

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

EFRAIN FERNANDEZ

CIVIL ACTION

NO. 97-1503

v.

JOSEPH W. CHESNEY, et al.

MEMORANDUM

Broderick, J.

December 1, 1997

Petitioner Efrain Fernandez is currently incarcerated at the State Correctional Institution in Frackville, Pennsylvania. On February 28, 1997, petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he alleges seventeen separate grounds for relief, set forth below. The United States Magistrate Judge to whom the petition was referred filed a report and recommendation on September 24, 1997 recommending that the petition be denied. Petitioner filed timely objections to each one of the Magistrate Judge's findings on his seventeen claims. Having conducted a de novo review of each of petitioner's objections, the Court will approve and adopt the Magistrate Judge's Report and Recommendation and deny the petition for a writ of habeas corpus.

**I. BACKGROUND**

On December 29, 1981, after an eight day jury trial in the Court of Common Pleas for Montgomery County, petitioner was

convicted for two counts of second degree murder, burglary, and attempted robbery. He was sentenced to two concurrent life sentences on the murder charges and ten to twenty year sentences on the other charges. The trial judge, the Honorable William H. Yohn, Jr., who now sits on this Court, summarized the facts underlying petitioner's convictions as follows:

On Saturday, September 28, 1974, [the petitioner], Sigisfredo Ortiz, Roberto Tome and a man named Santiago drove from Philadelphia to the residence and place of business of Doris and Jean Maiale known as the Villanova Nursery in King of Prussia, Montgomery County, Pennsylvania. Their plan was to steal a large amount of cash they believed to be at the Maiale residence. Their plans went awry when, while subduing the Maiale sisters, Tome shot both of them in the head. Panicked and before even taking the money they came to steal, the would-be robbers fled the Nursery and went back to Philadelphia. Roberto Tome was tried and convicted of the Maiale murders and related crimes in 1975 .... Sigisfredo Ortiz entered a plea of guilty to attempted robbery and testified for the Commonwealth at both the Tome and Fernandez trials. Santiago died before being brought to trial. Fernandez was finally apprehended by the police in 1981 in Puerto Rico.

Commonwealth v. Fernandez, No. 1879-81, slip op. at 3 (Mont. Co. C.C.P. Nov. 3, 1982).

## **II. CLAIMS PRESENTED**

The petition for a writ of habeas corpus and accompanying brief presents the following seventeen claims: (1) trial counsel rendered ineffective assistance when he did not appeal the trial court's denial of his pre-trial petition for a writ of habeas corpus; (2) trial counsel rendered ineffective assistance at trial when he failed to impeach Sigisfredo Ortiz with Ortiz's

failure to identify the petitioner at the preliminary hearing; (3) trial counsel and PCHA counsel rendered ineffective assistance when they failed to raise the inherent unreliability and inconsistency of the Commonwealth's case as a basis for acquittal or reversal; (4) trial counsel rendered ineffective assistance by failing to request that the jury be given a prior inconsistent statement instruction and a false in one false in all instruction; (5) trial counsel rendered ineffective assistance by failing to request that the court correct an erroneous alibi instruction; (6) the petitioner's right to be free from compulsory self-incrimination was denied when the trial court ordered him to shave his beard before trial; (7) the trial court denied the petitioner his due process right to a fair trial when it refused to declare a mistrial after Ortiz testified to observing the petitioner engage in uncharged criminal activity sometime after the charged offenses had occurred; (8) the trial court denied the petitioner his due process right to a fair trial when it failed to declare a mistrial after Ortiz testified that he had identified the petitioner from police mug shots; (9) the trial court violated the petitioner's due process right to a fair trial when it refused to allow the petitioner to put on an alibi defense; (10) the petitioner's equal protection and due process rights were violated when he was tried by a death qualified jury; (11) the court erred when it dismissed his Post Conviction Hearing Act ("PCHA") petition, which concerned a claim that trial counsel was ineffective; (12) trial counsel rendered ineffective

assistance by failing to comply with Pennsylvania Rule of Criminal Procedure 305(C)(1)(a); (13) trial counsel rendered ineffective assistance by failing to challenge the use of a death qualified jury in the petitioner's trial; (14) trial counsel rendered ineffective assistance by failing to object to the trial court's jury instruction that the petitioner could be convicted of first degree murder on "the alternative theories of specific intent to kill and felony murder;" (15) trial counsel rendered ineffective assistance by failing to argue that the trial court erred in charging the jury concerning culpability for the conduct of an accomplice; (16) trial counsel rendered ineffective assistance by failing to argue that the trial judge committed error in the supplemental charge to the jury; and (17) trial counsel rendered ineffective assistance by failing to argue that there was insufficient evidence to sustain the verdict.

Because petitioner filed timely objections to each one of the Magistrate Judge's findings on these claims, the Court will review each claim in accordance with 28 U.S.C. § 636(b)(1)(C).

### **III. DISCUSSION**

#### **A. Procedural Default**

Having conducted a thorough and independent review of the Magistrate Judge's findings, the Court agrees with the Magistrate Judge that petitioner's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and fifteenth claims are procedurally defaulted.

Petitioner brought three separate challenges to his conviction in the state courts. After trial, he pursued a direct appeal to the Superior Court of Pennsylvania, which affirmed the trial court. Petitioner filed but later withdrew a petition for allowance of appeal ("allocatur") with the Pennsylvania Supreme Court. In 1985, petitioner sought collateral relief pursuant to the then-named Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 Pa. C.S.A. §§ 9541 et seq. (superseded). He was denied collateral relief at the trial level and in both the Superior Court and Supreme Court of Pennsylvania. In 1992, he filed a second collateral attack pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541 et seq. The PCRA court granted him relief on a question of Pennsylvania sentencing law concerning his lesser offenses but denied his petition in all other respects. Petitioner appealed his adverse ruling to the Superior Court and Supreme Courts of Pennsylvania.

The petitioner raised his first, second, third, fourth, and fifth habeas claims in his PCRA petition, which was his second attempt at collateral review. The Court agrees with the Magistrate Judge's finding that these claims are procedurally defaulted based on Commonwealth v. Lawson, 549 A.2d 107 (Pa. 1988). In Lawson, the Supreme Court of Pennsylvania held that second and subsequent petitions for collateral relief will not ordinarily be entertained absent a "miscarriage of justice" or other exception. In this case, the Superior Court of Pennsylvania ruled that petitioner's PCRA petition failed to

satisfy the Lawson exceptions, and also determined that if it were to reach the merits of petitioner's claims, then it would adopt the PCRA court's decision concerning those claims. As the Magistrate Judge correctly found, where a state court relies upon a petitioner's failure to comply with a state procedural rule as an alternative basis for denying a claim, the habeas court should rely upon the petitioner's procedural default as a basis for denying relief. Sistrunk v. Vaughn, 96 F.3d 666, 673-75 (3d. Cir. 1996). Accordingly, petitioner's first, second, third, fourth, and fifth habeas claims are procedurally defaulted.

The petitioner raised his sixth, seventh, eighth, ninth, and tenth habeas claims in his direct appeal. The Court agrees with the Magistrate Judge's finding that these claims have not been exhausted, and that requiring petitioner to do so at this late date would be futile. Because petitioner withdrew his allocatur petition, these claims have never been properly presented to the Pennsylvania Supreme Court, and petitioner would have to file a nunc pro tunc allocatur petition. The Third Circuit has ruled that it is futile to file such a petition several years after the Superior Court has rendered a decision, thereby constituting a procedural default. Caswell v. Ryan, 953 F.2d 853, 860-61 (3d Cir. 1992); Beaty v. Patton, 700 F.2d 110, 112 (3d. Cir. 1983). Accordingly, petitioner's sixth, seventh, eighth, ninth, and tenth habeas claims are procedurally defaulted.

As to petitioner's eleventh and fifteenth claims, the Court agrees with the Magistrate Judge that they are also procedurally

defaulted. Although the Magistrate Judge found that petitioner never presented his eleventh claim to any court, a review of the record reveals that this claim was listed in the first "Statement of Questions Presented" in petitioner's appeal of his PCHA petition to the Superior Court. However, the eleventh claim was not presented in the allocatur petition. The fifteenth claim was also pursued in petitioner's appeal of his PCHA petition to the Superior Court, and was also not presented in the allocatur petition. In order to exhaust these claims, petitioner would have to file a nunc pro tunc allocatur petition. As the Court determined in connection with his sixth through tenth claims, petitioner's failure to file a timely allocatur petition for his eleventh and fifteenth claims constitutes a procedural default barring habeas review. Caswell, 953 F.2d at 861; Beaty, 700 F.2d at 112. Accordingly, petitioner's eleventh and fifteenth claims are procedurally defaulted.

The Magistrate Judge correctly determined that none of petitioner's procedurally defaulted claims can be reviewed unless "the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991). The Court agrees with the Magistrate Judge that the petitioner has not satisfied either of Coleman's requirements. Accordingly, the Court cannot review petitioner's first through tenth, eleventh, and fifteenth habeas

claims on their merits, and these claims will be denied.

B. Ineffective Assistance of Counsel

Petitioner's remaining habeas claims have all been properly exhausted, and will be considered on the merits. These claims -- twelve, thirteen, fourteen, sixteen, and seventeen -- all allege ineffective assistance of counsel. The Court agrees with the Magistrate Judge's findings on each of these claims that petitioner has failed to satisfy the two-part standard announced in Strickland v. Washington, 466 U.S. 668 (1984).

As to petitioner's twelfth claim, the Court agrees with the Magistrate Judge that petitioner was not prejudiced by trial counsel's failure to comply with Pennsylvania Rule of Criminal Procedure 305(C)(1)(a) concerning notice of a proposed alibi defense. Accordingly, petitioner's twelfth claim will be denied.

As to petitioner's thirteenth claim, the Court agrees with the Magistrate Judge that trial counsel was not ineffective for failing to challenge the use of a death-qualified jury, since such a jury does not deny a criminal defendant his Sixth Amendment right to an impartial jury. Buchanan v. Kentucky, 483 U.S. 402 (1987); Lockhart v. McCree, 476 U.S. 162 (1986). The Court also agrees with the Magistrate Judge that even if trial counsel's failure to object to a death qualified jury was objectively unreasonable under the first part of the Strickland test, petitioner has failed to establish prejudice. Accordingly, petitioner's thirteenth claim will be denied.

As to petitioner's fourteenth claim, the Court agrees with the Magistrate Judge that there is no factual basis to support petitioner's claim. The trial court never delivered the jury instruction to which petitioner claims his counsel should have objected. Furthermore, the Court agrees that petitioner cannot establish that he was prejudiced by the trial court's instruction on first degree murder, since he was convicted of second degree murder rather than first degree murder. Accordingly, petitioner's fourteenth claim will be denied.

As to petitioner's sixteenth claim, the Court agrees with the Magistrate Judge that the trial court delivered proper supplemental charges to the jury, and that petitioner's counsel was not ineffective for failing to object to these charges. Any objections would have been without merit. The Court also agrees with the Magistrate Judge that petitioner has failed to show prejudice. Accordingly, petitioner's sixteenth claim will be denied.

As to petitioner's final claim, the Court agrees with the Magistrate Judge that there was sufficient evidence presented at trial from which a jury could have properly convicted the petitioner of second degree murder. Counsel was not ineffective for failing to raise what would have been a meritless claim. Accordingly, petitioner's seventeenth claim will be denied.

#### IV. CONCLUSION

For the foregoing reasons, the Court agrees with the Magistrate Judge's findings that petitioner's first through tenth, eleventh, and fifteenth habeas claims are procedurally defaulted. The Court also agrees with the Magistrate Judge that petitioner has failed to satisfy the Strickland test for his remaining claims concerning ineffective assistance of counsel. Accordingly, the Court will adopt the Magistrate Judge's report and recommendation on each of petitioner's claims and deny the petition for a writ of habeas corpus.

An appropriate Order follows.

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ORDER

AND NOW, this 1st day of December, 1997; after careful and independent consideration of the petition for a writ of habeas corpus and the responses thereto; and after a de novo review of the Report and Recommendation of Diane M. Welsh, United States Magistrate Judge, filed September 24, 1997, and petitioner's objections thereto;

IT IS ORDERED:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for writ of habeas corpus is DENIED.
3. A certificate of appealability is not granted.

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RAYMOND J. BRODERICK, J.