied his Sixth Amendment right to competent counsel and to confront witnesses against him;

(3) Trial counsel was ineffective for failing to (a) ask for severance of the counts; (b) object to hearsay; (c) adopt any theory of defense; and (d) call character witnesses; and

(4) The prosecutor's closing argument constituted prosecutorial misconduct, and violated Petitioner's right to due process.

See Magistrate's Report and Recommendation, p. 6.

These claims are different. The claims raised in the federal habeas petition have not been presented first to the Pennsylvania Supreme Court either in Petitioner's original appeal or in his appeal of his PCRA petition, and therefore the highest state court has not had an opportunity to rule on the merits of these claims. The Pennsylvania Supreme Court very well may agree with the lower state court's conclusion that the appeal is barred by the fugitive forfeiture rule, but this is not entirely clear, and I think, therefore, that the state supreme court must at least be given the opportunity to hear the merits of the case if it so chooses. As such, Petitioner has failed to exhaust the claims he now raises in federal court. Consequently, I see nothing that would substantiate a different conclusion. Petitioner's Motion for Reconsideration, therefore, will be denied.

An appropriate Order follows.

