

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

RONALD JOHNSON : CIVIL ACTION
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 v. :
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 JOSEPH D. LEHMAN, ET AL. : No. 94-7583

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

December 17, 1998

Petitioner, having filed a petition for writ of habeas corpus, sought and was granted leave to amend the petition to include a claim that the prosecutor failed to disclose evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Bagley, 473 U.S. 667 (1985). After the amended claim was added, the matter was referred back to Magistrate Judge M. Faith Angell ("Judge Angell") for a Report and Recommendation. ("Report and Recommendation II"). Judge Angell recommended that an evidentiary hearing be held "limited to defense counsel's knowledge and understanding of the prosecutor's intended communication with Florida authorities concerning Mark Alan Jackson." Report and Recommendation II, p. 5. The respondent, Joseph Lehman, filing objections to the Report and Recommendation II, challenged the need for an evidentiary hearing and reasserted the nonexhaustion argument raised when Johnson was first granted leave to amend his petition. On reconsideration, this court concludes that the proper disposition is to dismiss the petition

without prejudice for failure to exhaust state remedies unless the petitioner chooses to withdraw the Brady claim.

Background

On October 28, 1991, following a jury trial in the Court of Common Pleas of Philadelphia County, Ronald Johnson ("Johnson") was found guilty of murder in the first degree, criminal conspiracy, and possession of an instrument of crime.

According to testimony at trial, on the evening of March 1, 1990, several people, interested in buying drugs from Joseph Goldsby ("Goldsby"), had gathered at 2100 Westmoreland Street. Goldsby was waiting in a car when two men arrived. One entered Goldsby's car to inspect the drugs, and the other remained outside. Shortly thereafter, shots were heard coming from inside the car. When the individual outside the car tried to fire a gun, it misfired. The man inside the car with Goldsby exited and ran from the scene; Goldsby tried to chase him but collapsed. The individual outside the car also fled.

Several witnesses identified Johnson as the individual outside the car whose gun misfired. Johnson was arrested and inadvertently placed in a cell with Mark Alan Jackson ("Jackson"), a Commonwealth witness and relative of Goldsby. While they were held in the same cell, Johnson allegedly threatened to kill Jackson if Jackson testified against him. At the time of trial, criminal proceedings were pending against

Jackson in Florida. The Assistant District Attorney agreed with Johnson's counsel not to introduce evidence of Johnson's alleged threat to Jackson in jail if Johnson's counsel did not cross-examine Jackson regarding the pending Florida criminal charges.¹

On direct appeal, Johnson claimed that trial counsel was ineffective for agreeing not to cross-examine Jackson about his Pennsylvania criminal record and pending Florida charges. On appeal, the Superior Court affirmed Johnson's conviction and the Supreme Court denied allocatur. Petitioner then filed this habeas corpus petition.

During discovery in this action, the Commonwealth disclosed for the first time a letter dated the day of Jackson's testimony from the Philadelphia assistant district attorney to the Florida prosecutor. The letter advised the Florida prosecutor of Jackson's full cooperation in the prosecution of Johnson, despite Johnson's attempt to intimidate Jackson, and requested that the Florida prosecutor consider this cooperation when evaluating Jackson's pending charges. Johnson's post-verdict counsel was not made aware of the letter, although he had "asked [the assistant district attorney who wrote the letter] for anything the DA had regarding Mr. Jackson." (Letter from Johnson's Habeas Counsel to Magistrate Judge Faith Angell, 10/25/95 at 2 attached

¹ However, Jackson did testify that prior to his arrest, Johnson told Jackson to "be careful about what you say." (N.T. 10/24/91, 15).

to Magistrate Judge Angell's Report and Recommendation I). As a result, there was no prior inquiry as to whether such a letter had been promised Jackson in return for his testimony inculcating Johnson.

Johnson, claiming violation of due process under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985), filed a motion to amend his petition because the Commonwealth was required to provide the defense with potential exculpatory evidence, Brady, 373 U.S. at 87, including impeachment evidence for cross-examination. Bagley, 473 U.S. at 675-76. The Commonwealth opposed Johnson's motion to amend because Johnson had not exhausted state remedies with respect to this claim. Johnson argued that the exhaustion requirement should be excused. The issue was referred to Judge Angell for a Report and Recommendation ("Report and Recommendation I") on the motion to amend.

Judge Angell found that the claim "ha[d] not been exhausted in the state court system," Report and Recommendation I, p. 4, because the Commonwealth only disclosed the letter recently. Petitioner had been prevented from raising this claim prior to the instant litigation. Judge Angell recommended that the court excuse Johnson's failure to exhaust state remedies, because such a decision would be in the interest of judicial economy. Judge Angell also recommended that this court hold an evidentiary

hearing "to explore whether trial counsel made a specific or general request for information on Mr. Jackson's criminal history and whether trial counsel would have done anything different had he known about the . . . letter." Report and Recommendation I, p 4-5. The Commonwealth, objecting to Judge Angell's Report and Recommendation, argued that judicial economy was not a proper basis for an exception to the exhaustion requirement.

By opinion issued January 6, 1998, this Court approved and adopted Judge Angell's Report and Recommendation I and referred the matter back to Judge Angell to consider the amended petition. Judge Angell's Report and Recommendation II recommended an evidentiary hearing to determine defense counsel's knowledge of the letter written by the prosecutor on behalf of Jackson. The Commonwealth objects to the recommendation for an evidentiary hearing.

Careful reconsideration in light of the Court of Appeals' recent decision in Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1998), petition for cert. filed (Apr. 23, 1998), has convinced this court that leave to assert this unexhausted claim was mistaken. If Johnson proceeds in this court on his ineffective assistance of counsel claim only, this court will adopt Judge Angell's recommendation for an evidentiary hearing; the Brady claim would be waived. But if Johnson chooses to continue to assert the Brady claim, the amended action must be dismissed

without prejudice so that both claims can be reconsidered in the same petition if and when the Brady claim has been exhausted in the state courts.

DISCUSSION

I. Standard of Review

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" 28 U.S.C. § 2254(d). Although a federal court need not defer to a state court's legal findings as it must to factual determinations, see Jackson v. Byrd, 105 F.3d 145, 147 (3d Cir.), cert. denied, 117 S. Ct. 2442 (1997), "only when the federal habeas court is convinced that the state court's determination ... constitutes a grave error can the state court's determination be found unreasonable and only then can the federal habeas court upset a judgment of the state court." Berryman v. Morton, 100 F.3d 1089, 1103 (3d Cir. 1996). This standard applies to both questions of law and mixed questions of law and fact.

II. Exhaustion

Title 28 of the United States Code Section 2254 restricts the ability of a federal court to grant a habeas petition "of a person in custody pursuant to the judgment of a State court [until] the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b) (1994). This requirement is not jurisdictional, but promotes comity and federalism by eliminating "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." Granberry v. Greer, 481 U.S. 129, 133 (1987); Rose v. Lundy, 455 U.S. 509, 515-16 (1982). "The petitioner must afford each level of the state courts a fair opportunity to address the claim." Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). Petitioner has exhausted state remedies only if the legal theory and supporting facts asserted in the federal habeas petition are in a form that is the "substantial equivalent" of that presented in the state courts. Picard v. Connor, 404 U.S. 270, 278 (1971).

A. Pursuit of Remedy in State Courts

Johnson does not dispute that all state remedies have not been exhausted. He has presented in state court the claim that counsel was ineffective for agreeing with the Commonwealth not to cross-examine Jackson regarding his criminal history and pending criminal charges, but not his Brady claim that he was "deprived of his federal constitutional right to due process of law"

because the Commonwealth failed to disclose this letter. Motion to Amend Habeas Corpus Petition, p. 2. Because the Commonwealth's determination of Johnson's ineffective assistance of counsel claims was not based on this Brady claim, he has not exhausted state remedies.

This court's opinion granting Johnson leave to amend his habeas petition to add a related Brady claim relied on the Supreme Court's holding that "there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion." Granberry, 481 U.S. at 131. The Court acknowledged that it might be appropriate to deem a nonexhaustion defense waived at the appellate level if not raised at the district court level "if it is evident that a miscarriage of justice has occurred." Id. at 135. But the Granberry holding was concerned primarily with the ability of a court to dismiss a meritless habeas petition without requiring unnecessary exhaustion in state courts. Id. at 134. Here, the Commonwealth has not waived nonexhaustion in the district court, and it is far from clear that the amended Brady claim is meritless.²

In his initial petition, Johnson asserted an exhausted claim for ineffective assistance of counsel based on counsel's failure

²Although the AEDPA does not apply to Johnson's petition, Lambert cast doubt on the continued viability of Granberry after the enactment of the AEDPA unless there has been an express waiver of the nonexhaustion defense by the government. See Lambert, 134 F.3d at 515.

"to cross examine a key prosecution witness regarding bias from pending criminal charges." Petition for Writ of Habeas Corpus, ¶ 12B. He contends that "had trial counsel fully presented . . . this impeachment material to the jury, there existed a reasonable probability that the Petitioner would have been found not guilty." Objections of Petitioner to Report and Recommendations of U.S. Magistrate Judge, p. 2.

This court's opinion of January 6, 1998, granted Johnson leave to amend his petition to add a due process claim arising from the government's failure to provide Johnson at trial with a copy of the letter written on Jackson's behalf, in violation of Brady and Bagley. Leave to amend was premised on the Granberry line of cases discussed above, as well the relatedness between the ineffective assistance and Brady claims. The alleged prejudice with regard to this claim was related to Johnson's ineffective assistance of counsel claim and the state appellate court, presented with the ineffective counsel claim, had already found that Johnson "failed to overcome his burden of establishing counsel's ineffectiveness, not to mention his burden of establishing actual prejudice." Philadelphia Court of Common Pleas Opinion, October 28, 1993, p. 9.

But even though a court may hear a claim that has not been presented in its exact form to the state courts, "[b]oth the legal theory and the facts on which a federal claim rests" must

have been fairly presented. Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986)(citing Picard, 404 U.S. at 277). "This requirement is especially appropriate in the context of an alleged Brady violation since the materiality of the suppressed information is determined by considering the strength of the state's case as a whole." Landano v. Rafferty, 897 F.2d 661, 670 (3d Cir.), cert. denied, 498 U.S. 811 (1990).

This court's decision should have been informed by the Court of Appeals' decision in Lambert, decided immediately before this court granted Johnson leave to amend his petition. Lambert requires the district court "to examine the exhaustion issue and to reject a petition if it raised unexhausted issues." Lambert, 134 F.3d at 515. The Lambert court analyzed the impact of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") on habeas petitions filed pursuant to 28 U.S.C. § 2254. The AEDPA, enacted after the filing of Johnson's petition, is not applicable here, so the discussion of the AEDPA in Lambert is not binding. But the Lambert court also restated this Circuit's "rigorous endorsement of the total exhaustion rule," Lambert, 134 F.3d at 513 (citing Rose, 455 U.S. at 518), and that applies to Johnson's petition.

Mindful of the explicitly-worded Lambert decision and upon careful reconsideration of exhaustion jurisprudence, the decision to grant Johnson leave to amend his petition precludes

consideration of the amended petition at this time.³ The Lambert court unambiguously held that district courts have a duty to examine a petition for exhaustion and dismiss any unexhausted claims. Lambert, 134 F.3d at 515. Although it might better serve the interests of judicial economy to hear all of Johnson's claims now, the exhaustion requirement was implemented to assure comity over efficiency. Ex Parte Royall, 117 U.S. 241, 251 (1886).

The amendment of habeas petitions is governed by Federal Rule of Civil Procedure 15, see 28 U.S.C. § 2242, and "may be amended in the interest of justice." Holiday v. Johnston, 313 U.S. 342, 350 (1941). But a provision safeguarding the unwary petitioner from inadvertent dismissal of a technically imperfect petition cannot serve as a means to circumvent the exhaustion requirement. Cf. Riley v. Taylor, 62 F.3d 86, 90-92 & n.8 (3d Cir. 1995) (district court's failure to grant leave to amend petition to add exhausted claims was an abuse of discretion).

Judge Angell's Report and Recommendation II appears to recommend an evidentiary hearing to determine the extent of defense counsel's knowledge of the Jackson letter as it affects both the ineffective assistance of counsel and the Brady claims. To the extent that the evidentiary hearing would illuminate the

³The newly discovered letter might be evidence in Johnson's initial ineffective assistance of counsel claim to support Johnson's existing claim rather than introducing a "claim upon which the state courts had not passed." Vasquez v. Hillery, 474 U.S. 254, 259 (1986).

ineffective assistance of counsel claim, this court would adopt Judge Angell's recommendation.⁴

B. No Excuse from the Exhaustion Requirement

Finding Johnson's due process claim has not been exhausted, a finding that Johnson does not dispute, only completes the first half of this court's analysis, as a failure to exhaust may still be excused if there are exceptional circumstances. Lambert, 134 F.3d at 516. Exceptional circumstances can exist when: 1) state remedies are inadequate or fail to provide a forum for relief; or 2) when a state claim for relief would be futile. First, there is no evidence in this case of any unusual or exceptional circumstances that could override the interest in comity by allowing the Commonwealth to assess possible prosecutorial misconduct first. See Landano, 897 F.2d at 675 ("[E]ven 'clear violations' of constitutional rights" do not warrant excusing the exhaustion requirement)(quoting Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam)); O'Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996), cert. denied, --U.S.--, 117 S. Ct. 742 (1997)(cited with approval in Lambert, 134 F.3d at 516).

Second, there is no question that Johnson has an avenue of relief available under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(i), to assert his Brady claim, so a state claim would not necessarily be

⁴Whether Johnson will wish to proceed in this manner will be for him to decide. This point is further addressed in Part III.

futile. Second or successive petitions are permitted under the PCRA when the issues have not previously been litigated or waived. Id. § 9543(a)(3). An issue is deemed waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." Id. § 9544(b). Johnson could not have raised the Brady claim at the time he filed his first petition under the PCRA, so he has not waived it and may file a subsequent petition.

Johnson does not face a statute of limitations bar in state court, as the one year statute of limitations in the PCRA does not apply to claims when "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." Id. § 9545(b)(1)(ii). The petitioner must file any such claim within sixty days "of the date the claim could have been presented. Id. § 9545(b)(2). The state court would presumably toll the sixty-day period of limitations for the time that Johnson has spent attempting to pursue his Brady claim in this court. See 42 Pa. Cons. Stat. Ann. § 5103 (West Supp. 1998); see also School District v. Marshall, 657 F.2d 16, 19 (3d Cir.1981)(equitable tolling may be appropriate if plaintiff timely, but mistakenly, asserted his claim in the wrong forum). Even if this court is uncertain of the reception that petitioner will receive in state

court, any doubt must be resolved in favor of exhaustion; if there is even a possibility the state court might entertain Johnson's claim, this court must permit it to do so. Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997)(citation omitted).

In the event that the Pennsylvania courts either decline to hear, or deny, Johnson's second petition in state court, Johnson will then be able to reassert his Brady claim in federal court. When a prior petition has been dismissed without prejudice for failure to exhaust state remedies, no authorization from the court under the AEDPA is necessary and the petitioner may file his petition in the district court as if it were the first such filing. Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997).⁵

II. Dismissal of the Petition

This court is constrained to dismiss the Brady claim without prejudice for failure to exhaust state remedies because the amended petition contains both exhausted and unexhausted claims (a "mixed petition"). Rose v. Lundy, 455 U.S. 509, 522 (1982). Johnson may proceed with his Brady claim in the state courts and, in the event that he is denied relief there, return to federal court with both claims. In the alternative. Johnson may withdraw his Brady claim and proceed in federal court now with his

⁵Even though the AEDPA was not applicable to Johnson's first habeas petition, antedating the Act, it would apply to any subsequent habeas petition filed by Johnson.

ineffective assistance of counsel claim, see id. at 520-21, but the Rose Court warns that proceeding with only exhausted claims risks dismissal of subsequent federal petitions for abuse of writ. See id. The AEDPA, enacted since Rose, might bar a subsequent petition for a claim that had been withdrawn.

CONCLUSION

This court, not fully appreciating the significance of the Court of Appeals' contemporaneous ruling in Lambert, granted Johnson leave to amend his habeas petition without dismissal for failure to exhaust the amended claim. Recommitting to the Magistrate Judge for consideration of the petition on its merits was erroneous. Johnson's newly asserted Brady claim has not been presented in any state court; the state must be permitted the first opportunity to correct any constitutional error that may have occurred in its courts. Lambert, 134 F.3d at 513 (citing Rose v. Lundy, 455 U.S. at 518). Johnson's amended petition, containing both an exhausted and unexhausted claim, must be dismissed without prejudice for failure to exhaust state remedies. If Johnson elects to amend his petition and proceed with his exhausted ineffective assistance of counsel claim, this court would approve and adopt Judge Angell's recommendation for an evidentiary hearing. The court will defer entry of an order dismissing without prejudice for thirty (30) days.

An appropriate order follows.

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ORDER

And now, this 17th day of December, 1997, upon careful consideration of the Report and Recommendation of Magistrate Judge M. Faith Angell, the government's objections, and the petitioner's response thereto, and in accordance with the accompanying Memorandum, it is **ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Angell is **NOT** approved and adopted.
2. Petitioner's Petition for Writ of Habeas Corpus is **DENIED** and **DISMISSED** for failure to exhaust state remedies.
3. There is no probable cause to issue a certificate of appealability.

J.