

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

<b>EDWARD C. PETERSON</b>	:	<b>CIVIL ACTION</b>
<b>vs.</b>	:	
<b>EDWARD BRENNAN, Mr., WARDEN;</b>	:	<b>NO. 97-3477</b>
<b>and, THE DISTRICT ATTORNEY OF</b>	:	
<b>THE COUNTY OF PHILADELPHIA;</b>	:	
<b>and, THE ATTORNEY GENERAL OF</b>	:	
<b>THE STATE OF PENNSYLVANIA</b>	:	

**ORDER AND MEMORANDUM**

**ORDER**

**AND NOW**, to wit, this 31<sup>st</sup> day of December, 1998, upon consideration of defendants' Motion for Reconsideration (Doc. No. 32, filed August 26, 1998) and Petitioner's Letter Memorandum in Opposition to Respondent's Motion for Reconsideration of Order Entered August 12, 1998 (Doc. No. 35, filed September 8, 1998), for the reasons set forth in the attached Memorandum, it is **ORDERED** that the defendants' Motion for Reconsideration is **DENIED**.

**MEMORANDUM**

Before the Court is the defendants' Motion for Reconsideration (Doc. No. 32, filed August 26, 1998), in which defendants ask the Court to reconsider its August 11, 1998, Order (the "Order") and Memorandum dismissing petitioner Edward C. Peterson's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 for failure to exhaust state

remedies.<sup>1</sup> In the Order, the Court concluded that the petition contained both exhausted and unexhausted claims, that is, was a “mixed” petition, which had to be dismissed for failure to exhaust state remedies. See Rose v. Lundy, 455 U.S. 509, 521-22 (1982). The Court dismissed 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, a step the Court took to eliminate any risk that petitioner might be barred from any federal review of his claims by the one-year period of limitations of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2244(d)(1). Defendants argue in their motion that both the decision to dismiss the petition for failure to exhaust state remedies and the Court’s use of Fed. R. Civ. P. 15(c)(2) were in error. The Court disagrees, and therefore it denies the Motion for Reconsideration.

## **I. BACKGROUND<sup>2</sup>**

The background of the case is set forth in the Court’s Memorandum of August 11, 1998. For that reason the Court will provide only a summary of background information.

On March 10, 1988, following a jury trial before the Honorable George J. Ivins, petitioner and an accomplice, Hubert Leitner, were convicted in the Court of Common Pleas of Philadelphia County, Pennsylvania, of two counts of first degree murder for the execution-style shootings of Mario Papini and his girlfriend, Katherine Logan. Post-trial motions were denied and petitioner was sentenced to life imprisonment on each of the

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<sup>1</sup> Peterson v. Brennan, 1998 WL 470139 (E.D. Pa. Aug. 11, 1998).

<sup>2</sup> The background information is derived from a review of the Petition for Writ of Habeas Corpus, the Response of the Philadelphia County District Attorney’s Office, petitioner’s Reply to the Response, and related papers.

murder convictions.

Petitioner sought pre-trial habeas corpus relief. That petition was dismissed by the Honorable John B. Hannum on October 2, 1987, for failure to exhaust state remedies. The dismissal was affirmed by the Third Circuit on February 29, 1988. Petitioner filed a second petition for writ of habeas corpus in this Court while post-trial motions were pending in state court. That petition was dismissed by Order dated October 18, 1990 for failure to exhaust state remedies.<sup>3</sup> Petitioner's appeal to the Third Circuit was dismissed for lack of appellate jurisdiction.

Petitioner filed two direct appeals to the Pennsylvania Superior Court. That court quashed the first appeal on the ground that petitioner's pro se brief precluded effective appellate review. Petitioner's second appeal was from a trial court order which denied his petition to compel production of certain evidence; it was quashed by Order dated January 17, 1991. On October 17, 1991, the Pennsylvania Supreme Court denied a petition for allowance of appeal from the Superior Court's decision to quash petitioner's direct appeals.

After these direct appeals, on May 26, 1992, petitioner filed a pro se petition under the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, et seq. An amended petition was filed by appointed counsel, alleging, inter alia, that trial counsel was ineffective because he did not present reputation evidence. On September 29, 1993, the Honorable Joseph I. Papalini granted petitioner the opportunity to file a nunc pro tunc direct appeal to the Superior Court on the claim that trial counsel failed to

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<sup>3</sup> Petitioner thereafter filed a motion to withdraw the petition without prejudice, which was granted by the Court on December 21, 1990.

call character witnesses.

On the direct appeal to the Pennsylvania Superior Court which followed, petitioner claimed, inter alia, that trial counsel was ineffective for (1) failing to present character evidence and that post-trial counsel was ineffective for failing to raise this issue; (2) failing to properly litigate a motion to dismiss for pre-arrest delay; and (3) failing to move for pre-trial dismissal under Pennsylvania Rule of Criminal Procedure 1100, the Pennsylvania speedy trial rule. The judgments of sentence were affirmed by the Superior Court on September 22, 1995. On May 22, 1996, the Pennsylvania Supreme Court denied a petition for allowance of appeal.

The instant habeas corpus petition was filed on May 19, 1997. Petitioner alleges that trial counsel erred in not seeking a pre-trial dismissal for denial of a speedy trial under Pennsylvania Rule of Criminal Procedure 1100, the Sixth Amendment of the United States Constitution, and the Interstate Agreement on Detainers Act (“IADA”), 42 Pa.C.S.A. § 9101, et. seq. (West. Supp. 1998), and in not properly litigating a motion to dismiss for pre-arrest delay. Petitioner also claims that the Commonwealth (1) denied him a speedy trial under the Sixth Amendment, and the IADA; (2) denied him Due Process by delaying his arrest; (3) violated his speedy trial right under the Sixth Amendment by delaying his appeal; and (4) denied him equal protection when the Superior Court concluded that his reputation evidence was irrelevant.

On March 30, 1998, Magistrate Judge Charles B. Smith, the magistrate judge to whom the instant habeas corpus petition had been referred,<sup>4</sup> recommended that the

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<sup>4</sup> Pursuant to 8 U.S.C. § 636(b)(1), a federal court may refer Habeas Corpus petitions to a magistrate judge for a “report as to the facts and [a] recommendation as to the order.”

petition be denied and dismissed without an evidentiary hearing. Judge Smith concluded that the petitioner's Sixth Amendment and IADA speedy trial claims, his Sixth Amendment delayed appeal claim, and his equal protection claim had been procedurally defaulted, and thus could not serve as the basis of federal habeas review. Judge Smith then addressed the exhausted claims and recommended that petitioner's ineffective assistance of counsel claims -- in (a) not seeking pre-trial dismissal for denial of a speedy trial under Pennsylvania Rule of Criminal Procedure 1100, (b) not properly litigating a motion to dismiss for pre-arrest delay, and (c) failing to call a reputation witness -- be denied. In addition, Judge Smith recommended that petitioner's exhausted claim that post-verdict counsel was ineffective for not challenging trial counsel's ineffectiveness be denied.

The petitioner filed Objections to the Magistrate Judge's Report and Recommendation on April 24, 1998. In his objections, petitioner disputed nearly all of the Magistrate Judge's Report and Recommendation including, *inter alia*: (1) the finding that the petitioner was formally sentenced; (2) the conclusion that petitioner's Sixth Amendment and IADA speedy trial claims were procedurally defaulted; and (3) the recommendation that the Court deny and dismiss petitioner's exhausted claims without an evidentiary hearing.<sup>5</sup>

Defendants filed their response to petitioner's objections on May 8, 1998. The petitioner then filed a motion to strike certain portions of the response on May 11, 1998 and a reply to the response on May 18, 1998. Defendants filed a reply to the petitioner's

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<sup>5</sup> Because the Court concluded that petitioner had not exhausted all of his claims, it did not reach these objections in its Order and Memorandum of August 11, 1998.

motion to strike on June 1, 1998.

In its Order and Memorandum of August 11, 1998, the Court concluded that petitioner's first four claims - alleging the denial of a speedy trial under the Sixth Amendment and the IADA, a Sixth Amendment violation for delaying his appeal, and the denial of equal protection by the Superior Court Judge who concluded that petitioner's reputation evidence was irrelevant - were unexhausted and not clearly procedurally barred from state court review, and that it would not be futile for petitioner to present these claims in state court. Since petitioner had failed to exhaust state court remedies with respect to these four claims, by Order dated August 11, 1998 his habeas corpus petition was dismissed without prejudice under the "mixed" petition rule adopted by the Supreme Court in Rose v. Lundy, 455 U.S. 509, 522 (1982). The Order provided for the filing of an amended petition under Federal Rule of Civil Procedure 15(c)(2) after petitioner exhausted his state remedies.

## **II. DISCUSSION**

In their Motion for Reconsideration, the defendants urge the Court to reconsider its August 11, 1998, Order, specifically arguing that the Court misread Third Circuit precedent on the exhaustion of state law claims, finding a lack of exhaustion when no such finding was justified under Pennsylvania court practice. In addition, the defendants assert that the Court's use of Fed. R. Civ. P. 15(c)(2) to shield petitioner from the potential deprivation of federal habeas review of his claims was improper. The Court will examine each of these arguments in turn.

### **A. Exhaustion and Futility**

In addressing a habeas corpus petition under §2254, a court must first consider whether petitioner has exhausted his state remedies. 28 U.S.C. § 2254(b)-(c). A claim which has not been pursued in all available state court proceedings has not been exhausted. See, e.g., Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986).<sup>6</sup> 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.” Id. It is, therefore, well settled that federal courts may not grant habeas petitions presenting only unexhausted claims. See, e.g., Picard v. Connor, 404 U.S. 270, 275 (1971). In addition, the Supreme Court has consistently held that a “mixed” petition, one containing both exhausted and unexhausted claims, must also be dismissed. See, e.g., Rose v. Lundy, 455 U.S. 509, 521-22 (1982); see also Coleman v. Thompson, 501 U.S. 722, 731 (1991); Castille v. Peoples, 489 U.S. 346, 349 (1989). This is often referred to as the “total exhaustion” rule.<sup>7</sup>

The Court’s examination of the record in this case demonstrated that petitioner had never raised in state court a Sixth Amendment or IADA speedy trial claim, or an equal protection claim against the Commonwealth, each of which he sought to raise before this Court as part of his § 2254 petition. Petitioner did present a speedy trial claim to the Pennsylvania Superior and Supreme Courts on nunc pro tunc direct appeal as a

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<sup>6</sup> In order to exhaust a claim, it must have 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). Otherwise, the claim will be deemed to be newly presented in the habeas petition and, therefore, unexhausted.

<sup>7</sup> There are exceptions to this general rule. The principal exception applies when it would be futile to return an unexhausted claim to state court because of a state procedural bar; this exception is discussed below.

state law violation under Pennsylvania Rule of Criminal Procedure 1100. However, “it is not enough that all the facts necessary to support the federal claim were before the state courts, . . . or that a somewhat similar state-law claim was made.” Anderson v. Harless, 459 U.S. 4, 7 (1982) (citations omitted). Because petitioner’s Sixth Amendment and IADA speedy trial claims, as opposed to the Rule 1100 speedy trial claim, and his equal protection claim were not presented to the state court on direct appeal or on collateral attack in a PCRA petition, these were considered by the Court to be newly raised issues which were unexhausted. The Court also found that petitioner’s assertion of a violation of his Sixth Amendment right to a speedy trial raised a due process, not a Sixth Amendment, claim; this Sixth Amendment “delayed appeal” claim, more properly framed as a due process claim, was not presented to the state court on direct appeal or on collateral attack in a PCRA petition. Thus, this was a newly raised issue which was unexhausted and, unless an exception applied, would require that the Court dismiss the petition for failure to exhaust.

Where it would be “futile” to return unexhausted claims in a “mixed” petition 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.<sup>8</sup> A

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<sup>8</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 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).

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. Beyer, 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. As the Third Circuit recently stated:

In this regard we point out that federal courts should be most cautious before reaching a conclusion dependent upon an intricate analysis of state law that a claim is procedurally barred. Toulson surely made that point clear and the enactment of the AEDPA, which overall is intended to reduce federal intrusion into state criminal proceedings, reinforces the point. In questionable cases, even those not involving capital punishment, it is better that the state courts make the determination of whether a claim is procedurally barred.

Banks v. Horn, 126 F.3d 206, 213 (3d Cir. 1997).

In addressing the issue of futility, the Court must analyze the applicability of two procedural bars – waiver and the statute of limitations – which would have to be overcome before petitioner could proceed in state court. The Court will examine each of these procedural bars in turn.

#### **i. The State Court Procedural Bars – Waiver and Statute of Limitations**

42 Pa.C.S.A. § 9544(b) provides 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 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) (“[N]early all claims are waived under the PCRA since nearly all claims potentially could have been raised on direct appeal.”).

In addition to the waiver rule, a recent amendment to the PCRA requires that all petitions under that statute 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). Because the Superior Court of Pennsylvania affirmed petitioner’s convictions on September 22, 1995 and the Supreme Court of Pennsylvania denied allocatur on May 22, 1996, petitioner had ninety days from the latter date (until August 20, 1996) in which to seek certiorari from the United States Supreme Court, and he did not do so. Thus, judgment was final on August 20, 1996.<sup>9</sup>

The petitioner previously filed a PCRA petition in state court. Thus, a new petition would probably (but not necessarily) be considered petitioner’s second PCRA petition.<sup>10</sup> This means that petitioner might be barred by the statute of limitations of 42 Pa.C.S.A. § 9545(b)(1) from presenting his new claims in state court. The Court must therefore determine whether the likely application of the waiver provision and the PCRA

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<sup>9</sup> 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 first 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).

<sup>10</sup> Note the discussion of Commonwealth v. Lewis at page 13, infra.

statute of limitations renders further state proceedings futile.

**ii. The Pennsylvania Post Conviction Relief Act and the Principle of Comity**

In the Third Circuit, 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, 134 F.3d 506, 522 (3d Cir. 1997); Banks v. Horn, 126 F.3d 206, 214 (3d Cir. 1997). In light of this holding, the Court concludes that the PCRA’s waiver requirements did not present a procedural bar sufficient to allow this Court to retain jurisdiction over petitioner’s exhausted claims.

Likewise, the Court concludes that petitioner’s claims were not definitively barred from state court review by the PCRA’s statute of limitations. In Lambert v. Blackwell, the Third Circuit recently addressed 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>11</sup> Lambert, 134 F.3d at 523-24. The circuit court went further, however, noting that regardless of whether petitioner qualified under one of those exceptions:

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<sup>11</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 defendant 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).**

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, 134 F.3d at 524, n. 33. Thus the possibility exists that, like the waiver provisions of 42 Pa.C.S.A. § 9544, the statute of limitations bar could be waived by Pennsylvania courts in some cases. Because it is uncertain whether a state court would enforce this procedural bar, this Court was required to dismiss petitioner's habeas corpus petition. See Doctor, 96 F.3d at 681. In light of the holding in Lambert and Banks, petitioner's first four claims are not clearly foreclosed by state court procedural bars; therefore the Court must first give the state courts the opportunity to rule on petitioner's unexhausted claims.

The defendants, however, urge that the above disposition is in error. In their Motion for Reconsideration, defendants point out that while the Pennsylvania Supreme Court has not ruled directly on this issue, the lower courts have all enforced the procedural provisions of the PCRA strictly in all non-capital cases. There is no basis, the defendants state, on which to rest the assumption that a state court will refuse to enforce the time limitations of the PCRA in a non-capital case; both the plain language of the statute and the practice of the courts, defendants argue, render petitioner's claims futile in state court and thus exhausted for the purpose of his habeas petition. The defendants conclude, therefore, that this Court should assume the state courts will apply the PCRA "consistently," and rule that petitioner's state claims are all exhausted due to the futility of pursuing the claims.

While it is true that, to the Court's knowledge, no lower state courts have waived

the relevant PCRA limitations period in a non-capital case, that is not binding on the disposition of the matter under the rules enunciated in Lambert, Banks, and Doctor. The role of this Court, under established Third Circuit precedent, is to give the maximum amount of deference possible to a state court's resolution of state law issues; this Court will not substitute its judgment for that of the state court when there is a genuine chance, however remote, that a state court would consider the merits of petitioner's claims. As the Third Circuit wrote in Doctor:

If the federal court is uncertain how a state court would resolve a procedural default issue, it should dismiss the petition for failure to exhaust state remedies even if it is unlikely that the state court would consider the merits to ensure that, in the interests of comity and federalism, state courts are given every opportunity to address claims arising from state proceedings.

Doctor, 96 F.3d at 681 (citing Vasquez v. Hillery, 474 U.S. 254, 257 (1986)). These cases establish that any possibility of state review, no matter how slim, requires dismissal of an unexhausted claim so as to give state courts "every opportunity to address claims arising from state proceedings." Id.

In the instant case the defendants have provided the Court with a list of Pennsylvania Superior Court decisions which have enforced the PCRA provision barring substantive review of PCRA petitions which were filed (as the instant petitioner's would be) more than a year after the judgment in the petitioner's case became final. What the defendants ignore is that there are avenues which a state court might decide to pursue if it wished to review the merits of petitioner's claims. In the recent case of Commonwealth v. Lewis, 1998 WL 677192 (Pa. Super. Oct 2, 1998), the court treated a prisoner's late, successive PCRA petition as an initial petition for PCRA purposes because his original

PCRA petition had been treated as a nunc pro tunc appeal to the Superior Court. An identical procedure was ordered with respect to petitioner's initial PCRA petition in the instant matter, filed on May 26, 1992 – it was treated as a nunc pro tunc appeal to the Superior Court. Under the rationale of Lewis, a state court might thus treat petitioner's newly filed PCRA petition as an “first” PCRA petition by tolling the limitations period or by relating the new PCRA petition back to the filing date of the original. This would enable the state court to consider the merits of the petition despite the restrictions on second or successive PCRA petitions found in 42 Pa.C.S.A. § 9545(b)(1) .

Moreover, the state court reviewing such a petition could grant it on its merits. Although the PCRA was amended in November, 1995, petitioner filed his initial PCRA petition on May 26, 1992. Accordingly, the court might decide to follow the reasoning of Lewis and apply the pre-November 1995 provisions of the PCRA. The state court could then employ a “miscarriage of justice” or “ineffective assistance of counsel” exception to allow it to hear and grant relief to petitioner's claims. See, e.g., Commonwealth v. Lawson, 519 Pa. 504, 513-14 (1988); Commonwealth v. Fiore, 665 A.2d 1185 (Pa. Super. 1995); 42 Pa. Cons. Stat. §§ 9543(a)(2), (3) and (4) (West 1994).<sup>12</sup>

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<sup>12</sup> At the time of the filing of petitioner's initial PCRA petition, sections 9543(a)(2), (3) and (4) required that Appellant plead and prove by a preponderance of the evidence:

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of Pennsylvania or laws of this Commonwealth or the Constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

(iv) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) A violation of the provisions of the Constitution, law or treaties of the United

Alternatively, a state court could employ the current, amended PCRA § 9545(b)(1)(ii)<sup>13</sup> if it determined that petitioner's instant claims are based in whole or in part on evidence unknown to petitioner at the time of his first PCRA petition. A state court could also exercise its equitable powers and follow the approach of such pre-amendment cases as Commonwealth v. Heck, 467 A.2d 896 (Pa. Super. 1983) (holding that because information from the record was insufficient to support finding that petitioner's claims were patently frivolous, remand for evidentiary hearing on ineffective assistance of counsel claim was required).

There may well be other possibilities which a mastery of Pennsylvania procedure would offer a state jurist, but the actual method which a state court might utilize is

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**States which would require the granting of Federal habeas corpus relief to a State prisoner.**

**(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.**

**(3) That the allegation of error has not been previously litigated and one of the following applies:**

**(i) The allegation of error has not been waived.**

**(ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.**

**(iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.**

**(4) That the failure to litigate the issue prior to or during trial or on direct appeal could not have been the result of any rational strategic or tactical decision by counsel.**

**42 Pa.C.S.A. §§ 9543(a)(2), (3) and (4) (1994).**

<sup>13</sup> **42 Pa.C.S.A. § 9545(b)(1) provides, in pertinent part:**

**Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:**

**...**

**(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence**

**42 Pa.C.S.A. § 9545(b)(1) (1998).**

irrelevant to this inquiry. While such scenarios may not strike the Court as probable, the fact that a willing state court could entertain the merits of petitioner's claims renders the Court's initial disposition absolutely correct.

Defendants are also mistaken in their reliance on language in Banks which they argue suggests that deference to state court resolution is limited to capital cases. While it is true that the court in Banks wrote that, "we are not confident that the Pennsylvania Supreme Court, even in the face of the 1995 amendments to the PCRA, will abandon its practice of reaching the merits of claims in PCRA petitions in capital cases," no such language appears in Doctor or Lambert (both non-capital cases), nor does the Court believe that the reasoning of Banks itself was dependant on its status as a capital case. In Banks, the court looked to the Pennsylvania Supreme Court to determine how it had treated PCRA petitions in death penalty cases because, under the rule of Johnson v. Mississippi, 486 U.S. 578, 588-89 (1988), a state procedural rule must be "consistently or regularly applied" for that rule to have any preclusive effect on the ability of a federal court to rule on a petitioner's habeas corpus claims. The court in Banks examined Pennsylvania Supreme Court precedents to determine whether "that court consistently or regularly bars second or subsequent PCRA petitions which may not meet the court's requirements for such petitions." Banks, 126 F.3d at 211. In doing so, the Third Circuit panel was not carving out any special approach to capital cases, but was rather performing the analysis required of a federal court when it assesses whether or not a state court is likely to hear the merits of claims in the habeas corpus petition in question. If that petition emanates from a capital case, then it is the procedures of the state courts dealing with such cases which the federal court must examine. The state law that is to be relied

on must be “firmly established and regularly followed” to bar federal habeas review, Ford v. Georgia, 498 U.S. 411, 423-24 (1991), and the state law in question should be applied “evenhandedly to all similar claims,” Hathorn v. Lovorn, 457 U.S. 255, 263 (1982). At no time does the Banks court imply that it is doing anything but examining state court handling of similar cases, that is, of capital cases, and indeed the defendants ignore explicit language in Banks disclaiming any distinction between the handling of capital and non-capital cases:

[W]e point out that federal courts should be most cautious before reaching a conclusion dependant upon an intricate analysis of state law that a claim is procedurally barred. Toulson surely made that point clear and the enactment of the AEDPA, which overall is intended to reduce federal intrusion into state criminal proceedings, reenforces the point. In questionable cases, even those not involving capital punishment, it is better that the state courts make the determination of whether a claim is procedurally barred.

Banks, 126 F.3d at 213 (citing Toulson v. Beyer, 987 F.2d 984, 989 (3d Cir. 1993))

(emphasis added). Given the Banks court’s explicit rejection of the argument the defendants urge before this Court, the Court concludes it was correct in determining that petitioner’s claims are not exhausted due to futility. This determination is wholly consistent with the decisions of the Third Circuit in Banks, Doctor and Lambert.

### **Application of the Anti-Terrorism and Effective Death Penalty Act**

The defendants also argue that the Court’s use of Fed. R. Civ. P. 15(c)(2) to shield petitioner from the potential deprivation of federal habeas review of his claims was in error. In their motion for reconsideration, defendants assert that this Court’s “apparent attempt to shield the petitioner from operation of the federal statute of limitations [of the AEDPA], 28 U.S.C. 2244(d)(1)” is an improper attempt to “return habeas litigation to its

pre-amendment status” and that the Court’s action amounts to holding a petition in abeyance in violation of the rule of Christy v. Horn, 115 F.3d 201 (3d Cir. 1996). The Court disagrees and will once again explain the propriety of its ruling and the role it plays in promoting fundamental fairness under the post-AEDPA habeas corpus process.<sup>14</sup>

As this Court explained in Williams v. Vaughn, 1998 WL 238466 (E.D. Pa., May 8, 1998):

The Court's decision to utilize Rule 15(c)(2) . . . was premised, in large part, on the language of the AEDPA's statute of limitations. The AEDPA states that the “time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2). The Third Circuit has ruled that a “properly filed” PCRA petition is one which is “submitted according to the state's procedural requirements, such as the rules governing the time and place of filing.” Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). This interpretation of “properly filed” leaves open the possibility that a Pennsylvania Post Conviction Relief Act [“PCRA”], 42 P.S. § 9541 et seq., (Purdon's 1982 & Supp. 1997) proceeding which is dismissed on procedural grounds will not be deemed to have been “properly filed” for purposes of the AEDPA and will not, therefore, toll the statute of limitations. It was this possibility--that the limitations period would expire before petitioner could exhaust and file a new petition--which prompted the Court to dismiss the within habeas petition without prejudice to petitioner's right to file a second amended petition pursuant to Federal Rule of Civil Procedure 15(c)(2) upon exhaustion of state remedies.

Id. at \*2. This Court employed the same approach in its decisions in Hammock v. Vaughn, 1998 WL 163194 (E.D. Pa. April 7, 1998) and Morris v. Horn, 1998 WL 150956 (E.D. Pa. March 19, 1998). In each case, the Court found there was a risk that the petitioner could be barred from federal court if the Court were simply to dismiss his petition, because of the provisions of the AEDPA noted above in Williams. In these cases this Court has presented a thorough explanation of its use of Fed. R. Civ. P.

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<sup>14</sup> See Peterson v. Brennan, 1998 WL 470139 at \*7-9 (E.D. Pa. Aug. 11, 1998).

15(c)(2), most notably in Williams, 3 F. Supp. 2d at 570-579 and Morris, 1998 WL 150956 at \*3-4. The Court is disinclined to repeat this explanation in response to the brief and somewhat vague objections included in the defendants' motion for reconsideration; rather the Court will confine itself to the two principal arguments made by defendants, that the Court's use of Fed. R. Civ. P. 15(c)(2) violated the rule of Christy, and that it was designed to bypass the newly enacted limitations of the AEDPA.

Contrary to the defendants' contention, the Court's Order was not the equivalent of holding a claim (or in this case, the petition) in abeyance. When a claim is held in abeyance by a court, it continues to be subject to the jurisdiction of that court. The Third Circuit has held that a court may only retain jurisdiction of a habeas petition if it finds that there are "exceptional circumstances" which warrant retention. See Christy, 115 F.3d at 207. The decision in Christy was motivated by a concern of comity. See id. By dismissing the petition without prejudice, the Court has relinquished jurisdiction altogether. By providing that petitioner may file an amended petition pursuant to Fed. R. Civ. P. 15(c)(2) after exhaustion of state remedies, the Court has also ensured that petitioner will not be prejudiced by the possibility of a state court dismissal on procedural grounds. That result is effected without infringing on the jurisdiction of the state court and thus comports with Christy's holding.

Because of the uncertainty as to the meaning of the phrase "properly filed" as employed in the AEDPA, there is a chance that a petitioner could be barred from ever presenting his or her claims in federal court after attempting to exhaust unexhausted claims in state Court. Cf. Lovasz, supra. The Court decided not to force petitioner to gamble on this outcome.

By employing Fed. R. Civ. P. 15(c)(2) to ensure that habeas corpus remains available to a petitioner whose claims have never been heard on their merits before a federal court, the Court avoids an outcome which would raise serious constitutional questions. Specifically, in the instant case, the Court avoids deciding whether the AEDPA would be unconstitutional if it denied petitioner a federal judicial forum for his claims due to a procedural decision of a state court. In reaching this result, the Court respects Congress' intent to streamline collateral review and to discourage repetitive and piecemeal litigation, while at the same time giving meaning to Congress' express decision (reaffirmed in the AEDPA) to preserve habeas corpus for those extraordinary instances where justice demands it. See Schlup v. Delo, 513 U.S. 298, 322 (1995) (noting that in interpreting the law of collateral review, courts should “accommodate [ ] both the systemic interests in finality . . . and conservation of judicial resources, and the overriding individual interest in doing justice in the extraordinary case”) (citation and internal quotation marks omitted); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion of Powell, J.) (noting “the clear intent of Congress that successive federal habeas review should . . . be available when the ends of justice so require”). To potentially cut off all federal review of petitioner’s claims with a procedural technicality would be to call the constitutionality of the procedural structure of the AEDPA into question needlessly. Instead, the Court will allow petitioner, upon the conclusion of his proceedings in state courts, to file an amended habeas corpus petition raising the then exhausted claims in this Court pursuant to Fed. R. Civ. P. 15(c)(2). The filing of such an amended habeas corpus petition will relate back to the filing date of the original petition because such an amended petition would arise out of the conduct or occurrence set forth in the original

petition, thus avoiding the potential injustice associated with the automatic imposition of the AEDPA's one-year statutory bar.

**III. CONCLUSION**

For the foregoing reasons, the Court denies the defendants' Motion for Reconsideration.

**BY THE COURT:**

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**JAN E. DUBOIS**