

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

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**FRANCIS BAUER HARRIS,**  
Petitioner,

v.

**JEFFREY BEARD, Commissioner, et al.,**  
Respondents

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**CIVIL ACTION  
NO. 04-1237**

**ORDER**

**AND NOW**, this 15th day of December, 2004, upon consideration of Petitioner's Motion to Hold His Habeas Proceedings in Suspense Pending Exhaustion of State Remedies, the Commonwealth's Answer to Petitioner's Motion to Hold His Habeas Proceedings in Suspense [Doc. # 13], Petitioner's Response to Commonwealth's Answer [Doc. # 15], and after a telephonic conference with counsel, the Court hereby **ORDERS** the following:

1. Petitioner's Motion is **GRANTED** insofar as it seeks to hold his Petition for a Writ of Habeas Corpus in suspense;<sup>1</sup>

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<sup>1</sup> Petitioner Francis Bauer Harris received a death sentence for committing first degree murder. He was convicted on October 4, 1997, in the Court of Common Pleas of Lancaster County. The Supreme Court of Pennsylvania affirmed Harris' conviction and death sentence on November 20, 2002. The United States Supreme Court denied Harris' Petition for Writ of Certiorari on December 8, 2003. On March 15, 2004, Pennsylvania Governor Edward G. Rendell signed a death warrant scheduling Harris' execution for May 13, 2004. On March 22, 2004, Harris filed a Motion for Stay of Execution, Appointment of Counsel and In Forma Pauperis Status [Doc. # 1]. On March 30, 2004, this Court granted the Motion and appointed the Capital Habeas Unit of the Defender Association of Philadelphia to prepare a habeas petition [Doc. # 4]. On October 12, 2004, Harris filed his Petition for a Writ of Habeas Corpus [Doc. # 12].

All parties agree that Harris' Petition for a Writ of Habeas Corpus is a mixed one,

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containing both exhausted and unexhausted claims. See Petition, ¶ 8; Commonwealth’s Answer to Petitioner’s Motion to Hold His Habeas Proceedings in Suspense, ¶ 1. While the Petition stated that the precise nature of the exhaustion for each claim would be discussed in a Memorandum of Law to be filed subsequent to the Petition, Harris has not filed such a Memorandum subsequent to the Petition, and has not discussed the status of the exhaustion for each of his numerous claims in any filing with this Court. Nonetheless, the Court holds that it is appropriate to stay *all* of Harris’ claims pending exhaustion in state court, and dismiss any claims that remain unexhausted after Harris returns to federal court. See Crews v. Horn, 360 F.3d 146, 154 n.5 (3d Cir. 2004) (“If the unexhausted claims are dismissed initially subject to reinstatement, the petitioner might use the re-submission as an opportunity to amend his petition to add new claims beyond the one-year filing period.”).

The Supreme Court has required district courts to dismiss habeas petitions containing both exhausted and unexhausted claims, stating that “a total exhaustion rule promotes comity and does not unreasonably impair the prisoner’s right to relief.” Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198, 1198 (1982). Since Lundy, Congress has enacted the Antiterrorism and Effective Death Act of 1996 (the “AEDPA”), introducing a new one-year statute of limitations on all claims brought in state prisoners’ petitions for writs of habeas corpus. The Third Circuit views the AEDPA time limit as creating a possibility that dismissing a mixed petition would deprive the petitioner of the a federal forum, and calling “into doubt the conclusion in Lundy that dismissal of a mixed petition does not unreasonably impair the prisoner’s right to relief.” Crews, 360 F.3d at 151. Therefore, “where outright dismissal could jeopardize the timeliness of a collateral attack, a district court would abuse [its] discretion if it were not to offer to the petitioner the opportunity of staying, rather than dismissing, the petition.” Id., 360 F.3d at 151.

Harris’s counsel represented to this Court that Harris filed a PCRA petition in Lancaster County on November 22, 2004, fifteen days before the expiration of the AEDPA statute of limitations. The AEDPA statute of limitations is tolled for “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. . .” 28 U.S.C. § 2244(d)(2). At first glance, it appears that if this Court were to dismiss Harris’ Petition without prejudice, Harris will have fifteen days to re-file his habeas petition after exhaustion and/or denial of state post-conviction relief (if Harris’ PCRA petition was “properly filed”). However, interpretation of § 2244(d)(2) is still ongoing. See Crews, 260 F.3d at 150 n.1, 151 (petitioner’s entitlement to statutory or equitable tolling for time during which state PCRA petitions were pending is not clear). Further, district courts are not required to engage in the “potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation and calculation of whether the AEDPA limitations period has already run or will have run by the time the petitioner returns to federal court.” Pliler v. Ford, 124 S. Ct. 2441, 2446 (2004) (holding that federal judges are not required to warn a *pro se* habeas petitioner that his federal claims would be time-barred upon return to federal court if petitioner opted to dismiss a mixed petition without prejudice and return to state court to exhaust all claims). Finally, the Third Circuit stated that thirty days (twice as long as Harris appears to have under the AEDPA) from the denial of state post-conviction relief would be a reasonable interval during which the petitioner may return to federal court. Crews, 360 F.3d at 154.

2. The Clerk of the Court shall place the above-captioned case on the civil suspense docket;

3. Petitioner's counsel shall notify the Court of the status of the PCRA court proceedings within six (6) months from the date of this Order;

4. It is further **ORDERED** that Respondents are hereby absolved from responding to Petitioner's Petition for Writ of Habeas Corpus [Doc. # 12] until all state court proceedings are concluded or until further Order of the Court.

It is so **ORDERED**.

**BY THE COURT:**

/s/ Cynthia M. Rufe

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**CYNTHIA M. RUFÉ, J.**

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During the telephonic conference of November 22, 2004, all parties agreed that a six-month stay would be reasonable. Accordingly, given the current fluctuating state of the law in this particular area and the short amount of time that appears left to Harris to return to federal court after conclusion of his state PCRA proceedings, the Court chooses to exercise its discretion and stay Harris' Petition. The Court will revisit this Order in six months to determine whether the stay should be lifted and the Petition dismissed without prejudice. As the Commonwealth pointed out in its Answer to Petitioner's Motion, on June 28, 2004, the United States Supreme Court granted certiorari in Rhines v. Weber, No. 03-9046, to consider the propriety of such a suspense procedure. The Court believes that a stay of six months will not only conserve judicial resources by avoiding a potentially unnecessary appeal by Harris, but will also not prejudice the Commonwealth. Further, it will give the Court an opportunity to resolve this issue in accordance with the Supreme Court's directives.