

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

KENNETH J. WILLIAMS	:	CIVIL ACTION
vs.	:	
DONALD T. VAUGHN, Mr.; DISTRICT ATTORNEY FOR LEHIGH COUNTY; and, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	NO. 95-7977
	:	

**ORDER AND MEMORANDUM**

**ORDER**

AND NOW, to wit, on this 8<sup>th</sup> day of May, 1998, upon consideration of the Respondents' Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e) (Document No. 25, filed April 2, 1998), and Petitioner's Brief in Opposition to the Respondents' Motion to Alter or Amend Judgment (Document No. 28, filed April 20, 1998), for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** that Respondents' Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e), treated as a Motion for Relief From Judgment or Order pursuant to Federal Rule of Civil Procedure 60(b), is **DENIED**.

**MEMORANDUM**

A. Introduction: Rule 59(e) provides that "[a]ny motion to alter or amend judgment shall be filed no later than 10 days after entry of the judgment." Fed.R.Civ.P. 59(e). This "ten-day period 'is jurisdictional, and cannot be extended in the discretion of the district court.'" Adams v. Trustees of the New Jersey Brewery Employees' Pension Trust Fund, 29 F.3d 863, 870 (3d Cir. 1994) (quoting Welsh v. Folsom, 925 F.2d 666, 669 (3d Cir. 1991)).

The judgment which respondents seek to have altered or amended was entered on March 18, 1998. Not counting intervening weekend days or legal holidays, see Fed.R.Civ.P. 6(a), respondents had until April 1, 1998 to file their Motion under Rule 59(e). The respondents' Motion was filed on April 2, 1998. Respondents are therefore time barred.

Although the Court has concluded that respondents' Rule 59(e) Motion is time barred, it will nonetheless treat the Motion as one brought pursuant to Federal Rule of Civil Procedure 60(b) and address

the merits of respondents' claims.<sup>1</sup> See, e.g., Carpenter v. Williams, 86 F.3d 1015, 1016 (10<sup>th</sup> Cir. 1996); Cf. United States v. Clark, 984 F.2d 31, 32 (2d Cir.1993) (“[A] motion to reconsider a section 2255 ruling is available . . . [and] is to be treated as a Rule 59(e) motion if filed within 10 days of entry of the challenged order and as a Rule 60(b) motion if filed thereafter . . .”).

**Respondents' Arguments:** The respondents request relief from the Court's Order entered March 18, 1998, on a number of grounds:

(1) Respondents argue that the Court improperly utilized Rule 15(c)(2) because that rule applies only to pending cases and, once dismissed, this case is not pending.

(2) Respondents also argue that the Court, by dismissing the petition without prejudice to petitioner's right to file a second amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of state remedies, has effectively held the petition in abeyance and thereby violated the dictate of Christy v. Horn, 115 F.3d 201 (3d Cir. 1997).

(3) Additionally, respondents contend that the Court's Order dated March 17, 1998 is “fundamentally inconsistent” with the Anti-Terrorism and Effective Death Penalty Act [“AEDPA”] of 1996, 110 Stat. 1214, effective April 24, 1996, which (among other things) amended the habeas corpus statute by creating a new statute of limitations and by providing for stricter limits on successive petitions. The Court's ruling is “inconsistent” with the AEDPA, respondents say, because, by allowing inmates to file an initial petition in federal court and then return to state court to pursue frivolous claims without penalty, the decision permits those inmates multiple bites at the habeas apple and unlimited time to appear in federal court.

(4) Finally, under Rose v. Lundy, 455 U.S. 509 (1982), respondents note, inmates may drop unexhausted claims and proceed in federal court. By employing that procedure,

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<sup>1</sup> A detailed analysis of the facts and issues presented in this case is set forth in the Court's Memorandum dated March 16, 1998.

they argue, an inmate avoids any possibility of prejudice.

**C. Discussion:** The Court’s decision to utilize Rule 15(c)(2), as described in its Memorandum dated March 16, 1998, was premised, in large part, on the language of the AEDPA’s statute of limitations. The AEDPA states that the “time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2). The Third Circuit has ruled that a “properly filed” PCRA petition is one which is “submitted according to the state’s procedural requirements, such as the rules governing the time and place of filing.” Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). This interpretation of “properly filed” leaves open the possibility that a Pennsylvania Post Conviction Relief Act [“PCRA”], 42 P.S. § 9541 et. seq., (Purdon’s 1982 & Supp. 1997) proceeding which is dismissed on procedural grounds will not be deemed to have been “properly filed” for purposes of the AEDPA and will not, therefore, toll the statute of limitations. It was this possibility – that the limitations period would expire before petitioner could exhaust and file a new petition – which prompted the Court to dismiss the within habeas petition without prejudice to petitioner’s right to file a second amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of state remedies.<sup>2</sup>

Although respondents contend that there is no authority for this Court to employ Rule 15(c)(2) as it has, they also do not cite authority for the proposition that the Court cannot so use the Rule. In the normal course of events, a party could not avoid a statute

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<sup>2</sup> The Court notes that petitioner has argued in his response to respondent's Motion that the Court's concern – that he may be time barred under the AEDPA if his state court collateral proceedings are found to be improperly filed – is unfounded because the pending state court collateral proceedings were properly filed. Nonetheless, as the Court explained at length in its Memorandum dated March 16, 1998, there is a possibility that petitioner will be time barred upon re-filing in federal court if there is a finding that his state court collateral proceeding was not properly filed. Accordingly, in order to protect the right of the petitioner to return to federal court, the Court decided to dismiss the Petition without prejudice to petitioner's right to file an Amended Petition under Federal Rule of Civil Procedure 15(c)(2).

of limitations defense upon re-filing a claim which became barred after the claim had been dismissed without prejudice. If a court dismisses a complaint, without more, “[i]t is a well recognized principle that a statute of limitations is not tolled by the filing of a complaint subsequently dismissed without prejudice. As regards the statute of limitations, the original complaint is treated as if it never existed.” Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68, 77 (3d Cir. 1983). As a result, in those cases where there is a potential statute of limitations bar after dismissal of a complaint and before an amended complaint can be filed, it has long been the practice of this Court to dismiss without prejudice to the right of a party to file an amended complaint if it concludes that equity so demands.

The Court recognizes that, in the context of a habeas petition, employing the relation back provision of Rule 15(c)(2) is somewhat novel.<sup>3</sup> Nonetheless, there is nothing new about dismissing a case with leave to amend.

As a general matter, of course, “[t]he district court has discretion whether or not to grant leave to amend, and its decision is not subject to review on appeal except for abuse of discretion. . . .” 3 Moore’s Federal Practice P 15.08[4], at 15-64 (2d ed. 1987) (footnotes omitted). In exercising its discretion, however, the court must observe the direction in Rule 15(a) that leave to amend “shall be freely given when justice so requires.” Fed.R.Civ.P. 15(a); see Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); 3 Moore’s Federal Practice P 15.08[4], at 15-65. Given our jurisprudential preference for adjudication of cases on their merits rather than on the basis of formalities, it will generally be an abuse of discretion to deny leave to amend when dismissing a nonfrivolous original complaint on the sole ground that it does not constitute the short and plain statement required by Rule 8.

Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir, 1988). Indeed, at least one case has recognized that dismissing with leave to amend suspends operation of the statute of limitations. See Gordon v. Green, 602 F.2d 743, 747 (5<sup>th</sup> Cir. 1979) (“We hold that under

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<sup>3</sup> The Court has adopted this novel course because of the Third Circuit’s stricture against holding habeas petitions in abeyance absent “exceptional circumstances.” Christy, 115 F.3d at 207. If, upon review of this matter on appeal, the Third Circuit believes that Rule 15(c)(2) is inapplicable to the situation presented, this Court invites the appeals panel to reconsider the holding in Christy in light of the way in which the AEDPA’s statute of limitations may apply in cases such as this one.

F.R.Civ.P. 15(c), the filing of a proper, decent, acceptable amendment will relate back to the original filing, thus eliminating any question concerning the statute of limitations.” (citation omitted) (cited with approval by Cardio-Medical Associates, 721 F.2d at 77)).

The Third Circuit has recently reiterated that while “even though [plaintiff] no longer was entitled to amend her complaint as of right after the dismissal of her claim, it was within the district court's discretion to grant her leave to amend.” Smith v. National Collegiate Athletic Ass'n, 1998 WL 111526, \*8 (3rd Cir. March 16, 1998) (citing Newark Branch, NAACP v. Town of Harrison, 907 F.2d 1408, 1417 (3d Cir.1990); Kauffman v. Moss, 420 F.2d 1270, 1276 (3d Cir.1970); In re Sverica Acquisition Corp., 179 B.R. 457, 459 (Bkrcty.E.D.Pa.1995); Fearon v. Community Fed. Sav. & Loan of Phila., 119 F.R.D. 13, 15 (E.D.Pa.1988)); see also Nelson v. County of Allegheny, 60 F.3d 1010, 1015 (3d Cir.1995), cert. denied, --- U.S. ---, 116 S.Ct. 1266, 134 L.Ed.2d 213 (1996) (recognizing that the relation back provision of Rule 15(c) “ameliorates” the effect of a statute of limitations but denying motion to amend pleadings). Thus, a court may grant a motion under Rule 15 to amend a complaint even though the complaint is no longer pending. Clearly, therefore, Rule 15 does not apply only to pending matters.

It is also worth examining a recent Third Circuit case of first impression: Urrutia v. Harrisburg County Police Dep't, 91 F.3d 451 (3d Cir. 1996). In that case, Urrutia, the *pro se* plaintiff in a § 1983 claim, filed an *in forma pauperis* complaint prior to the two year statute of limitations governing § 1983 claims in Pennsylvania. Under the provisions of 28 U.S.C. § 1915 then governing, the court could “dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.” 28 U.S.C. § 1915(d) (West Supp. 1995). In Urrutia, the statute of limitations expired while a magistrate judge was addressing these “§ 1915(d) concerns.” Upon receipt of the report and recommendation, the district judge dismissed the complaint and denied Urrutia’s motion for an extension of time to amend.

During the time his § 1915 motion was pending, Urrutia could not serve the

parties named in his complaint because only the court could authorize “the commencement . . . of any suit . . . without prepayment of fees and costs.” 28 U.S.C. § 1915(a) (West Supp. 1995). Thus, an *in forma pauperis* suit was not commenced upon filing of the complaint, but rather only after the district court satisfied itself that the plaintiff was indigent and that the claim was not frivolous. If a plaintiff needs to add a party to the complaint, he has only 120 days to do so under Rule 15(c)(3) (incorporating Rule 4(m)). Because the time spent waiting for a § 1915(d) determination is not within the control of the plaintiff, and because both the statute of limitations and the 120 day period can expire while a plaintiff is waiting, the Third Circuit held that “once a plaintiff submits an *in forma pauperis* complaint within the limitations period, and where an amendment will be necessary to cure a defect, the 120 day period of Rule 15(c)(3) is suspended until the district judge authorizes the issuance of the summons and service of the amended complaint.” Urrutia, 91 F.3d at 459. The effect of this holding is to toll the statute of limitations during the pendency of an *in forma pauperis* motion. See id. at 459-60.

The Third Circuit in Urrutia was plainly motivated by a concern that a valid claim not be barred because of the technical application of a statute of limitations. It therefore extended the reach of Rule 15 to allow a plaintiff to amend his pleadings even after the running of the statute of limitations where plaintiff was not responsible for the delay but the delay was instead the result of proceedings outside of his control. While that case is not on all fours with the instant matter, it does instruct district courts that plaintiffs – and by extension, petitioners – should not be punished where they are proceeding in good faith and, due to no fault of their own, become tangled in the complexities of statutory limitations provisions. Under the facts of this case, the “properly filed” provision of the AEDPA’s statute of limitations remains open to interpretation. Therefore, the Court has employed Rule 15(c)(2) so as to toll the running of the statute of limitations should that be necessary upon petitioner’s return to federal court.

Furthermore, a court may dismiss a case in such a way as to ensure, when equity demands, that a non-jurisdictional statute of limitations will not bar the filing of an amended complaint or petition. With respect to habeas petitions, the Ninth Circuit has held that the AEDPA's statute of limitations is not jurisdictional and is therefore subject to equitable tolling. See Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1286 (9<sup>th</sup> Cir. 1997), cert. denied 118 S.Ct. 899 (1998). In the instant case, the Court concluded that employing Rule 15(c)(2) was the best way to protect against the risk that petitioner would be barred from federal court, and that utilizing that Rule as it has best complied with the terms of both the AEDPA and Third Circuit precedent expressing comity concerns. The Court now turns to those latter concerns.

Contrary to respondents' contention, the Court's order was not the equivalent of holding a claim (or in this case, the petition) in abeyance. When a claim is held in abeyance by a court, it continues to be subject to the jurisdiction of that court. The Third Circuit has held that a court may only retain jurisdiction of a habeas petition if it finds that there are "exceptional circumstances" which warrant that retention. See Christy, 115 F.3d at 207. The decision in Christy was motivated by a concern of comity. See id. By dismissing the petition without prejudice, the Court has relinquished jurisdiction altogether. By providing that petitioner may file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) after exhaustion of state remedies, the Court has also ensured that petitioner will not be prejudiced by the possibility of a state court dismissal on procedural grounds. That insurance is effected without infringing on the jurisdiction of the state court and thus comports with Christy's holding.

Moreover, this procedure will not, as respondents argue, allow "any number of improper state collateral proceedings to indefinitely delay litigation of the single federal action the amended habeas petition contemplates." Respondent's Memorandum of Law at 1. If, once a court does dismiss pursuant to Rule 15(c)(2), a petitioner abuses his right

to proceed in state court and presents a succession of frivolous claims, the court is permitted, when the inmate returns to federal court to, on its own motion, address the merits of all the claims in order to dismiss them. See 28 U.S.C. § 2254(b)(2). Moreover, a court may, on its own motion, dismiss any claims it deems to be frivolous which have been filed by an inmate proceeding (as the vast majority do) *in forma pauperis*. See 28 U.S.C. § 1915(e)(2)(B)(i).

Finally, while it is true that Rose contemplates the possibility that a petitioner may simply drop his unexhausted claims, it equally contemplates the possibility that petitioner will choose to return to state court to exhaust his unexhausted claims. Moreover, the AEDPA provides that “properly filed” state collateral proceedings will toll the operation of the habeas statute’s new statute of limitations. See 28 U.S.C. § 2244(d)(2). Thus, Congress, in enacting the AEDPA, also contemplated the possibility that state inmates would choose to exhaust their state remedies before returning to federal court.<sup>4</sup> Because of the uncertainty as to the meaning of the phrase “properly filed,” there is a chance that a petitioner could be barred from ever presenting his or her claims in federal court after attempting to exhaust unexhausted claims in state Court. Cf. Lovasz, supra. With this concern in mind, the Court simply is not prepared to make a petitioner gamble that his state claim will not later be considered properly filed by a federal court.

**D. Conclusion:** For the foregoing reasons, the Court has denied respondents’ Motion to Alter or Amend Judgment pursuant to Rule 59(e), treated as a Motion for Relief From Judgment or Order pursuant to Rule 60(b).

**BY THE COURT:**

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<sup>4</sup> Indeed, because of the more stringent procedural hurdles an inmate must surmount before successfully filing a second or successive petition under the AEDPA, and because of the newly enacted statute of limitations, it is more likely now than before enactment of the AEDPA that, rather than dropping their unexhausted habeas claims, inmates will first seek to exhaust all of their remedies.

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**JAN E. DUBOIS**