

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

BRIAN K. COHEN, SR.	:	CIVIL ACTION
	:	
v.	:	
	:	
MARTIN HORN, et al.	:	NO. 97-7175

MEMORANDUM AND ORDER

YOHN, J. December , 1998

Brian K. Cohen, Sr. filed a Petition for a Writ of Habeas Corpus in this court pursuant to 28 U.S.C. § 2254 (1994 & Supp. 1998). In May of 1992, Cohen was convicted of rape and was sentenced to six to twenty years in prison. According to Cohen, he became eligible for parole on October 21, 1997.¹ In his present habeas petition,² Cohen argues that the Pennsylvania Board of Probation and Parole (the "PBPP") violated his due process rights when it denied his application for parole on September 11, 1997. He alleges that his due process rights were violated because (1) he was denied access to the state courts to challenge the denial of his parole; (2) the PBPP's decision was based on policies that were not in effect when he was sentenced, in violation of the ex post facto clause; (3) the PBPP's decision was based on arbitrary and capricious reasons; (4) the PBPP applied its governing statutes to him in an arbitrary and capricious manner; and (5) the

¹ Any facts included in this opinion are taken from Cohen's original and amended habeas petitions.

² Cohen filed his original petition in this case on November 24, 1997. On December 12, 1997, the magistrate judge issued a Report and Recommendation which recommended that Cohen's petition be dismissed for failure to raise a federal habeas claim. Rather than file objections to the magistrate judge's report, Cohen filed an amended petition on December 29, 1997, which significantly expanded upon the claims and the legal theories raised in his original petition. By order issued on January 7, 1998, this court accepted the amended petition for filing.

PBPP ignored the stipulation in his guilty plea that he would serve a five year minimum sentence. See Amended Petition, at 1-2, 10. Cohen’s amended petition was referred to the magistrate judge, who recommended that his petition be dismissed because Cohen has failed to raise claims that are cognizable in a federal habeas proceeding. See Report and Recommendation (“Report”). Cohen filed objections to the Report. See Objections to the Courts [sic] Opinions (“Objections”). After conducting a de novo review of the magistrate judge’s Report, I adopt portions of the Report for the reasons set forth below, and find that Cohen’s petition should be denied.

DISCUSSION

I. Exhaustion of State Court Remedies

A federal court will ordinarily dismiss a petition for a writ of habeas corpus if the petitioner has not “fairly presented” each claim in his petition to the highest state court empowered to consider it. Castille v. Peoples, 489 U.S. 346, 349 (1989). A claim has been exhausted in state court only when the applicant no longer has the right to raise his claims under state law “by any available procedure.” 28 U.S.C. § 2254 (c) (1994 & Supp. 1998). The requirement of exhaustion will not be excused unless “there is an absence of available State corrective process; or . . . circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B) (Supp. 1998). An applicant need not raise his claim to the state courts in a post-conviction proceeding if he raised that claim on direct appeal. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1998). The petitioner has the burden of proving that he has exhausted all of his available state remedies. See id.

Cohen has not presented his claims to the Pennsylvania state courts. He contends that

because Pennsylvania state courts will not entertain his appeal from the PBPP's decision to deny him parole, the exhaustion requirement should be waived. See Amended Petition, at 11-13. In support of his position, Cohen cites a recent decision of the Commonwealth Court holding that denials of parole are not adjudicatory in nature, and are thus not "subject to judicial review." Weaver v. Pennsylvania Bd. of Probation & Parole, 688 A.2d 766, 770 (Pa. Commw. Ct. 1997). The magistrate judge agreed with his contention, finding that it would be futile to return Cohen to state court in light of Weaver and its progeny. See Report, at 7; see also Eldridge v. Pennsylvania Bd. of Probation & Parole, 688 A.2d 273, 274 (Pa. Commw. Ct. 1997) ("a prisoner cannot appeal a decision of the Board denying him or her parole").

A significant portion of the Weaver opinion is devoted to a critique of the 1996 opinion of the Third Circuit in Burkett v. Love, 89 F.3d 135, 142 (3d Cir. 1996). In Burkett, the Third Circuit dismissed a Pennsylvania prisoner's constitutional claims concerning the retaliatory denial of parole for failure to exhaust state court remedies, and predicted that the prisoner had "three potential ways of attacking the denial of parole in Pennsylvania courts - appeal, mandamus, or habeas corpus." Id. at 142. Weaver denied the availability of each of these suggested remedies and concluded that "both the statutory and decisional law of Pennsylvania precludes an appeal from the Board's grant or denial of parole." Weaver, 688 A.2d at 771-72 ("we do not believe that the remedies suggested in Burkett are available to a prisoner who has been denied parole based upon an unconstitutional factor"). Weaver also distinguished Burkett based on the particular violation alleged by the prisoner. Whereas Burkett challenged his denial of parole based on a "factor[] . . . wholly extraneous to the decision of whether or not to grant parole," namely retaliation for prior successful habeas actions, Weaver's challenge to his

sentence was based “a facially relevant factor” in the parole decision, whether his failure to admit his guilt in the sex offender treatment program would prevent him from being effectively treated and rehabilitated. Id. at 773.

After Weaver, it appeared reasonable to assume that there were no remedies in Pennsylvania state courts for prisoners who wished to challenge the denial of parole, even if the denial was based on blatantly unconstitutional reasons. Accordingly, on several occasions, Pennsylvania prisoners who brought federal court actions challenging their denial of parole on constitutional grounds were excused from exhausting their state court remedies. See Bonilla v. Vaughn, No. 97-7440, 1998 WL 480833, at *5 (E.D. Pa. Aug. 14, 1998); Speth v. Pennsylvania Bd. of Probation & Parole, No. 98-1631, 1998 WL 272155, at *2 (E.D. Pa. May 18, 1998); cf. George v. Vaughn, No. 98-3, 1998 WL 188847, at *2 (E.D. Pa. April 21, 1998) (“it is not clear whether any remedies are available in Pennsylvania to challenge a denial of parole”).

The Commonwealth Court, however, has recently retreated from its opinion in Weaver. See Myers v. Ridge, 712 A.2d 791, 794 (Pa. Commw. Ct. 1998). In Myers, the Commonwealth Court reached the merits of a prisoner’s due process, ex post facto, and equal protection claims because it found that it may entertain an application for a writ of mandamus to review the PBPP’s denial of parole “to the extent that a constitutional or statutory violation has occurred.” Id. at 794. Myers’ failure to distinguish its holding from Weaver’s, or even to cite to Weaver, muddles the position of the Pennsylvania state courts on the reviewability of denials of parole. Thus, “in the absence of a controlling Pennsylvania Supreme Court decision, or even a consensus of the Commonwealth Court judges, this court is bound by the Third Circuit’s interpretation of

Pennsylvania law,” as announced in Burkett.³ McCoy v. Dragovich, No. 98-3493, 1998 WL 639192, at *1 (E.D. Pa. Sept. 17, 1998). As the Third Circuit has not overruled Burkett, this court is obligated to conclude that Cohen has available state remedies, and that he must exhaust those remedies before bringing a habeas action to this court.

Moreover, even though Cohen has not exhausted his available state court remedies, this court nonetheless concludes that his petition must be denied on its merits. See 28 U.S.C. § 2254 (b)(2) (1994 & Supp. 1998) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”).

II. Cohen’s Due Process Claims

Cohen is protected by the Due Process Clause of the Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. It is well-established that in Pennsylvania, prisoners have no liberty interest in a parole decision. Because the PBPP has complete discretion to grant or deny parole on the expiration of a prisoner’s minimum sentence, a prisoner has no justifiable expectation of parole, or “legitimate claim of entitlement” to parole that gives rise to a liberty interest. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989) (defining the

³ The availability of state review for denials of parole is an issue which the Pennsylvania Supreme Court has never squarely faced, and because of the number of prisoners potentially affected by this issue, is “of such substantial importance as to require prompt and definitive resolution” by that court. Perhaps, therefore, if the Third Circuit is presented with this issue, it will consider submitting this issue to the Supreme Court of Pennsylvania in a certification petition in accordance with the procedures established by the Supreme Court of Pennsylvania to accept certification petitions beginning on January 1, 1999. See Michael A. Riccardi, Pennsylvania High Court to Accept Law Questions from Federal Bench, *The Legal Intelligencer*, at 1, 10 (Nov. 9, 1998).

types of liberty and property interests protected by the Fourteenth Amendment); see also Jubilee v. Horn, 975 F. Supp. 761, 764 (E.D. Pa. 1997), aff'd, 151 F.3d 1025 (3d Cir. 1998); Commonwealth v. Stark, 698 A.2d 1327, 1333-34 (Pa. Super. Ct. 1997); Weaver, 688 A.2d at 770. The Board's discretion, however, does not give it the authority to make parole decisions for unconstitutional or arbitrary reasons. See Burkett, 89 F.3d at 139-40; Block v. Potter, 631 F.2d 233, 235-36 (3d Cir. 1980) ("A legislative grant of discretion does not amount to a license for arbitrary behavior.").

A. Denial of Access to State Courts

Cohen claims that because he was denied access to a state court forum in which to challenge the denial of his parole, his due process rights were violated. See Amended Petition, at 1, 3. He also challenges the magistrate judge's finding that the requirements of due process are satisfied by the provision of a federal forum for his allegations, by insisting that the PBPP has usurped the sentencing court's jurisdiction over his sentence and has thus rendered him a pawn of "political justice." See Report, at 10, Objections, at 3. Even assuming, as Cohen clearly does, that Weaver is a correct interpretation of Pennsylvania law, and that there is no state court action available to appeal his parole denial, Cohen has failed to demonstrate that his due process rights have been violated.⁴

Though prisoners have a constitutionally-mandated right of access to the courts to pursue direct appeals, habeas corpus and civil rights claims, the constitution does not provide an inmate with the authority to insist that particular courts hear his claims. See Lewis v. Casey, 518 U.S.

⁴ The court notes again that under Burkett and after Myers, without a definitive ruling from the Pennsylvania Supreme Court, I follow Burkett and conclude that Cohen does have available state remedies.

343, 354 (1996) (“universe of relevant claims” in access-to-court cases is narrow and includes only direct appeals, habeas petitions and civil rights actions under § 1983); Bounds v. Smith, 430 U.S. 817, 827-28 (1977) (emphasizing that states must provide inmates with adequate law libraries or legal assistance to preserve their “fundamental constitutional right of access to the courts”). This fundamental right of access only provides prisoners with the assurance that they will have adequate resources to present valid claims to courts empowered to hear those claims. It does not create a substantive right to have otherwise unreviewable claims heard by courts without jurisdiction to hear them. See Speth, 1998 WL 272155, at *4 (“because no liberty interest is implicated by a denial of parole, this right of access does not include the right to appeal a parole decision in state courts”); Debrose v. Chesney, No. 95-6813, 1996 WL 4093, at * 4 (E.D. Pa. Jan. 2, 1996) (“due process doctrine does not require states to provide for appeal as of right from administrative decisions that deny early release from valid prior sentences”). Even if Cohen had a fundamental right to bring his denial of parole claims to a court, he has failed to demonstrate an “actual injury” by being obligated to bring those claims in this court rather than in state court. See Oliver v. Fauver, 118 F.3d 175, 177-78 (3d Cir. 1997) (inmate must prove that he suffered actual injury as a result of shortcoming in his right of access to court).

Cohen’s allegations, in his Objections, that the PBPP has invalidly assumed “jurisdiction” over his sentence and that he is illegally being held beyond his minimum sentence for political reasons are more appropriately addressed in the context of resolving his claims that the PBPP has arbitrarily and capriciously interpreted its enabling statutes. See infra Part II.D.

B. Ex Post Facto Claims

Cohen next claims that because the PBPP evaluated his application for parole under

different policies or regulations than those in place when he was sentenced, it has violated his due process right to be free from the application of ex post facto laws.⁵ The magistrate judge concluded that any changes to the PBPP's guidelines did not violate the prohibition on ex post facto laws as the guidelines were applied with "substantial flexibility" and are thus, not "laws" which the PBPP is prohibited from applying retroactively. See Report, at 11. Cohen objected to the magistrate judge's findings, arguing that the PBPP's policies and rules cannot be applied to him retroactively without effectively absolving the PBPP of consistently applying its regulations.⁶ As explained briefly below, this court adopts the magistrate judge's analysis of Cohen's ex post facto claim and agrees that the PBPP's policies are applied with insufficient rigidity to make them "laws" for purposes of the Ex Post Facto Clause.

Cohen argues, in essence, that before the "Mudman Incident" in 1995,⁷ he would have been paroled at the expiration of his minimum sentence, but in light of political pressure on the PBPP to prevent a similar crime, he is still incarcerated. See Amended Petition, at 4. Even if his contention is true, Cohen has not demonstrated that the PBPP has done more than weigh some

⁵ The Ex Post Facto Clause provides that "[n]o State shall . . . pass any . . . ex post facto Law . . ." U.S. Const. art. I, § 10, cl. 1.

⁶ Because pro se petitions should be construed broadly, this court presumes that it has correctly paraphrased Cohen's allegation that "[a]nd without a court ruling, this agency further empowers itself because it can do that, and it does not have to comply with its own rules, policies, etc. This is without a doubt "absurd" in their part. The simplicity of justice far out weighs any government agency. This court must rectonize [recognize?] the contempt on part of this agency to allow it to continue to undermine the court's power of jurisdiction." Amended Petition, at 4.

⁷ In 1995, a Pennsylvania parolee named Robert "Mudman" Simon killed a police officer and precipitated an intense media focus on Pennsylvania's parole procedures. See Myers, 712 A.2d at 797; Robert Moran, Simon Case Puts a Crunch on Parolees and Prisons, Philadelphia Inquirer, Aug. 24, 1995, at B1.

factors in the parole decision more heavily than others. See Bonilla, 1998 WL 480833, at *7. As explained above, the PBPP had broad discretion to grant or deny parole when Cohen was sentenced, and retains that broad discretion today. See Krantz v. Pennsylvania Bd. of Probation & Parole, 483 A.2d 1044, 1047 (Pa. Commw. Ct. 1984); see also Pa. Stat. Ann. tit. 61, § 331.21 (West Rev. Supp. 1998) (granting discretion to the PBPP to determine a prisoner’s release date). Though the PBPP may now place more emphasis on Cohen’s past history than on his prison disciplinary record and his participation in prison-offered treatment programs, this shift in policy does not alter the broad discretion with which the Board makes parole decisions. See Eldridge v. Vaughn, 692 A.2d 616, 618 (Pa. Commw. Ct. 1997) (“The decision to grant a favorable recommendation for parole lies solely within the discretion of the Corrections Defendants.”). Moreover, “[c]hanges in vigor in the application of existing laws are not new laws subject to invalidation by the ex post facto clause.” Bonilla, 1998 WL 480833, at *7; cf. California Dept. of Corrections v. Morales, 514 U.S. 499, 510 (1995) (no ex post facto violation from application of parole procedure extending the time between some prisoners’ parole hearings because it is only speculative that new procedures will increase the length of Morales’ confinement). Cohen has offered no evidence that the PBPP applies its policies or guidelines in a rigid manner rather than as a tool to facilitate the exercise of its discretion, and thus cannot prove that the PBPP is free to make and apply its own “laws” without accountability to the legislature or the courts.

C. Arbitrary and Capricious Rationale for Denying Parole

Cohen next alleges that the PBPP denied him parole for arbitrary and capricious reasons that violate his right to substantive due process. He complains primarily that the PBPP and the Department of Corrections denied him parole based solely on his past history, which he can

never change, and have ignored his participation in treatment programs for substance abuse and for sex offenders.⁸ See Amended Petition, at 6. The magistrate judge concluded that the PBPP's written decision shows that it considered many factors in addition to Cohen's past history, and that the PBPP acted well within its discretion when it considered details of his past crimes to determine whether to grant parole. See Report, at 12-13. Cohen recites no separate objections to this portion of the Report, but claims that it is defective for the same reasons he argued previously. See Objections, at 4.

If the PBPP did base its denial of parole on an arbitrary and capricious, or an unconstitutional reason, it has violated Cohen's right to be free from arbitrary government action, even if he has no constitutionally protected liberty interest in the expectation of parole. See Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."); Block, 631 F.2d at 236 ("A legislative grant of discretion does not amount to a license for arbitrary behavior."); Carter v. Kane, 938 F. Supp. 282, 284 (E.D. Pa. 1996) ("The fact that a particular government decision does not implicate a constitutionally protected interest, such as a liberty or property interest, does not

⁸ On September 22, 1997, the PBPP denied parole to Cohen and issued the following decision:

As recorded on 9/11/97 the Board of Probation and Parole rendered the following decision in your case:

Refuse. Substance abuse. Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Your need for further counseling and treatment. Failure to benefit from a treatment program for sex offenders. You must earn an institutional recommendation for parole.

Review in August, 1998.

Must participate in prescriptive program plan including sex offender program.

You must maintain a clear conduct record. You must earn an institutional recommendation for parole.

Amended Petition, Exhibit A.

mean that there are no restrictions on the manner in which the government may make that decision.”).

While the PBPP has broad discretion to determine whether to grant or deny parole, it is directed to consider specifically whether “the best interests of the convict justify or require him being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.” Pa. Stat. Ann., tit. 61, § 331.19 (West Rev. Supp. 1998). The PBPP shall also consider “the nature and character of the offense committed, any recommendation made by the trial judge, the general character and history of the prisoner and the written or personal statement or testimony of the victim or victim’s family.” Pa. Stat. Ann., tit. 61, § 331.21 (West Rev. Supp. 1998). Thus, it appears that in considering the assaultive nature of Cohen’s crime, the injury to Cohen’s victim, and his general history of substance abuse, the Board specifically followed its statutory directive, and did not exercise its discretion in either an arbitrary or capricious manner. Cf. Block, 631 F.2d at 239 (Board of Parole violated prisoner’s substantive due process rights by denying him parole because he was white, well-educated, and well-to-do and was thus more deserving of deterrence); Jubilee, 975 F. Supp. at 764, n.1 (prisoner stated a substantive due process claim when he alleged that prison officials acted arbitrarily and capriciously by “deliberately us[ing] erroneous and incorrect information in reviewing his parole status”). In fact, the factors considered by the PBPP in denying Cohen’s parole are virtually identical to the factors held not to be arbitrary or capricious in Bonilla. See Bonilla, 1998 WL 480833, at * 10 (PBPP did not abuse its discretion by denying parole for reasons of “(1) substance abuse, (2) assaultive instant offense, (3) very high assaultive behavior potential, (4) victim injury, and (5) your . . . need for counseling and treatment”). Contrary to Cohen’s claims, the fact that the Board

considers factors that he is currently unable to change does not mean that the Board is denying him parole arbitrarily, for the Board's conclusions concerning the nature of his crime, when combined with its conclusions about his "very high" potential for "assaultive behavior," are clearly relevant to determine whether Cohen's release on parole will protect the state's interest in public safety. See Pa. Stat. Ann., tit. 61, § 331.1 (West Rev. Supp. 1998) ("the board shall first and foremost seek to protect the safety of the public").

D. Arbitrary and Capricious Application of the PBPP's Governing Statutes

Cohen's fourth claim is that the PBPP has improperly construed its governing statutes in a manner that allows it to deny parole for arbitrary and capricious reasons and "in effect, [to] resentence [Cohen] past the court imposed minimum without due cause in violation of [his] rights to due process of law." Amended Petition, at 2. Cohen objected to the magistrate judge's conclusion that the PBPP properly exercised its discretion by arguing that the PBPP has appropriated the adjudicatory authority of the courts for an executive branch agency. See Objections, at 4. Cohen also complains that the PBPP overstepped its authority when it denied him parole on August 4, 1998, despite the fact that a prison psychologist had recommended him for pre-release. See Objections, at 5.

Cohen's first argument, which repeats his earlier objection that the PBPP has usurped the court's jurisdiction by denying him parole after the expiration of his minimum sentence, is without foundation in Pennsylvania law. It is well established that in Pennsylvania, a prisoner's sentence is his maximum sentence, not his minimum sentence, and that prisoners have no right, constitutional or otherwise, to be released on the expiration of their minimum sentences. See Brown v. Pennsylvania Bd. of Probation & Parole, 668 A.2d 218, 220 (Pa. Commw. Ct. 1995);

Reider v. Commonwealth, 514 A.2d 967, 971 (Pa. Commw. Ct. 1986); Krantz, 483 A.2d at 1047. By providing that courts may only “impose a sentence to imprisonment without the right to parole” in specific categories of cases, the Pennsylvania legislature did not create an absolute right to parole upon the expiration of a prisoner’s minimum sentence. Pa. Stat. Ann. tit. 42, § 9756 (c) (West 1982 & Rev. Supp. 1998); see Reider, 514 A.2d at 971. Therefore, the PBPP did not overstep its authority when it refused to parole Cohen after his minimum sentence expired. Contrary to Cohen’s assertions, the sentencing judge did not mandate that he be released after six years; the sentencing judge gave Cohen a twenty year sentence, and allowed the PBPP to consider, in its discretion, whether to parole Cohen after he had served six years of his sentence. See Krantz, 483 A.2d at 1047. Cohen’s due process rights have not been violated because it is within the PBPP’s discretion to deny him parole and, as discussed above, he had not demonstrated that its stated reasons for doing so were arbitrary or capricious. See supra Part II.C.

Cohen’s second objection, that the PBPP abused its discretion when it denied him parole notwithstanding a prison doctor’s recommendation to the contrary, is not properly before the court, as it was raised for the first time in his objections to the magistrate judge’s Report, and was then again raised in a letter to this court, dated October 15, 1998. See Objections, at 5; Letter from Cohen to the Clerk of Court (Oct. 15, 1998); Martinez v. United States, No. 94-5782, 1995 WL 572913, at *11, n. 6, 9 (E.D. Pa. Sept. 28, 1995), aff’d, 92 F.3d 1173 (3d Cir. 1996), cert. denied, 118 S. Ct. 123 (1997) (district court will not examine issues raised for the first time in objections to magistrate’s Report, particularly when those issues “could establish an entirely new basis for a habeas petition”); Thomas v. Ryan, No. 85-2459, 1988 WL 96806, at *1 (E.D. Pa. Sept. 14, 1990) (same). Even if Cohen’s new claim were to be resolved on the merits, it does not

establish a violation of his due process rights. Because the PBPP has broad discretion to grant or deny parole, it is not obligated to make a parole decision based on any single factor, even a doctor's recommendation. Cohen has not claimed that the PBPP failed to consider the doctor's recommendation, but has only claimed that the PBPP is not entitled to disagree with the doctor's recommendation though it may be only one of the factors relevant to a parole decision. As such, Cohen has failed to allege that the PBPP's action was either arbitrary or capricious and thus a violation of his due process rights. See Block, 631 F.2d at 236 (court must determine whether the PBPP "abused its discretion").⁹

⁹ Cohen argues, in a section of his brief that appears to be incomplete, that the PBPP violated his due process rights when it ignored the five year minimum sentence to which he agreed in his guilty plea stipulation. See Amended Petition, at 10. The magistrate judge declined to reach this claim in her Report because "the explanation of this claim ends in mid-sentence and [is] unintelligible." Report, at 3, n. 2. Cohen did not object to the magistrate judge's decision not to address this issue; therefore, I will decline to address it as well.

CONCLUSION

Following Burkett, I would dismiss this petition for failure to exhaust state remedies. Exercising my authority under 28 U.S.C. § 2254 (b)(2), however, I deny the petition on its

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ORDER

AND NOW, this _____ day of December, 1998, after careful and independent consideration of petitioner's application for a writ of habeas corpus under 18 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge M. Faith Angell, and the objections thereto, IT IS ORDERED that:

- (1) the Report and Recommendation is APPROVED and ADOPTED; and
- (2) the application for a writ of habeas corpus is DENIED and DISMISSED.

As there is a conflict between the Third Circuit and subsequent decisions of the state courts of Pennsylvania with respect to the issues of whether Cohen has state court remedies and is obligated to exhaust them, a certificate of appealability is issued as to those issues only.

William H. Yohn, Jr., J.

merits.

An appropriate order follows.

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