

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

RICHARD R. HAMMOCK,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	
MR DONALD VAUGHAN;¹	:	
THE ATTORNEY GENERAL OF THE	:	
STATE OF PENN.; and	:	
THE DISTRICT ATTORNEY FOR	:	
PHILADELPHIA COUNTY,	:	
Respondents.	:	NO. 96-3463

MEMORANDUM

DUBOIS, J.

April 7, 1998

Currently before the Court is the pro se petition of Richard R. Hammock, filed in forma pauperis, for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the Court will dismiss the Petition without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) after exhaustion of state remedies.

I. Background

A. Petitioner's Claims

In his petition for writ of habeas corpus, petitioner raised the following four claims: (1) the prohibition against double jeopardy was violated because he was charged and convicted of manslaughter; (2) the prosecution unconstitutionally failed to disclose evidence favorable to the defense; (3) trial counsel was ineffective for failure to present lay witnesses in support of the insanity

¹The Court notes that Donald Vaughn's name is misspelled "Vaughan" in the caption.

defense and failure to properly prepare the defense expert for trial; and (4) trial counsel was ineffective for failure to call fifteen eyewitnesses to rebut perjured testimony presented by the Commonwealth.

Former Chief Magistrate Judge Powers² filed a Report and Recommendation in which he recommended that the Court deny the petition. Petitioner filed Objections to the Report and Recommendation in which he raised several claims which were not presented in his original petition -- claims that his trial counsel provided ineffective assistance in allowing petitioner to be interviewed by a psychiatrist who then testified at trial for the Commonwealth and that trial counsel, appointed by the court, improperly took money from petitioner's mother.

New claims may not be raised in objections to a magistrate's report. See, e.g., United States v. Armstrong, 951 F.2d 626 (5th Cir. 1992); cf. Todaro v. Bowman, 872 F.2d 43, 44 (3d Cir. 1989) (addressing claim that pro se plaintiff first raised in Objections to Magistrate's Report because facts stated in complaint supported the claim). Petitioner's new claims are not proper objections and have not been properly raised before this Court. They will therefore not be addressed.

Petitioner also contended for the first time in the Objections that his mental illness provided an objective cause for the procedural defaults in state court, and therefore this Court should entertain his claims despite his procedural defaults. To do otherwise, he argued, would be a miscarriage of justice. As the Court is not reaching the merits of petitioner's claims at this time, the Court will not address this argument.

B. Factual and Procedural Background

Petitioner was convicted of first-degree murder and possession of an instrument of a crime

² Chief Magistrate Judge Richard A. Powers, III retired on September 30, 1997.

in the Court of Common Pleas of Philadelphia County after a six day bench trial beginning in November 1980. He was sentenced to life imprisonment on July 30, 1981. The evidence presented at trial disclosed that on May 13, 1979, petitioner stabbed a Southeastern Pennsylvania Transportation Authority (“SEPTA”) bus driver with a knife fifteen times in the face, chest and back after the driver told petitioner that he had not deposited sufficient money in the fare box.

The Pennsylvania Superior Court affirmed the judgment, rejecting petitioner's claims that the evidence was insufficient to prove the state of mind necessary to support a guilty verdict and that Pennsylvania should change its definition of legal insanity. Commonwealth v. Hammock, 319 Pa. Super. 497, 466 A.2d 653 (1983). Petitioner did not file a petition for allowance of appeal with the Supreme Court of Pennsylvania.

Petitioner has sought state collateral relief three times.³ In his first petition for collateral relief, filed January 30, 1985, petitioner claimed that his trial counsel was ineffective because counsel allowed him to be interviewed by a psychiatrist without being given Miranda warnings, see Miranda v. Arizona, 384 U.S. 436 (1966), and failed to file a motion to suppress statements made to the psychiatrist. That petition was denied on June 4, 1985. The Superior Court affirmed, see Commonwealth v. Hammock, 357 Pa. Super. 635, 513 A.2d 1075 (1986), and the Supreme Court denied allowance of appeal, see Commonwealth v. Hammock, No. 616 E.D. Allocatur Docket 1986.

Petitioner's second petition for collateral relief was dismissed on January 19, 1990, following an evidentiary hearing. See Commonwealth v. Hammock, Nos. 1113, 1115 (Pa. Ct. of Common

³The Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. Ann. §§ 9541-51, governed collateral relief until April 13, 1988. At that time, the PCHA was superseded by the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46. The PCRA was extensively amended, effective January 15, 1996. Act of 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32.

Pleas Jan. 19, 1990). In that petition, petitioner claimed that trial counsel was ineffective for failing to provide his psychiatric expert with the statements of eye witnesses and failing to present the testimony of two lay witnesses in support of his defense. The Superior Court affirmed, concluding that this second petition was properly dismissed for failure to offer a “strong prima facie showing” that a “miscarriage of justice” may have occurred. See Commonwealth v. Lawson, 519 Pa. 504, 513, 549 A.2d 107, 112 (1988) (requiring this showing for consideration of a second or successive post-conviction relief petition); see also Commonwealth v. Hammock, No. 471 Philadelphia (Pa. Super. Ct. Oct. 26, 1990). See Commonwealth v. Beasley, 544 Pa. 554, 563, 678 A.2d 773, 777 (1996) cert. denied Beasley v. Pennsylvania, 117 S.Ct. 1257 (1997) (second or subsequent petition for post-conviction relief under PCRA requires “strong prima facie showing” of “miscarriage of justice.”); Commonwealth v. Szuchon, 534 Pa. 483, 487, 633 A.2d 1098, 1100 (1993) cert. denied Szuchon v. Pennsylvania, 118 S.Ct. 224 (1997) (same). The Supreme Court of Pennsylvania denied allocatur on October 17, 1991. Commonwealth v. Hammock, 529 Pa. 631, 600 A.2d 951 (1991). These same contentions of ineffective assistance of counsel are the subject of the third claim in the Petition presently before this Court.

On December 3, 1993, petitioner filed his first request for habeas relief in this Court. On March 25, 1994, this Court dismissed the petition without prejudice for failure to exhaust state remedies. Petitioner then filed his third state collateral action in which he claimed that the prosecution had failed to prove the requisite mental state for first degree murder and that his attorney was ineffective. That action was summarily dismissed pursuant to Lawson on October 20, 1994 for failure to make a “strong prima facie showing” that a miscarriage of justice occurred. Commonwealth v. Hammock, No. 423287, slip op., (Comm. Pleas Oct. 20, 1994). Petitioner did

not appeal. The instant habeas petition, filed May 2, 1996,⁴ then followed.

In his Report and Recommendation, former Chief Magistrate Judge Powers recommended that Hammock's petition be denied. He concluded that all of petitioner had procedurally defaulted on all his claims in state court, and petitioner had not shown cause for such defaults. Former Chief Magistrate Judge Powers also concluded that petitioner's claim of ineffectiveness of counsel was found to be waived as a matter of law by the state courts, and that petitioner's three remaining claims had never been presented to a state court and could not now be presented because of the recently enacted statute of limitations for PCRA petitions, see 42 Pa. C.S.A. § 9545(b), and the requirement of a "strong prima facie" showing of a miscarriage of justice in order to obtain review of successive

⁴The Court concludes that Hammock's petition is not precluded by the one-year statute of limitations period of the Antiterrorism and Effective Death Penalty Act of April 24, 1996 ("AEDPA"), Pub.L. 104-132, 110 Stat. 1214 (codified at and amending 28 U.S.C. § 2244 et seq.). The AEDPA provides that a one-year statute of limitations applies to § 2254 motions and generally shall run from the date on which the judgment of conviction became final. See 28 U.S.C. § 2244(d)(1)(1997). However, there is a split in authority regarding the applicability of the AEDPA's limitations period to habeas motions which were filed after the effective date of the AEDPA and which relate to cases which became final more than one year before the AEDPA's enactment.

The Third Circuit has held in an unpublished opinion that "for a petitioner whose conviction became final prior to the effective date of the AEDPA, the statute allows a reasonable period of time, not to exceed one year, from the effective date of the AEDPA for the filing of a habeas corpus petition." United States v. Urrutia, No. 97-7051, slip op. at 2 (3d Cir. September 15, 1997) (holding that seven and one-half months falls within a "reasonable period of time."); see also United States v. Ortiz, No. 97-1250, 1997 WL 214934, *5 (E.D. Pa. April 28, 1997) (holding that § 2255 motion filed ten months after the AEDPA became effective, but more than a year after the running of the limitations period, was filed within a reasonable time and thus was not barred (citing Brock v. North Dakota, 461 U.S. 273 (1983))). Cf., Clarke v. United States, 955 F. Supp. 593, 597 (E.D. Va. 1997) ("[i]f Congress had intended to delay enforcement of its reforms, Congress easily could have provided a grace period in this portion of the AEDPA"); Chapdelaine v. United States, No. 97-160P, 1997 WL 446465 (D.R.I. July 28, 1997).

In this case, petitioner's motion was filed on May 2, 1996, more than one year after his judgment of conviction became final on November 6, 1983, but less than two months after the effective date of the AEDPA. Therefore, the Court finds that petitioner's motion was filed within a "reasonable period of time" and is not time barred.

The Court further notes that 28 U.S.C. § 2244(b) (Supp. 1996) is inapplicable to this case. That section applies to second or successive habeas corpus petitions, requiring courts to dismiss claims not presented in a prior petition unless certain circumstances have been met and dictating that a petitioner must move in the court of appeals for an order authorizing the district court to entertain a second or successive petition. 28 U.S.C. § 2244(b) (Supp. 1996). Hammock's petition presently before this Court is not a second or subsequent petition for purposes of these provisions because this Court dismissed his 1993 petition without prejudice for failure to exhaust state remedies. See Order dated March 25, 1994. See Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997) ("We hold that when a prior petition has been dismissed without prejudice for failure to exhaust state remedies, no such authorization [from the Court of Appeals] is necessary and petitioner may file his petition in the district court as if it were the first such filing.").

PCRA petitions. Petitioner filed Objections to the Report and Recommendation, described supra, on September 23, 1997. Respondents filed a Response to Petitioner’s Objections on October 10, 1997.

The Court agrees with former Chief Magistrate Judge Powers that three of petitioner’s claims have never been raised in state court. However, for the reasons discussed below, the Court will dismiss the Petition without prejudice to petitioner’s right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) after exhaustion of state remedies rather than deny the Petition.

II. Discussion

A. Exhaustion of State Remedies

Petitioner’s habeas Petition contains three claims – his claims that the prohibition against double jeopardy was violated; that the prosecution failed to disclose evidence favorable to the defense; and that trial counsel was ineffective for failing to call fifteen eyewitnesses – which have never been presented to a state tribunal.⁵ A claim which has not been pursued in state court has not been “exhausted.” Exhaustion “serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner’s federal rights.” Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986). It is, therefore, well settled that habeas petitions presenting only unexhausted claims may not be granted by federal courts. See, e.g., Picard v. Connor, 404 U.S. 270, 275 (1971); 28 U.S.C. § 2254(b).

⁵ Unless a claim has been “fairly presented” to the state courts, meaning that the claim heard by the state courts was the “substantial equivalent” of the claim asserted in the habeas petition, see, e.g., Picard v. Connor, 404 U.S. 270, 275, 278 (1971), it will be deemed to be newly presented in the habeas petition.

Petitioner has also included a claim, the third claim, which was presented to a state court – thus presenting a “mixed” petition, one containing both exhausted and unexhausted claims. Under the “total exhaustion rule,” a district court confronted with a “mixed” petition is required to dismiss the petition without prejudice to permit the petitioner to exhaust state remedies, unless an exception to the exhaustion rule applies. See, e.g., Rose v. Lundy, 455 U.S. 509, 521-22 (1982); Castille v. Peoples, 489 U.S. 346, 349 (1989); see, also, Coleman v. Thompson, 501 U.S. 722, 731 (1991), Lambert v. Blackwell, C.A. Nos. 97-1281, 97-1283 and 97-1287, 1997 WL 815397 at * 4.

B. Exceptions to the Exhaustion Requirement

There are two significant exceptions to the “total exhaustion” rule, although neither applies in this case. They will be discussed below.

1. Exception for Denial of a Petition

First, the rule was modified by amendment of the habeas statute in 1996. Under that amendment, a federal court may reach the merits of a habeas petition which includes an unexhausted claim to deny – but not grant – the petition. 28 U.S.C. § 2254(b)(2). If a court chooses not to exercise jurisdiction under § 2254(b)(2) and deny the claims in a “mixed” petition, that court must dismiss the entire petition without prejudice unless returning the petition to state court for exhaustion would be futile or “exceptional circumstances” are present.⁶ In this case, the Court chooses not to exercise jurisdiction under § 2254(b)(2) and deny the claims.

⁶ The Third Circuit has suggested in dicta that in “exceptional circumstances,” such as an “imminent” execution, a federal court may retain jurisdiction over a “mixed” habeas petition. See Christy v. Horn, 115 F.3d 201, 207 (3rd Cir. 1996), vacated as moot en banc, 84 F.3d 668 (3d Cir. 1996) (remanding stay of petition with instructions to dismiss because execution was not imminent). See Williams v. Vaughn, CA No. 95-7977, slip op. at 12-13 (E.D. Pa. March 16, 1998) (citing cases). That is not the case here.

2. Exception for Futility

The second exception to the “total exhaustion” rule is that of futility. If it would be futile for a petitioner to present his unexhausted claims to state court because of a state procedural bar, a federal court may retain jurisdiction over the petition, although it generally may not reach the merits of the unexhausted claims.⁷ See Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993). A federal court may conclude that petitioner’s return 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)). However, 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. The Court will, therefore, turn to the question of whether returning petitioner’s unexhausted claims to state court would be futile.

In Pennsylvania, a person may collaterally challenge his or her state conviction under the amended PCRA, and petitioner has done so. However, petitioner faces two procedural bars – waiver and the statute of limitations – which will have to be overcome before he may proceed in state court on his unexhausted claims.

a. PCRA’s Waiver Requirement

⁷ Under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), a federal court may reach the merits of a habeas claim procedurally 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). 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). In his Objections to former Chief Magistrate Judge Power’s Report and Recommendation, petitioner argued for the first time that his mental illness presented cause for his procedural defaults in state court. As the Court is not reaching the merits of the claims at this time, it will not address this argument.

Before a state court will consider the merits of petitioner’s claims, he must overcome the waiver provisions of 42 Pa. C.S.A. § 9544(b), 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.” If applied, this requirement would almost certainly bar petitioner from proceeding with his unexhausted claims in state court because he had the opportunity to present his claims on direct appeal and in his three earlier PCRA petitions and did not do so. 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”). In the Third Circuit, however, it is well settled 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, slip op. at 30; Banks v. Horn, 126 F.3d 206, 214 (3d Cir. 1997). The PCRA’s waiver requirements do not, therefore, present a procedural bar sufficient to allow this Court to retain jurisdiction over the Petition.

b. Statute of Limitations

In addition to the waiver rule, a recent amendment to the PCRA 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) (West Supp. 1997). A judgment is final, for purposes of the PCRA, “at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S.A. § 9545(b)(3).

The Superior Court of Pennsylvania issued an opinion denying petitioner's claims on direct appeal of his sentence and conviction on October 7, 1983. Petitioner had thirty days from that date (or until November 6, 1983) to file a petition for allowance of appeal with the Pennsylvania Supreme Court. Thus, the judgment against petitioner became final on November 6, 1983. Any PCRA petition that petitioner filed as a result of this Order would be filed well more than a year after judgment became final. Thus, under the PCRA, there is a possibility that petitioner will be barred by the statute of limitations from presenting his new claims in state court. The question then, is whether the statute of limitations makes further state proceedings futile.

The Third Circuit recently addressed, in Lambert v. Blackwell, the question of whether it would be futile for a petitioner to return to state court if 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.⁸ 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

⁸ 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).

some cases. There is thus a lack of certainty with respect to state application of this bar. This lack of certainty demands dismissal of this habeas petition without prejudice. See Doctor, 96 F.3d at 681.

The Court notes that a few days before Lambert was decided, the Superior Court of Pennsylvania decided Commonwealth v. Alcorn, 703 A.2d 1054 (Pa. Super. Ct. 1997). In that case, not discussed in Lambert, the Superior Court wrote that:

It is clear from the enactment of the 1995 amendments that the General Assembly intended to change the existing law by providing that delay by itself can result in the dismissal of a petitioner's PCRA petition. As a result, though this result may appear harsh to petitioners like appellant whose second PCRA petition will almost certainly be filed more than one year from the date when their judgment of sentence becomes final, that is the result compelled by the statute.

Id. 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 rigidly applied. 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.

Because the Court chooses not to exercise jurisdiction under 28 U.S.C. § 2254(b)(2) and deny the habeas petition despite petitioner's unexhausted claims, and because the Court cannot conclude that it would be futile for petitioner to present his three unexhausted claims to a state court, the Court cannot address the merits of petitioner's third claim, which is exhausted. Rather, in accordance with comity, the Court must first give the state courts the opportunity to rule on petitioner's unexhausted claims.

C. The Proper Disposition of the Petition

If the Court were simply to dismiss the Petition, petitioner could find himself barred from re-filing his habeas petition in federal court after exhausting state remedies because of the AEDPA's one year statute of limitations. The AEDPA 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).⁹ The AEDPA also provides for the tolling of its statute of limitations, 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). Upon reading this statute, the question arises: what is the meaning of "properly filed?" 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).

There is a possibility that should this Court dismiss the 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

⁹ See, supra, note 4, for a discussion of why this Petition is not affected by the AEDPA's statute of limitations.

statute of limitations. If it takes more than a year for the PCRA 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.¹⁰

While the Court cannot pre-judge the likelihood of this scenario, the Court believes there is a risk that petitioner could be barred from federal court were the Court simply to dismiss his petition, even if dismissal is without prejudice. It is true that upon re-filing a habeas petition which had been dismissed without prejudice after exhausting state remedies, the re-filed petition will not be treated as a successive or subsequent petition for purposes of the AEDPA. See Christy, 115 F.3d at 208. The AEDPA's time limit applies to first petitions as well, however, so the issue is not whether the re-filed petition will face the procedural hurdles of a successive petition, but whether it will relate back to the date the petition currently before the Court was filed for statute of limitations purposes.

Simply dismissing without prejudice – with nothing more – might not allow petitioner to argue that his re-filed petition relates back to the date of filing of the Petition currently before the Court because it might be argued that the newly filed petition is barred by the one year statute of limitations in the AEDPA. 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.”

¹⁰ 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 (9th 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.

(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 that defendants may have been on notice as to plaintiff’s cause of action does not toll the running of the statute; only the refileing of the complaint within the statutory period could have done that”). Thus, in order to be protected against a statute of limitations defense under the AEDPA if proceedings in state court are not completed within one year, any amended petition filed after exhaustion of state remedies would have to relate back to the date of filing of the Petition currently before the Court.

The Federal Rules of Civil Procedure are applicable to habeas cases. See 28 U.S.C. § 2242. One such rule, Rule 15(c)(2), provides for the relation-back of an amended pleading to the date of the original pleading when “the claim or defense asserted in the amended pleading arose out of a conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” Fed. R. Civ. P. 15(c)(2) (1998).

In this case, the matters raised in the unexhausted claims presented to this Court, and the claims and defenses presented to this Court in petitioner's Objections to the Report and Recommendation of former Chief Magistrate Judge Richard Powers but never presented in state court, arise out of the conduct, transaction or occurrence set forth in the original petition -- petitioner's trial and sentencing. Thus, pursuant to Federal Rule of Civil Procedure 15(c)(2), an amended petition filed by a petitioner would relate back to the date of filing the petition currently before the Court. In this way, any risk of a statute of limitations bar can be avoided.

III. CONCLUSION

Petitioner presents this Court with a Petition for Writ of Habeas Corpus which contains three unexhausted and one exhausted claim and is therefore a “mixed” Petition. In addition, petitioner sought to inject into the case by his Objections to the Report and Recommendation of former Chief Magistrate Judge Richard Powers, several claims and one new cause for the state procedural bars - mental illness - that do not appear to have been presented in state court. The Court concludes that it will not be futile to return the three unexhausted claims in the Petition to state court and it will therefore dismiss the Petition for failure to exhaust state remedies so as to give petitioner an opportunity to present these claims and the unexhausted claims and mental illness issue, raised for the first time in Objections to the Report and Recommendation, in state court. In order to avoid the possibility of a bar to refiling, the Court will dismiss the Petition without prejudice to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of state remedies.

An appropriate Order follows.

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

RICHARD R. HAMMOCK,	:	CIVIL ACTION
Petitioner		
	:	
v.		
	:	
MR DONALD VAUGHAN;¹¹		
THE ATTORNEY GENERAL OF THE	:	
STATE OF PENN.; and		
THE DISTRICT ATTORNEY FOR	:	
PHILADELPHIA COUNTY,		
Respondents.	:	NO. 96-3463

ORDER

AND NOW, to wit, this 7th day of April, 1998, upon consideration of the pro se Petition of Richard Hammock for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Document No. 1, filed May 2, 1996); the Response to Petition for Writ of Habeas Corpus by respondents, Donald

¹¹The Court notes that Donald Vaughn's name is misspelled "Vaughan" in the caption.

Vaughn; the Attorney General of the State of Pennsylvania; and the District Attorney for Philadelphia County (Document No. 7, filed July 17, 1996); the Report and Recommendation of Chief Magistrate Judge Richard A. Powers, III dated September 4, 1996 (Document No. 9); Petitioner's Objections to the Proposed Report and Recommendation by Chief Magistrate Judge (Document No. 14, filed September 23, 1997); and the Response to Petitioner's Objections to the Magistrate's Report and Recommendation (Document No. 15, filed October 9, 1997) **IT IS ORDERED** that, for the reasons set forth in the attached Memorandum, the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is **DISMISSED WITHOUT PREJUDICE** to petitioner's right to file an amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of his state remedies under Pennsylvania's Post Conviction Relief Act, 42 P.S.A. § 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**.

BY THE COURT:

JAN E. DUBOIS, J.