

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

IN RE: STEPHEN COHEN : CIVIL ACTION  
:   
vs. :   
:   
THE DISTRICT ATTORNEY :   
FOR PHILADELPHIA COUNTY : NO. 98-6136

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 3rd day of June, 1999, upon consideration of the Petition of Stephen Cohen for Writ of Habeas Corpus and the record herein, and after review of the Report and Recommendation of United States Magistrate Judge M. Faith Angell dated May 12, 1999, and the Answer to Recommendation by Magistrate Judge, **IT IS ORDERED** that the Report and Recommendation of United States Magistrate Judge M. Faith Angell is **APPROVED AND ADOPTED IN PART** and **REJECTED IN PART** as follows:

1. That part of Magistrate Judge Angell's Report and Recommendation concluding that the Petition for Writ of Habeas Corpus should be dismissed for failure to exhaust state remedies is **APPROVED AND ADOPTED;**

2. That part of the Report and Recommendation of United States Magistrate Judge Angell concluding that the Petition for Writ of Habeas Corpus should be denied without an evidentiary hearing on the ground that the claim, as presented in state court, asserts a violation of state law - the Interstate Agreement on

Detainers Act, 42 Pa. C.S.A. § 9101, et seq. - which is not cognizable in federal court is **REJECTED**;

3. The Petition of Stephen Cohen for Writ of Habeas Corpus is **DISMISSED** for failure to exhaust state remedies **WITHOUT PREJUDICE** to petitioner's right to file an amended petition under Federal Rule of Civil Procedure 15(c) upon exhaustion of state remedies;

4. A certificate of appealability will not issue because petitioner has not made a substantial showing of the violation of a constitutional right.

#### **MEMORANDUM**

##### **I. INTRODUCTION**

The Court adopts the well-reasoned analysis of United States Magistrate Judge M. Faith Angell with respect to that part of her Report and Recommendation which deals with the failure of the petitioner to exhaust state remedies. Under well-established law, such a failure requires a dismissal of the Petition for Writ of Habeas Corpus without prejudice under the circumstances presented in this case.

Magistrate Judge Angell, after concluding that petitioner had failed to exhaust state remedies, went on to recommend that the Petition should be denied because the claim raised by petitioner in state court -- a violation of the Interstate Agreement on Detainers Act ("IAD"), 42 Pa. Cons. Stat. Ann. §§ 9101, et seq. -- was not

cognizable in federal court. The Court disagrees with that recommendation.

## II. DISCUSSION

### A. THE INTERSTATE AGREEMENT ON DETAINERS ACT

The IAD is a compact among most of the states, the District of Columbia, and the federal government. It enables a participating state to gain custody of a prisoner incarcerated in another jurisdiction in order to try him on criminal charges. "Article IV(c) of the IAD provides that trial of a transferred prisoner shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, . . . the court having jurisdiction of the matter may grant any necessary or reasonable continuance." See Reed v. Farley, 512 U.S. 339, 341-42 (1994). The interpretation of the IAD is a question of federal law. Cuyler v. Adams, 449 U.S. 433, 438 (1981).

In Reed, the Court held that a violation of the 120-day rule of Article IV of the IAD was not cognizable "when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement." 512 U.S. at 342. Continuing, the Court stated that the facts presented gave it no cause to consider whether it would confront such a violation "if a state court, presented with a timely request to set a trial date within the IAD's 120-day period,

nonetheless refused to comply with Article IV(c)." Id. at 349. The Court in Reed, citing Hill v. United States, 368 U.S. 424, 428 (1962), went on to note that habeas review was available when an error qualifies as a "fundamental defect which inherently results in a complete miscarriage of justice." Id. at 348.

The extent to which a violation of the IAD is reviewable in federal court was recently addressed by the Third Circuit in McCandless v. Vaughn, 172 F.3d 255 (3d Cir. 1999). In that case the Court held that a violation of Article V(d) of Pennsylvania's IAD did not rise to the level of a "fundamental defect" which would be cognizable on habeas review. Id. at 263-64 (citing Cooney v. Fulcomer, 886 F.2d 41, 42 (3d Cir. 1989)). The McCandless court went on to note several other Third Circuit cases involving IAD violations that did not warrant habeas relief, and one case, United States v. Williams, 615 F.2d 585 (3d Cir. 1980), where the Court held that a violation of the antishuttling provision of IAD Article IV(e) was sufficiently "fundamental" to warrant habeas relief under § 2255. McCandless at 263 n.4.

It is clear from the foregoing that, under Third Circuit law, a violation of the IAD is not per se inappropriate for federal habeas review. Other circuits which have addressed the issue have reached the same conclusion. See Lara v. Johnson, 141 F.3d 239, 242 (5th Cir. 1998); Bush v. Muncy, 659 F.2d 402, 407 (4th Cir. 1981), Metheny v. Hamby, 835 F.2d 672, 674 (6th Cir. 1987). In the

latter cases, the courts held that a petitioner must show that the alleged violation is a "fundamental defect" of a type which would lead to a "miscarriage of justice." Such a defect must be an exceptional circumstance which causes prejudice to the defendant. See Lara, 141 F.3d at 242 (quoting Hill, 368 U.S. at 428); Cross v. Cunningham, 87 F.3d 586, 588 (1st Cir. 1996); Bush, 659 F.2d at 409; Metheny, 835 F.2d at 675.

The Commonwealth defendants correctly argue that a denial of a petition for writ of habeas corpus is permitted notwithstanding the failure to exhaust state remedies. See 28 U.S.C. § 2254(b)(2). However, the Court declines to deny the Petition on the present state of the record. This decision is without prejudice to respondents' right to object to any habeas relief sought by petitioner in this Court after exhaustion of state remedies.

**B. APPLICATION OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT**

The Court must also address issues related to further habeas proceedings in federal court after plaintiff exhausts state remedies. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2241 et seq., provides that "[a] 1-year period of limitation shall apply to an application for a Writ of Habeas Corpus . . . [which] shall run from the latest of -- (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 . . .

. " 28 U.S.C. § 2244(d)(1). However, the AEDPA also provides that "[t]he 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 limitation . . . ." Id. § 2244(d)(2). It is this provision which presents the possibility that plaintiff may be barred from review in federal court upon re-filing his habeas petition after exhausting his claims in state court because the statute of limitations is tolled only with respect to "properly filed" state applications. In the only Third Circuit decision addressing this issue to date, the circuit court held that a "properly filed" PCRA petition is one which is "permissible under state law," which means that it 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). That ruling raises a question as to whether a PCRA petition filed by petitioner at this time would be a "properly filed" petition.

If petitioner proceeds to exhaust state remedies by filing a PCRA petition after dismissal of the Petition for Writ of Habeas Corpus, it is possible that the state court could decide the PCRA filing was either time-barred or waived and dismiss on one or both of those grounds. See Alcorn, 703 A.2d at 1057. If the state court so decided, the PCRA petition would not have been filed

according to the "state's procedural requirements," Lovasz, 134 F.3d at 148, and the filing would not have been "proper" under the provisions of the AEDPA as defined by Lovasz. Such a ruling would mean that the AEDPA statute of limitations would not be tolled during the time petitioner spent in state court. Under those circumstances, if it takes more than a year to exhaust state remedies, the time to file another habeas petition in federal court could expire and petitioner might arguably be barred from federal review of his claims.<sup>1</sup>

While the Court cannot pre-judge the likelihood of this scenario, the Court believes there is a risk that petitioner could be barred from federal court were the Court simply to dismiss his Petition, even if dismissal is without prejudice. Accordingly, in order to avoid potential problems with respect to the tolling of the AEDPA's statute of limitations during the pendency of the PCRA proceedings, the Court will dismiss the Petition without prejudice to petitioner's right to file an amended petition after exhaustion of state remedies. The filing of such an amended petition would, pursuant to Federal Rule of Civil Procedure 15(c)(2), relate back to the original filing date of the instant Petition for Writ of

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<sup>1</sup> The Court notes that the Third Circuit recently determined that the AEDPA's statute of limitations is subject to equitable tolling. See Miller v. N.J. State Dept. Of Corrections, 145 F.3d 616 (3d Cir. 1998); see also Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1286 (9th Cir. 1997)(holding same).

Habeas Corpus because "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading." Fed.R.Civ.P. 15(c)(2). The one year statutory bar can thus be avoided. See Peterson v. Brennan, No.CIV.A. 97-2477, 1998 WL 470139 (E.D. Pa. Aug. 11, 1998)(DuBois, J.)(applying Rule 15 to avoid "unfair prejudice"); Williams v. Vaughn, No.CIV.A. 95-7977, 1998 WL 217532 (E.D.Pa. Feb. 24, 1998)(DuBois, J.)(same). Accordingly, the Court will dismiss the Petition for Writ of Habeas Corpus without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2).

### **III. CONCLUSION**

For the foregoing reasons, the Court will adopt that part of the Report and Recommendation of Magistrate Judge Angell in which it was recommended that the Petition for Habeas Corpus be dismissed for failure to exhaust state remedies. However, the Court will reject that part of the Report and Recommendation in which it was recommended that the Petition for Writ of Habeas Corpus be denied without an evidentiary hearing on the ground that the claim asserts a violation of state law, the Interstate Agreement on Detainers Act, 42 Pa. Cons. Stat. Ann. §§ 9101, et seq. As set forth above, the Court concludes that IAD violations are not per se inappropriate for federal habeas relief. The Court will dismiss the Petition without prejudice to petitioner's right

to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of state remedies.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**