

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

<b>MCKEEVER,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Petitioner,</b>	:	
	:	
<b>v.</b>	:	<b>NO. 04-3567</b>
	:	
<b>WARDEN SCI GRATERFORD et al,</b>	:	
	:	
<b>Respondent.</b>	:	

**Diamond, J.**

**March 23, 2005**

**MEMORANDUM**

Victor McKeever petitions for a writ of habeas corpus, seeking to vacate his Pennsylvania State Court guilty plea and sentence. 28 U.S.C. § 2254. Magistrate Judge Jacob Hart has recommended that I grant the writ, and the Pennsylvania Attorney General does not object to the recommendation. Rather, McKeever objects, arguing that the relief recommended by Judge Hart is insufficient. I overrule Petitioner’s objections.

**FACTUAL AND PROCEDURAL HISTORY**

On January 9, 1995, pursuant to the recommendation of a statewide investigating grand jury, the Attorney General filed an 11-count information against Petitioner, charging him with delivery and possession of a controlled substance, dealing in proceeds of unlawful activities, and criminal conspiracy. 18 Pa. C.S. §§ 5111, 903; 35 P.S. § 780-113(a), 116, and 130. In addition, the prosecution charged Petitioner under the Pennsylvania Corrupt Organizations Act (“PACOA”) with corrupt organization and corrupt organization conspiracy. 18 Pa. C.S. §

911(b)(3) and (b)(4). The prosecution alleged that Petitioner possessed and sold substantial amounts of heroin in Allegheny and Erie Counties. On June 13, 1995, Petitioner pled guilty to the information. Pursuant to a plea agreement, the prosecution had “no objection” to the merger of the sentences on Counts II and III (corrupt organization and corrupt organization conspiracy under PACOA), and the imposition of concurrent sentences on Counts I, II, III, and IV (dealing in proceeds of unlawful activities, corrupt organization, corrupt organization conspiracy, and criminal conspiracy). The prosecutor’s position was not binding on the Court. During the guilty plea colloquy, the Erie County Common Pleas Court informed Petitioner that he was facing a maximum possible sentence of 145 years imprisonment, which included a possible 20 year sentence for violations of PACOA. (Transcript of Guilty Plea at 6); 18 Pa. C.S. §§ 911(b)(3) and (b)(4).

On July 24, 1995, the state court judge, accepting the recommendation in the plea agreement, imposed an aggregate sentence of 15-42 years imprisonment. Although Petitioner timely appealed his sentence to the Pennsylvania Superior Court, his counsel withdrew that appeal, which the Superior Court dismissed on October 2, 1995. (Memorandum in Support of Petition for Habeas Corpus at 9).

On January 23, 2003, Petitioner sought relief in the Erie County Common Pleas Court under Pennsylvania’s Post Conviction Relief Act. 42 Pa. C.S.A. §§ 9451-9551. Petitioner alleged that his guilty plea was based on a mutual mistake of fact, and requested rescission of the plea agreement. On May 6, 2003, the court ruled the PCRA petition untimely, and dismissed for lack of jurisdiction. On February 20, 2004, the Pennsylvania Superior Court upheld the denial of PCRA relief. Commonwealth v. McKeever, No. 1051 WDA 2003 (non-precedential opinion).

McKeever filed the instant habeas petition on July 28, 2004. He contends that under changing Pennsylvania statutory and decisional law, he was actually innocent of violating PACOA at the time of his plea. It is undisputed that Petitioner's drug selling business -- his "corrupt organization" -- was wholly illegitimate. (N.T. 2/23/05 at 15). At the time of his 1995 guilty plea, Pennsylvania law provided that operating a wholly illegitimate business violated PACOA. 18 Pa. C.S. §§ 911(b)(3) and (b)(4); see also Commonwealth v. Besch, 674 A.2d 655 (Pa. 1996).

In 1996, the Pennsylvania Supreme Court changed the law, holding that PACOA did not apply to individuals, like Petitioner, who operated a wholly illegitimate business. The Supreme Court explained that PACOA was intended to punish those who ran businesses that included both legitimate and illegitimate operations -- that is, individuals who "corrupted" legitimate businesses. Besch, 674 A.2d at 661. In 1996, the Pennsylvania Legislature amended PACOA to apply to businesses with solely illegitimate operations. 18 Pa. C.S. §911 et seq. The Pennsylvania Supreme Court has held that the amendment's application is entirely prospective. Commonwealth v. Shaffer, 734 A.2d 840 (Pa. 1999). Accordingly, at the time of his 1995 guilty plea, Petitioner's admitted operation of a wholly illegitimate drug business did not violate PACOA.

Once Petitioner sought relief in this Court, the matter was referred to Judge Hart, who determined that: this Court has jurisdiction to hear the matter; Petitioner has exhausted his state court remedies; the instant petition is not time-barred; and, at the time of Petitioner's 1995 guilty plea, he was actually innocent of violating PACOA. Accordingly, Judge Hart concluded that Petitioner's guilty plea to the PACOA counts violated federal due process standards. (Magistrate

Opinion, 11/30/04, at 6 (citing Fiore v. White, 531 U.S. 225, 228-229 (2001); Stocker v. Warden, SCI Graterford, 2004 WL 603400, at \*17 (E.D. Pa. Mar. 24, 2004)). Judge Hart recommended that I grant the writ as to the PACOA convictions, and that I stay execution of the writ for 180 days to permit the Commonwealth of Pennsylvania to vacate the PACOA convictions and resentence Petitioner.

On December 20, 2004, Petitioner objected to Judge Hart's Report and Recommendation, contending that "the appropriate remedy for the federal constitutional violation is rescission of the [1995] plea agreement." (McKeever's Response to Commonwealth's Answer to Objections at 2). In Petitioner's view, I am obligated to

remand to the sentencing court with instructions that the [entire] guilty plea be vacated on the grounds that it was not entered knowingly, intelligently, and voluntarily with full knowledge of the nature of the charges and the maximum sentence that could have been imposed.

(McKeever's Supplemental Memorandum at 1).

The Attorney General does not object to Judge Hart's conclusion that Petitioner is actually innocent, or to the relief Judge Hart recommends. The prosecution urges, however, that "principles of comity and federalism" do not allow me to rescind Petitioner's guilty plea in its entirety. (Attorney General Supplemental Memorandum at 1).

#### **STANDARD OF REVIEW**

The extent of District Court review of a Magistrate Judge's Report is committed to the Court's discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa. 1994); see also Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). The District

Court must review *de novo* those portions of the Report to which objection is made. 28 U.S.C. § 636 (b)(1)(c) (2004); see generally Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984). The Court may "accept, reject or modify, in whole or in part, the magistrate's findings or recommendations." Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001).

### **DISCUSSION**

A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In fashioning a remedy, "[b]oth the historic nature of the writ and principles of federalism preclude a federal court's direct interference with a state court's conduct of state litigation." Barry v. Brower, 864 F.2d 294, 300 (3d Cir. 1988) (citing Wainwright v. Sykes, 433 U.S. 72, 81, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977)). The Third Circuit in Barry has cautioned:

A habeas court does not have the power to directly intervene in the process of the tribunal which has incorrectly subjected the petitioner to the custody of the respondent official, [and] [t]he respect due the tribunals of a sovereign state within our federal system . . . requires that its courts be given an opportunity to correct their own errors.

Barry, 864 F.2d at 301; Dickerson v. Vaughn, 90 F.3d 87, 92 (3d Cir. 1996) ("a state should be given the opportunity to correct its own errors and federal remedies should be designed to enable state courts to fulfill their constitutional obligations to the defendant") (citation omitted).

Here, Petitioner argues that he has been denied the "benefit" of his "bargain" with the prosecution. Had he known that the PACOA charges were a legal nullity, he would have insisted that the plea agreement include different terms. (McKeever Response to Commonwealth's Answer to Objections at 3). Accordingly, he argues that as a matter of federal constitutional law, I am obligated to rescind the agreement in its entirety. Whatever the merits of this argument, it is

more appropriately made in the state court on remand. See Barry, 864 F.2d at 301; Dickerson, 90 F.3d at 92.

The case of Dunn v. Colleran is instructive. 247 F.3d 450 (3d Cir. 2001). The petitioner Dunn pled nolo contendere to state court assault charges pursuant to a plea agreement in which the prosecutor promised to recommend a minimum sentence within the state guideline range. At sentencing, the prosecutor reneged on the agreement, successfully arguing for a “considerable” penalty and a “lengthy term of incarceration.” Id. at 451. On habeas review, the Third Circuit agreed that Dunn’s state court conviction was unconstitutionally obtained, but also deemed it appropriate “to refer the issue of remedy to the state court.” Id. at 462. The Court refused to decide “whether [Dunn] should be resentenced under the plea agreement or given the opportunity to withdraw his plea.” Id. The Court explained that the limited federal review allowed under §2254 “informs our decision to give the state court an opportunity to determine whether [the Defendant] should be resentenced or permitted to go to trial.” Id.

The Supreme Court has held similarly. In Santobello v. New York, a New York prosecutor agreed that in return for Santobello’s guilty plea to criminal charges, the prosecutor would make no sentencing recommendation. 404 U.S. 257, 263, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). After the state court’s acceptance of the guilty plea, a new prosecutor took over the case. At sentencing, the new prosecutor recommended the statutory maximum sentence, which the trial judge imposed. A Supreme Court plurality agreed that the guilty plea was defective, and remanded to the state courts for further consideration. Id. at 262-263. The plurality stated:

The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement of the

plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.

See also Patrick v. Camden County Prosecutor, 630 F.2d 206, 208 (3d Cir. 1980) (“We think Santobello [v. New York] dictates that if there is a violation of a plea bargain, the relief to be afforded is within the discretion of the state court, at least where more than one remedy is legally permissible.”); Gunn v. Ignacio, 263 F.3d 965, 971 (9th Cir. 2001) (“On petitions for a writ of habeas corpus, we require . . . that resentencing be available where the plea agreement regarding sentence was breached, but we do not constrain the state’s determination of how to formulate the relief.”); 28-671 Moore’s Federal Practice -- Criminal Procedure § 671.12 (2004) (“The federal courts have no power to *order* the state to provide a specific remedy . . . If the error affected the validity of the sentencing proceeding, the release will be conditioned on the state resentencing the petitioner.”).

This uniform authority compels me to conclude that the Pennsylvania State Courts alone should determine whether Petitioner’s plea agreement may stand in the circumstances presented here. The state courts are in a better position to decide whether a “mutual mistake” denied Petitioner of the “benefit” of his “bargain” with the prosecution, and the legal significance (if any) of such a denial. Indeed, at oral argument, Petitioner’s counsel suggested as much when she stated that, under Pennsylvania’s very strict waiver doctrine, she was obligated to raise on federal habeas review the issue of relief so that it would be preserved when the case was remanded to state court. (N.T. 2/23/05 at 4). See Commonwealth v. Kemmerer, 526 Pa. 160, 164, n.7 (1991) (criminal defendant is required to raise his constitutional objections in prior proceedings) (citing Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974); Commonwealth v. Marlin, 452 Pa.

380, 305 A.2d 14 (1973)).

I adopt Judge Hart's Report and Recommendation and grant the writ of habeas corpus. The execution of the writ is stayed for 180 days from the date of this Order to permit the Commonwealth of Pennsylvania to vacate Petitioner's convictions related to the Pennsylvania Corrupt Organizations statute and to resentence him accordingly. If the Commonwealth fails to vacate the PACOA convictions, the writ shall issue and Respondents shall release McKeever from any incarceration or other restraint imposed by the conviction under attack in this petition. An appropriate Order follows.

**By The Court**

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**Paul S. Diamond, J.**

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	:	
<b>Respondent.</b>	:	

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**Order**

AND NOW, this 28th day of September, 2004, upon consideration of the cross-Motions for Summary Judgment, the Report and Recommendation of Magistrate Judge M. Faith Angell, and Plaintiff's Objections to the Report and Recommendation and Defendant's response, it is ORDERED and DECREED:

1. Plaintiff's Objections to the Report and Recommendation are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED;
3. Plaintiff's Motion for Summary Judgment is DENIED; and
4. Defendant's Motion for Summary Judgment is GRANTED.

The Clerk of Court shall close this matter for statistical purposes.

**BY THE COURT:**

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**Paul S. Diamond, J.**