

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

CARLOS TIRADO a/k/a : CIVIL ACTION  
HERIBERTO PIRELA :  
v. :  
 :  
SUPT. DAVID H. LARKINS, :  
SCI-DALLAS, :  
AND :  
THE DISTRICT ATTORNEY OF :  
THE COUNTY OF PHILADELPHIA, :  
AND :  
THE ATTORNEY GENERAL OF :  
THE STATE OF PENNSYLVANIA : No. 98-2121

MEMORANDUM and ORDER

Norma L. Shapiro, J.

November 19, 1998

Petitioner Carlos Tirado ("Tirado") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and his petition was referred to Magistrate Judge Charles D. Smith ("Judge Smith") for a Report and Recommendation. Judge Smith recommended that Tirado's petition for writ of habeas corpus be denied and dismissed without an evidentiary hearing. For the reasons stated below, the court will approve the Report and Recommendation denying and dismissing Tirado's petition.

BACKGROUND

Tirado filed his first petition for a writ of habeas corpus on the merits of his conviction on December 6, 1993 (CV 93-6475), and that petition was referred to Judge Smith for a Report and Recommendation. Judge Smith filed a report recommending that Tirado's petition be dismissed for failure to exhaust state remedies or, in the alternative, for procedural default. The court accepted and adopted Judge Smith's Report and Recommendation, but on May 4, 1994, granted Tirado's motion for

reconsideration. After granting several extensions to Tirado, the action was placed in administrative suspense on April 17, 1995 and Tirado was given an additional six months, until October 20, 1995, to file objections to Judge Smith's Report and Recommendation.

Tirado filed his objections and Judge Smith issued another Report and Recommendation. Tirado, filing objections to the new report argued that it was improper for Judge Smith to issue a new Report and Recommendation. This court, in granting Tirado the six month extension, intended Judge Smith to file a new Report after considering Tirado's objections. Tirado also stated that in objecting to the second Report and Recommendation, he would rely upon his objections to the first Report and Recommendation.

After examining Tirado's petition, the court found, as had Judge Smith, that all of Tirado's claims should be dismissed either: 1) for failure to exhaust state remedies; 2) for procedural defaults barring exhaustion in the state courts and subsequent consideration by this court; or 3) for lack of merit. After de novo consideration of Tirado's objections, Judge Smith's Report and Recommendation was approved and adopted by order dated November 30, 1995. Tirado's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was denied and dismissed without an evidentiary hearing.

Tirado filed this second successive petition for a writ of habeas corpus on the merits of his conviction pursuant to 28 U.S.C. § 2254, and the second petition was also referred to Judge Smith for a Report and Recommendation. Judge Smith issued a Report recommending that Tirado's petition for writ of habeas corpus be denied and dismissed without an evidentiary hearing because Tirado did not comply with 28 U.S.C. § 2244 prior to

filing this petition. Judge Smith stated that because this was a second or successive petition for a writ of habeas corpus, Tirado must first apply to the Court of Appeals for an order authorizing consideration of the petition. 28 U.S.C. § 2244(b)(3)(A). Tirado, objecting to Judge Smith's Report and Recommendation, argues that this procedure prevents him from obtaining impartial and proper appellate review and violates his "right to a fair opportunity at rebuttal."

### **DISCUSSION**

The court conducts de novo review of the portions of a magistrate judge's Report and Recommendation on a motion to which specific objections have been filed. See 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

Tirado has filed two petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2254, the first on December 6, 1993, and the second on April 22, 1998. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to all petitions for writ of habeas corpus filed more than one year after the effective date of the AEDPA. See Burns v. Morton, 134 F.3d 109, 111-12 (3d Cir. 1998) (a court may not dismiss petition filed during one year grace period after effective date for failure to comply with AEDPA timeliness requirements). The AEDPA applies even where the first habeas petition was filed and decided prior to the effective date of the AEDPA. See Felker v. Turpin, 518 U.S. 651 (1996) (applying AEDPA to second petition where first petition was filed and decided prior to effective date); United States v. Enigwe, 1998 WL 670051 (E.D. Pa. Sept. 28, 1998) (applying AEDPA to petition filed after one year grace period).

The AEDPA provides that prior to filing a second or successive application, a petitioner must comply with § 2244 (b)(3)(A):

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244 (b)(3)(A) (emphasis added). "The [AEDPA] requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court . . . ." Felker v. Turpin, 518 U.S. 651, 664 (1996).

"[T]his requirement simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court." Id.

Tirado's petition is governed by the AEDPA because it was filed after the one year grace period. Tirado has not filed an application with the Court of Appeals for the Third Circuit to authorize his second or successive application. Tirado's petition cannot be entertained because he has not satisfied the AEDPA's procedural prerequisites for filing this application. After de novo consideration of petitioner's objections and the record relating thereto, Judge Smith's Report and Recommendation, that the petition be denied and dismissed without an evidentiary hearing, will be approved and adopted.

An appropriate Order follows.

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ORDER

AND NOW, this 19th day of November, 1998, upon consideration of the pleadings and record herein, and after de novo review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith ("Judge Smith"), it is **ORDERED** that:

1. Judge Smith's Report and Recommendation is **APPROVED AND ADOPTED**.
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, is **DENIED** and **DISMISSED WITHOUT AN EVIDENTIARY HEARING**.

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Norma L. Shapiro, J.