

facts concerning the Petitioner's underlying conviction in state court and the procedural history of Petitioner's state court appeal and post-conviction proceedings. Proudfoot v. Vaughn, et al., No. 94-590, 1997 WL 381590, at *1 (E.D. Pa. July 2, 1997).

II. LEGAL STANDARD

Petitioner has filed an Application for Certificate of Appealability. As part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), to appeal a final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, a defendant must first obtain a certificate of appealability from a district or circuit court judge. 28 U.S.C.A. § 2253(c)(1)(A)(West Supp. 1997). Prior to the AEDPA, a Section 2254 petitioner could pursue an appeal from a denial of a Section 2254 petition without first obtaining a certificate of appealability. Instead, pursuant to 28 U.S.C. § 2253, the petitioner needed to obtain a certificate of probable cause from a district or circuit judge in order to pursue such an appeal.²

Petitioner filed his habeas petition before the effective

²Before it was amended by the AEDPA, Section 2253 provided as follows: "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

date of the AEDPA but filed his application for certificate of appealability after the effective date of the AEDPA. Under these circumstances, Section 2253, as amended by the AEDPA, does not apply to Petitioner's appeal from the dismissal of his Section 2254 habeas petition. United States v. Skandier, 125 F.3d 178, 180-182 (3d Cir. 1997)(section 2255 motion); Green v. Johnson, 116 F.3d 1115, 1120 (5th Cir. 1997)(section 2254 habeas petition). Therefore, Petitioner needs to obtain a certificate of probable cause, not a certificate of appealability. Berrios v. United States, 126 F.3d 430, 432 n.2 (2d Cir. 1997).

The purpose of the certificate of probable cause requirement is to separate frivolous from meritorious appeals. Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394 (1983). To obtain a certificate of probable cause, a petitioner must make a "substantial showing of a denial of [a] federal right." Id. (internal quotations and citations omitted). In defining the "substantial showing" standard, the Supreme Court held that the appeal must present "a question of some substance." This requires a demonstration "that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Id. at 893 n.4, 103 S. Ct. at 3394 n.4 (emphasis in original, internal quotation and citation omitted).

Once a district court determines that the appeal is not frivolous and issues a certificate of probable cause, the district court cannot limit the certificate of probable cause to only certain claims that the petitioner seeks to appeal. United States ex rel. Hickey v. Jeffes, 571 F.2d 762, 765-66 (3d Cir. 1978).

III. DISCUSSION

One of the issues that Petitioner seeks to appeal is the two-year delay that he experienced in the direct review of his conviction by the state court. With respect to this issue, the United States Court of Appeals for the Third Circuit ("Third Circuit") has found that the "Due Process Clause guarantees a reasonably speedy appeal if the state has chosen to give defendants the right to appeal." Simmons v. Beyer, 44 F.3d 1160, 1169 (3d Cir. 1995)(citation and internal punctuation omitted). In Pennsylvania, the right to an appeal is guaranteed by the state constitution. Pa. Const., Art. V, § 9 ("[t]here shall . . . be a right of appeal . . . from a court of record . . . to an appellate court . . . ").

The Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972) identified the following four factors to be employed in evaluating claims of unconstitutional appellate delay: (1) the length of delay; (2) the reason for the delay;

(3) the defendant's assertion of his right; and (4) prejudice to the defendant. Id., 407 U.S. at 530, 92 S. Ct. at 2192; Simmons v. Beyer, 44 F.3d at 1169-70 (applying Barker criteria to determine whether appellate delay violated due process); Burkett v. Cunningham, 826 F.2d 1208, 1226-27 (3d Cir. 1987) ("Burkett I") (same).

The Supreme Court in Barker noted that "[w]e regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation . . . Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." 407 U.S. at 533, 92 S. Ct. at 2193. The Third Circuit has explained that "the Barker analysis presents four factors that are guidelines, not rigid tests." Burkett I, 826 F.2d at 1219 (internal quotation and citation omitted).

With respect to the fourth factor -- prejudice to the defendant, the Third Circuit provided the following guidance in Burkett I:

[i]n adapting the prejudice prong of the Barker analysis to appellate delays, courts have identified three interests in promoting prompt appeals: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in

case of reversal and retrial, might be impaired.
826 F.2d at 1222 (citation omitted).

As set forth in its July 2, 1997 Memorandum, the Court found that the following three of the four Barker factors weighed in favor of finding a due process violation resulting from the delay in direct review: that there was a two year delay between the imposition of sentence and the affirmance of that sentence by the Superior Court;³ that the cause of the delay was attributable entirely to the state; and that Petitioner asserted his right to a speedy appeal. The Court, however, found that Petitioner did not suffer any prejudice because of the delay. In making this determination, the Court relied heavily on the fact that Petitioner's conviction was upheld on appeal and that Petitioner failed to demonstrate actual prejudice.

It is unsettled whether the failure to demonstrate actual prejudice once a conviction has been upheld bars a defendant's due process claim based on the right to a speedy appeal when the remaining Barker factors weigh in favor of finding a due process violation. See Simmons v. Beyer, 44 F.3d at 1170 ("if [the petitioner] had received an adequate and effective, though

³In its July 2, 1997 Memorandum, the Court noted that the two year delay was considerably shorter than the delays which other courts have found to rise to the level of due process violations. Proudfoot, 1997 WL 381590, at *3. The Court concluded that the length of the delay weighed only mildly, if at all, in favor of finding a due process violation. Id. at *5.

excessively delayed appeal, then the issue of prejudice would become more difficult"). Under these circumstances, and in light of the fact that the Barker factors are not to be mechanically applied, the Court finds that Petitioner's appeal presents "a question of some substance." In particular, the Court finds that whether Petitioner's due process rights were violated because of the delay in the direct review of his conviction is an issue debatable among jurists of reason and that a court could resolve this issue differently than this Court did.

The Court will issue a certificate of probable cause for Petitioner to appeal this Court's dismissal of his habeas petition.

An appropriate Order follows.