

- h. On April 1, 2011, petitioner's counsel filed a motion to stay this action while petitioner exhausted the new claim in state court.
- i. On April 26, 2011, Magistrate Judge Rice issued a Second Supplemental Report and Recommendation. Magistrate Judge Rice found that the new claim was unexhausted and recommended that the court grant petitioner's motion for a stay. By order of May 20, 2011, the court approved and adopted the Second Supplemental Report and Recommendation and stayed the petition for a writ of *habeas corpus*.
- j. In a letter dated November 19, 2012, counsel for petitioner advised the court that petitioner's state court remedies have now been exhausted. The state court had dismissed petitioner's second PCRA petition raising the new claim as untimely. Petitioner filed objections to the Second Supplemental Report and Recommendation on February 27, 2013.
- k. By order of March 20, 2013, the court remanded this action to Magistrate Judge Rice for a Third Supplemental Report and Recommendation on whether petitioner's claim that his sentence exceeded the statutory maximum is barred by procedural default and, if not, on the merits of that claim.
- l. On August 7, 2013, Magistrate Judge Rice issued a Third Supplemental Report and Recommendation. Magistrate Judge Rice found that petitioner's claim that the sentence imposed for rape of a child exceeded the statutory maximum was not barred by procedural default and he examined the merits of that claim. At trial, Franklin was convicted of one count of rape of a child on an unspecified date between January 1, 2001 and January 30, 2004. The trial court imposed a sentence of twenty-to-forty years imprisonment, the maximum possible sentence under the current Pennsylvania rape statute. *See* 18 Pa. C.S. § 3121(e)(1). In December 2002, the Pennsylvania legislature modified the sentencing provisions of Section 3121. The modified provisions became effective on February 7, 2003. This statutory change doubled the maximum sentence for rape of a child from twenty years to forty years imprisonment. It is impossible to determine whether the jury found that the rape for which Franklin was convicted occurred before or after the February 7, 2003 statutory change, thus the rule of lenity requires that the trial court should have sentenced Franklin for the lesser offense. Franklin should have been sentenced under the pre-February 7, 2003 Pennsylvania rape statute, 18 Pa. C.S. § 3121(a)(6) (2002), which carried a maximum penalty of twenty years imprisonment.
- m. Magistrate Judge Rice recommended the court grant petitioner's petition for writ of *habeas corpus*, vacate petitioner's sentence imposed for rape of a child, and remand the case for resentencing under the pre-February 7, 2003 rape statute. Magistrate Judge Rice informed the parties that failure to file objections within fourteen days of service of the Third Supplemental Report and Recommendation might constitute a waiver of appellate rights.
- n. No objections to the Third Supplemental Report and Recommendation were timely filed.

Therefore, for the reasons stated above and in the Third Supplemental Report and Recommendation, it is **ORDERED** that:

1. The Third Supplemental Report and Recommendation is **APPROVED** and **ADOPTED**.
2. Petitioner's petition for writ of habeas corpus is **GRANTED**.
3. Petitioner's sentence imposed on his conviction for rape of a child is **VACATED**.
4. This action is **REMANDED** to the trial court for resentencing under the pre-February 7, 2003, statutory maximum of twenty years imprisonment.
5. There is no basis for issuing a certificate of appealability.

/s/ Norma L. Shapiro

J.