

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

KELVIN X. MORRIS, NO. AS-1924 : CIVIL ACTION  
vs. :  
MARTIN HORN, Commissioner, : NO. 97-6635  
Pennsylvania Department of :  
Corrections; JAMES S. PRICE, :  
Superintendent of the State :  
Correctional Institution at :  
Greene; and JOSEPH P. :  
MAZURKIEWICZ, Superintendent of :  
the State Correctional :  
Institution at Rockview :

MEMORANDUM AND ORDER

AND NOW, to wit, this 18th day of March, 1998, upon consideration of Respondents' Motion to Dismiss (Document No. 11, filed February 2, 1998), and Petitioner's Answer to Respondents' Motion to Dismiss (Document No. 12, filed February 10, 1998), because petitioner acknowledges that at least some of the claims presented in his habeas corpus petition are unexhausted, and the petition is therefore "mixed," see Rose v. Lundy, 455 U.S. 509, 521-22 (1982), **IT IS ORDERED** that respondents' Motion to Dismiss is **GRANTED** and the Petition for Writ of Habeas Corpus is **DISMISSED WITHOUT PREJUDICE** to petitioner's right to file an amended habeas corpus petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of his state remedies under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 P.S. § 9541 et. seq.

**IT IS FURTHER ORDERED** that because the facts of this case raise the possibility that petitioner will be barred from re-filing a habeas corpus petition in federal court after exhausting his state court remedies, the Court finds that petitioner "has made a substantial showing of the denial of a constitutional right" within the meaning of 28 U.S.C. § 2253(c)(2), and a certificate of appealability is hereby **ISSUED**.

The Court's decision is based on the following:

1. On December 30, 1996, petitioner, a state prisoner sentenced to death, initiated an action under Pennsylvania's Post-Conviction Relief Act, 42 Pa.C.S.A. ' 9541 et seq.

2. On October 28, 1997, although petitioner's state proceedings had not concluded, petitioner instituted this federal habeas corpus action pursuant to 28 U.S.C. ' 2254. At the same time, he filed an Amended Post-Conviction Relief Act Petition in the Philadelphia Court of Common Pleas.

The claims petitioner seeks to litigate in this Court are, at least in part, identical to the claims he is currently pursuing in state court. Because the state courts have not yet passed upon those issues, the claims have not been properly exhausted in the state system and cannot provide a basis for relief in federal court. See Anderson v. Harless, 459 U.S. 4 (1982); Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996). Petitioner has thus presented a

“mixed petition” – one containing both exhausted and unexhausted claims – and where there is not “total exhaustion” of claims, a court must dismiss a habeas petition unless some exception applies. See Rose v. Lundy, 455 U.S. 509, 521-22 (1982).

Where it would be “futile” to return unexhausted claims in a “mixed” petition to state court because of a state bar, a federal court may retain jurisdiction over the petition, although it generally may not reach the merits of the unexhausted claims.<sup>1</sup> See Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993). A federal court may conclude that a return by a petitioner to state court would be futile when a state procedural bar “clearly foreclose[s] state court review of the unexhausted claims,” Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996) (quoting Toulson v. Beyers, 987 F.2d 984, 987 (3d Cir. 1993)), but if there is any uncertainty as to “how a state court would resolve a procedural default issue, [a federal court] should dismiss the petition for failure to exhaust . . . .” Id. This authority raises the question of whether returning

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<sup>1</sup> Under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), a federal court may reach the merits of a habeas claim barred under state law, but only where a petitioner can show either: (1) a “miscarriage of justice” or (2) “cause and prejudice” for the procedural default. To demonstrate cause, a petitioner must prove “that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” Murray v. Carrier, 477 U.S. 478, 488 (1986). The ineffectiveness of counsel at trial or on direct appeal can constitute cause for a procedural default, but only if the error itself “was also constitutionally ineffective . . . .” Sistrunk v. Vaughn, 96 F.3d 666, 675 (3d Cir. 1996) (citing Murray v. Carrier, 477 U.S. at 492). Once “cause” has been demonstrated, “actual prejudice” must also be proved, requiring that petitioner show the outcome was “unreliable or fundamentally unfair” as a result of a violation of federal law. See Lockhart v. Fretwell, 506 U.S. 364, 366 (1993); see also Coleman v. Thompson, 501 U.S. 722, 750 (1991). Petitioner does not argue that there is “cause and prejudice” in this case, and, in any event, this exception only applies if a petitioner can first show that returning to state court would be futile.

petitioner's unexhausted claims to state court would be futile.

Petitioner faces two possible procedural barriers in state court. The first is presented by the waiver provisions of the PCRA which provide that "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S.A. § 9544(b). At least some of petitioner's unexhausted claims may be treated as waived under this provision by Pennsylvania's courts. See, e.g., Commonwealth v. Eaddy, 614 A.2D 1203, 1207-08 (Pa Super. Ct. 1992), appeal denied, 626 A.2d 1155 (Pa. 1993) ("nearly all claims are waived under the PCRA since nearly all claims potentially could have been raised on direct appeal"). It is well settled in the Third Circuit, however, that federal courts cannot conclude "that there is no chance that the Pennsylvania courts would find a miscarriage of justice sufficient to override the waiver requirements and permit review under the PCRA. Accordingly, we conclude that a return to state court would not be futile." Doctor, 96 F.3d at 683; see also Lambert v. Blackwell, C.A. Nos. 97-1281, 97-1283 and 97-1287 at 30, 1997 WL 815397 (3d Cir. 1997); Banks v. Horn, 126 F.3d 206, 214 (3d Cir. 1997).

The other potential barrier is posed by the PCRA's new statute of limitations which requires that all petitions must be filed "within one year of the date the judgment becomes final . . . ." 42 Pa.C.S.A. § 9545(b)(1). Under a provision which was enacted at the same time as the PCRA's new statute of limitations and which became effective on January 16, 1996, however, a petitioner has one year from that effective date to file his or her first PCRA petition, regardless of when judgment became final. See Penn. Gen. Ass. Act of November 17, 1995, P.L. 1118, No. 32 (Spec.Sess. No. 1), § 3(1). Petitioner's pending PCRA proceeding was filed on December 30, 1996, less than a year after the statute of limitations became effective, but it is his second petition, see Commonwealth v. Morris, 684 A.2d 1037, 1040 (noting that first PCRA petition was filed on April 2, 1990),

and is, therefore, time barred under the express terms of the PCRA's statute of limitations. See Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. Ct. 1997). The Court must therefore determine whether the PCRA's new statute of limitations presents a procedural barrier such that returning petitioner's exhausted claims to state court would be "futile."

The Third Circuit recently addressed, in Lambert, the question of whether it would be futile for a petitioner to return to state court where she is apparently barred by the PCRA's statute of limitations. Lambert held that an otherwise barred petition might nonetheless be heard by a state court under one of the exceptions to the PCRA's statute of limitations.<sup>2</sup> Lambert, slip. op. at 31-34. The circuit court went further, however, noting that whether or not petitioner qualified under one of those exceptions:

no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition. . . . Under the prior statute which did not contain a statute of limitations provision, the Pennsylvania courts were lenient in allowing collateral review after long delays, especially in situations involving ineffective assistance of counsel.

Lambert, slip op. 34 and 34 n.33. The possibility exists, therefore, that like the waiver provisions of 42 Pa.C.S.A. § 9544, the statute of limitations bar might be waived by Pennsylvania courts in some cases.<sup>3</sup> There is thus a lack of certainty with respect to state application of this bar. This lack of certainty demands dismissal. See Doctor, 96 F.3d at

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<sup>2</sup> The PCRA provides three exceptions to its statute of limitations: a petition is not time barred where the petition alleges, and petitioner proves either: (1) failure to raise the claim was the result of unconstitutional or unlawful interference by a government official; (2) there are new facts not previously discoverable; or (3) there is a newly announced constitutional right with retroactive application. See 42 Pa.C.S.A. § 9545(b)(1).

<sup>3</sup> The Court notes that a few days before Lambert was decided, a Pennsylvania Superior court applied the provisions of the PCRA's statute of limitations. See Alcorn, 703 A.2d at 1057. Alcorn is the only Pennsylvania case which has addressed the statute of limitations question to date and it suggests that the time bar may be applied rigidly. However, because it is the decision of an intermediate court, it is only instructive, not binding on this Court. Accordingly, in light of the clear holding in Lambert, the Court will not treat any of petitioner's claims as clearly foreclosed in state court.

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The Court cannot be certain whether petitioner will be barred either by the PCRA's statute of limitations or by the PCRA's waiver provisions. Accordingly, the Court concludes that it must dismiss the within habeas petition unless petitioner can justify this Court's retention of jurisdiction.

Because the "total exhaustion" rule is not an inflexible barrier – it is enforced as a matter of comity and not as a matter of jurisdiction, see Christy, 115 F.3d at 207 (citing Strickland v. Washington, 466 U.S. 668, 684 (1984)) – a district court may retain jurisdiction in "rare cases [in which] exceptional circumstances of peculiar urgency exist . . . ." Christy at 206-07. The only circumstance which the Third Circuit has recognized, in dicta, might present such exceptional circumstances is where the execution of a death warrant is "imminent." Id.; see also Lambert, slip op. at 18.

The Court notes that the recently enacted Anti-Terrorism and Effective Death Penalty Act ("AEDPA") of 1996, 110 Stat. 1214, provides for a statute of limitations, see 28 U.S.C. § 2244(d), which might arguably bar petitioner from re-filing a habeas petition after this Court dismisses the within petition. The Court will examine whether this possibility warrants its retention of jurisdiction over the within petition.

1. The AEDPA's statute of limitations 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). The AEDPA also provides for the tolling of this limitations period, and it is this provision which presents the possibility of a bar: "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 shall not be counted toward any period limitation . . . ." Id. § 2244(d)(2) (emphasis

added). The Third Circuit has held that a “properly filed” PCRA petition is one which is “permissible under state law” meaning 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, C.A. No. 97-3505, 1998 WL 9512, \*2 (3d Cir. Jan. 14, 1998).

2. There is a possibility that should this Court dismiss the within petition, the state court could decide that the PCRA filing was either time barred or waived and dismiss on one of those grounds. See Alcorn, 703 A.2d at 1057. If the state court so decided, petitioner will not have filed his PCRA petition according to the “state’s procedural requirements.” Lovasz at \*2. The filing will not, therefore, have been “proper” within the terms of the AEDPA as defined by Lovasz, and the time petitioner spent in state court would not, it follows, toll the AEDPA’s statute of limitations. If it takes more than a year for the state court to reach its decision, petitioner’s time to file his habeas petition under the AEDPA could expire and he might arguably be barred from federal review of his claims.<sup>4</sup>

3. Based on the foregoing, the Court concludes that there is a risk that petitioner could be barred from federal court were the Court simply to dismiss his petition without prejudice. See, e.g., Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68, 77 (3d Cir. 1983) (“It is a well recognized principle that a statute of limitations is not tolled by the filing of a complaint subsequently dismissed without prejudice. As regards the statute of limitations, the original complaint is treated as if it never existed.” (citing Butler v. Sinn, 423 F.2d 1116 (3d Cir. 1970) (per curiam); Di Sabatino v. Mertz, 82 F.Supp. 248 (M.D. Pa. 1949)); Sabo v. Parisi, 583 F.Supp. 1468, 1470 (E.D. Pa. 1984) (holding that where plaintiff files second complaint two years after first was dismissed without prejudice, “fact

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<sup>4</sup> The Court notes that at least one court has stated in dicta that the AEDPA’s statute of limitations is subject to equitable tolling. See Calderon v. United States District Court for the Central District of California, 128 F.3d 1283, 1286 (9<sup>th</sup> Cir. 1997), cert. denied 118 S.Ct. 899 (1998). It is possible, therefore, that petitioner would not be barred even under the scenario outlined above.

that defendants may have been on notice as to plaintiff's cause of action does not toll the running of the statute; only the re-filing of the complaint within the statutory period could have done that"). If, however, the Court dismisses the within petition without prejudice to petitioner's right to file an amended habeas corpus petition pursuant to Federal Rule of Civil Procedure 15(c)(2), the filing of the amended petition would relate back to the filing date of the original habeas corpus petition because "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). The one year statutory bar can therefore be avoided.

4. The Third Circuit has said that application of a provision of the AEDPA "so as to eviscerate completely the right of prisoners . . . to petition for habeas corpus relief would be 'entirely unfair . . . .'", United States v. Urrutia, C.A. No. 97-7051, Memo. Op. at 4-5 (3d Cir. Sep. 15, 1997), (quoting Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996)).<sup>5</sup> The Court concludes, however, that the risk of this "unfair" result can be avoided by dismissing the petition without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhausting his state remedies. See Williams v. Vaughn, Memorandum and Order dated Feb. 24, 1998 (DuBois, J.) (concluding that dismissal without prejudice to the right to file an amended complaint is preferable to staying federal proceedings under Rose v. Lundy and its progeny). Accordingly, the Court need not reach the question of whether the possibility of being barred from re-filing a habeas petition in federal court would amount to an "exceptional circumstance" within the meaning of Christy.

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<sup>5</sup> The Urrutia opinion is "not for publication" but the Court may nonetheless look to it for guidance.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**