

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

RAYMOND GRAY : CIVIL ACTION  
 :  
 v. :  
 :  
 SUPERINTENDENT RAYMOND J. SOBINA, :  
 et al. : NO. 97-4978

MEMORANDUM and ORDER

Norma L. Shapiro, J.

April 9, 1998

Petitioner Raymond Gray ("Gray") has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. By Order dated October 2, 1997, the court referred his petition to United States Magistrate Judge M. Faith Angell ("Judge Angell") for a Report and Recommendation. Judge Angell has recommended that Gray's § 2254 petition be denied because it is time-barred; her Report and Recommendation will be approved by the court and petitioner's objections overruled.

DISCUSSION

On December 2, 1990, Gray was convicted before the Honorable Joseph D. O'Keefe ("Judge O'Keefe") in the Philadelphia County Court of Common Pleas of first degree murder, robbery, criminal conspiracy and possession of an instrument of crime. Judge O'Keefe sentenced Gray to life imprisonment for first degree murder and concurrent imprisonment of ten to twenty years for robbery, five to ten years for conspiracy and one to two years for possessing an instrument of crime.

Gray, arguing the trial court committed prejudicial errors

concerning evidence, prosecutorial misconduct, insufficient evidence and a verdict against the weight of the evidence, appealed his conviction to the Pennsylvania Superior Court. The conviction was affirmed by Memorandum and Order dated August 6, 1992. The Supreme Court of Pennsylvania denied allocatur on April 20, 1994.

This habeas petition was filed August 4, 1997, but it was dated July 27, 1997, the day Gray delivered it to prison authorities. For inmates, the statute of limitations and other deadlines are tolled on the date of delivery to prison officials for mailing. See Houston v. Lack, 487 U.S. 266, 271 (1988); Burns v. Morton, 134 F.3d 109, 112-13 (3d Cir. 1998).

Gray raised seven claims in his habeas petition: 1) admission of a medical doctor's testimony; 2) admission of witness Corey White's testimony; 3) admission of accomplice Gerald Everett's testimony; 4) erroneous instructions on accomplice liability; 5) statements of personal opinion in the district attorney's opening and closing statements; 6) a verdict against the weight of the evidence; and 7) denial of a speedy trial.

A state prisoner could formerly file a § 2254 habeas petition any time after his conviction became final. See Vasquez v. Hillary, 474 U.S. 254, 265 (1986). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted on April

24, 1996, imposed a statute of limitations on § 2254 habeas petitions. Under the AEDPA:

(1) 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 ...

(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;

...

(2) The 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. § 2244(d). Section 2244(d) became effective April 24, 1996.

Applying § 2244(d) as written would require Gray to file his habeas petition on or before April 20, 1995, one year after his petition for review was denied by the Supreme Court of Pennsylvania and more than one year before the AEDPA was enacted. State prisoners whose convictions became final prior to April 24, 1996 have one year after the date of the AEDPA's enactment to file a federal habeas petition. See Burns, 134 F.3d at 111 ("[W]e hold that habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2244(d)(1)'s time limit."); see also United States v. Flores, 135 F.3d 1000, 1006 (5th Cir. 1998); Calderon v. United States District Court, 128 F.3d 1283, 1287 (9th Cir. 1997), cert.

denied, 118 S. Ct. 899 (1998); United States v. Simmonds, 111 F.3d 737, 745-46 (10th Cir. 1997); Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (in banc), rev'd on other grounds, 117 S. Ct. 2059 (1997).

Gray's § 2254 petition was not filed until July 27, 1997, the date of its delivery to prison authorities for mailing; it was filed more than one year after the effective date of the AEDPA and was time-barred. Gray states he "was not made aware of the AEDPA" and lost trial transcripts when he was transferred to different institutions in 1995. See Pet.'s Objections at I. But Gray admits his former attorney sent him replacement transcripts in "the first part of 1996," id. at 4, before the AEDPA effective date. Therefore the misplaced transcripts did not prevent Gray from filing his habeas petition before April 24, 1997, one year after April 24, 1996. Gray's § 2254 habeas petition will be denied because it is time-barred.

In certain limited circumstances, if a state habeas petitioner's remedy under § 2254 is deemed "inadequate or ineffective," he may file a petition under 28 U.S.C. § 2241.<sup>1</sup>

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<sup>1</sup> 28 U.S.C. § 2241 provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district court and any circuit judge within their respective jurisdictions" to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." Gray does not seek relief under § 2241, but in the interest of justice the court has considered his right to proceed under § 2241.

But the § 2254 remedy is not inadequate "merely because the petitioner is unable to meet the stringent gatekeeping requirements" of the AEDPA. In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

Section 2241 is only available if the § 2254 remedy is procedurally barred and the court's failure to afford relief would amount to a "complete miscarriage of justice." Id. (allowing relief under § 2241 where the petitioner had been convicted of a crime subsequently held invalid). Gray had an adequate and effective remedy prior to April 24, 1997. The § 2254 remedy is not "inadequate or ineffective" because of Gray's delay. There is not a "complete miscarriage of justice" if § 2241 relief is denied.<sup>2</sup> The narrow proceeding under § 2241 is not appropriate in this case.

An appropriate Order follows.

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<sup>2</sup> The § 2241 remedy is strictly limited. In Dorsainvil, petitioner "never had an opportunity to challenge his conviction as inconsistent with the Supreme Court's interpretation" of a statute under which he was convicted; the Supreme Court's decision granting its holding retroactive effect was after petitioner's direct review and successive collateral review was barred by the AEDPA. Dorsainvil, 119 F.3d at 251. The petitioner would have been punished "for an act that the law does not make criminal," a fundamental miscarriage of justice. Id.

Section 2241 does not provide a remedy when the petitioner could have raised his claims in a timely § 2254 action but failed to do so, because that "would eviscerate Congress's intent" in amending § 2254. Id.; see Buhl v. Hendrick, No. 97-1173, 1998 WL 70628, at \*6 (E.D. Pa. Feb. 19, 1998); United States v. Black, No. 92-538-1, 1997 WL 703182, at \*2 (E.D. Pa. Nov. 10, 1997); United States v. Walker, 980 F. Supp. 144, 146 (E.D. Pa. 1997).



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ORDER

AND NOW, this 9th day of April, 1998, upon de novo review of the record, the Report and Recommendation of United States Magistrate Judge M. Faith Angell ("Judge Angell"), petitioner Raymond Gray's ("Gray") objections thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. 1. The Report and Recommendation of Judge Angell is **APPROVED AND ADOPTED**; Gray's objections thereto are **OVERRULED**.

2. Gray's petition for writ of habeas corpus under 28 U.S.C. § 2254 is **DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING**.

3. Gray's motion to deny enlargement of time (Docket No. 7) is **DENIED**.

4. Gray's motion to decide petition without response from the State (Docket No. 11) is **DENIED**.

5. There is no probable cause to issue a certificate of appealability.

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Norma L. Shapiro, J.