



Not Reported in F.Supp.2d, 2012 WL 5467540 (M.D.Pa.)

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Only the Westlaw citation is currently available.

United States District Court,

M.D. Pennsylvania.

Andre GALE, Petitioner

v.

John WETZEL, et al., Respondents.

Civil Action No. 1:12-CV-1315.

Sept. 27, 2012.

Andre Gale, Somerset, PA, pro se.

Edward Marsico, District Attorney's Office, Harrisburg, PA, pro se.

Jason Eugene McMurry, Dauphin County District Attorney's Office, Harrisburg, PA, for Respondents.

REPORT AND RECOMMENDATION

[THOMAS M. BLEWITT](#), United States Magistrate Judge.

I. Background.

*1 On July 9, 2012, Petitioner Andre Gale ("Petitioner") filed a "Motion for Stay and Abeyance of § 2254 Petition." (Doc. 1). The Clerk of Court docketed Petitioner's "Motion for Stay and Abeyance" as his habeas petition. Petitioner is currently an inmate at the State Correctional Institute in Somerset, Pennsylvania ("SCI-Somerset"). On July 23, 2012, Petitioner paid the filing fee. (Doc. 4). In his "Motion for Stay and Abeyance," Petitioner indicated that he recently filed a Post Conviction Relief Act ("PCRA") Petition with the Dauphin County Court of Common Pleas in May 2012, and that "the time necessary for exhaustion of [his] PCRA Petition in the state court[] will exceed the one-year time limitation for timely filing the instant § 2254 [habeas] petition." (Doc. 1, p. 1). Petitioner stated that he raised the

following grounds in his May 2012 PCRA Petition he filed with the Dauphin County Court: 1) his trial counsel was ineffective for failing to raise a claim in Petitioner's direct appeal that his constitutional right to confront his accuser was violated when the trial court allowed the statement of his co-Defendant Wells to be read to the jury by the prosecutor without requiring Wells to take the witness stand; and 2) his appellate counsel in his first PCRA Petition collateral appeal was ineffective for failing to raise a claim that his trial counsel was ineffective for not appealing Wells' statement which was read to the jury. (Doc. 1, pp. 1-2). Petitioner based his PCRA claims on the case of [Martinez v. Ryan, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 \(2012\)](#). In his "Motion for Stay and Abeyance," Petitioner requested that this federal court stay and hold in abeyance the § 2254 habeas petition he was going to file until his PCRA Petition was decided by the state courts. Petitioner did not file a proper § 2254 habeas petition at the time he filed his "Motion for Stay and Abeyance."

On July 25, 2012, the Dauphin County Court issued a Final Order pursuant to its June 1, 2012 Memorandum and Order advising Petitioner of the court's intent to dismiss his PCRA Petition as untimely and, dismissed Petitioner Gale's PCRA Petition as untimely. (Doc. 9-1, Ex. C, pp. 18-22). On August 27, 2012, Petitioner filed a Notice of Appeal with the Pennsylvania Superior Court, docket number 1556 MDA 2012, regarding the Dauphin County Court's Final Order dismissing his May 2012 PCRA Petition. On September 4, 2012, the Dauphin County Court issued a PCRA Order explaining to the Superior Court why Petitioner's PCRA Petition was dismissed and stating that its July 25, 2012 Order should be affirmed. (Doc. 7, pp. 27-32). It appears that Petitioner's Notice of Appeal with the Pennsylvania Superior Court is still pending. (*See* Doc. 6, p. 7).

Since Petitioner did not file a proper § 2254 habeas petition with this federal court, on July 26, 2012, we

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issued an Order and directed the Clerk of Court to provide Petitioner with a form § 2254 habeas petition and directed Petitioner to file the proper habeas form within ten days. (Doc. 5).

*2 On August 13, 2012, Petitioner Gale filed his Petition for Writ of Habeas Corpus, pursuant to [28 U.S.C. § 2254](#). (Doc. 6). The Clerk of Court docketed Petitioner's habeas petition as his "Amended Petition for Writ of Habeas Corpus," but it was actually his original habeas petition since Petitioner's "Motion for Stay and Abeyance" was not a proper habeas petition. Petitioner also filed a Memorandum in support of his habeas petition with attached copies of the aforementioned state court records regarding his recent PCRA Petition. (Doc. 7). The instant habeas petition, is Petitioner Gale's third petition he has filed with this federal court. In his third habeas petition, Petitioner is again seeking to challenge his March 1996 first degree murder and conspiracy conviction and, sentence to life in prison without parole imposed by the Dauphin County Court of Common Pleas.

Petitioner filed his first [§ 2254](#) habeas petition with this Court on January 27, 2000, namely, *Gale v. Sobina*, Civil No. 00–0163, M.D. Pa. ^{FN1} (Doc. 9–1, Ex. A). On August 21, 2000, Petitioner filed a motion to dismiss in his case. (Civil No. 00–0163, Doc. 6). On August 22, 2000, the Court issued an Order and held that Petitioner's [§ 2254](#) habeas petition was withdrawn. (Civil No. 00–0163, Doc. 8). The Court further provided Petitioner with 120 days from the date of its Order to file an all-inclusive [§ 2254](#) habeas petition. (Civil No. 00–0163, Doc. 8). On December 21, 2000, the Court closed the case in Civil No. 00–0163 because Petitioner did not re-file his all-inclusive [§ 2254](#) habeas petition. (Civil No. 00–0163, Doc. 9).

^{FN1} Petitioner also filed two § 1983 civil rights cases with this Court. They were: *Manning, et al. v. Dauphin County Prison, et al.*, 1:CV–96–0520 and *Gale v. Dauphin County Prison, et al.*, 3:CV–96–0540. Petitioner currently has only this

instant habeas petition pending with this Court.

Petitioner filed his second [§ 2254](#) habeas petition with this Court on June 26, 2006, namely, *Gale v. Rozum*, Civil No. 06–01266, M.D. Pa., claiming ineffective assistance of counsel and actual innocence. On July 25, 2006, the Court dismissed Petitioner's [§ 2254](#) habeas petition. (Civil No. 06–01266, Doc. 5).^{FN2} The Court found that the AEDPA statute of limitations was expired. (*Id.*). The Court further found that the because Petitioner's Civil No. 06–01266 habeas petition was a successive filing, it had to be analyzed under the guidelines of [28 U.S.C.A. § 2244\(b\)\(2\)](#). (*Id.*). The Court noted that Petitioner voluntarily withdrew his first habeas petition, Civil No. 00–0163, in 2000 and did not file an all-inclusive habeas petition as the Court directed him to do. Therefore, the Court closed Petitioner's case in Civil No. 00–0163. Thus, the Court did not address the merits of Petitioner's first habeas petition. (*Id.*). Petitioner's second habeas petition, Civil No. 06–01266, was filed on June 26, 2006, which was not within the Court's 120–day timetable specified in Petitioner's Civil No. 00–0163 case. (*Id.*).^{FN3} The Court analyzed whether or not Petitioner's reliance on the miscarriage of justice exception to [§ 2254\(b\)\(1\)\(A\)](#) was warranted. (*Id.*). The Court found that the miscarriage of justice exception did not apply as Petitioner did not supply any evidence that persuaded the Court that no juror would have found him guilty beyond a reasonable doubt in order to prove he was actually innocent of the crime. (*Id.*). Thus, on July 25, 2006, the Court dismissed Petitioner's second habeas petition in Civil No. 06–01266. (*Id.*).

^{FN2} See also Doc. 9–1, Ex. A, Civil No. 13–1315, M.D. Pa.

^{FN3} See also Doc. 9–1, Ex. A, Civil No. 13–1315, M.D. Pa.

*3 Petitioner then filed a Notice of Appeal regarding the Court's dismissal Order in Civil No. 06–01266, with the Third Circuit Court of Appeals, U.S. C.A. No. 06–4234 (3d Cir.). On March 22, 2007, the Third Circuit

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construed Petitioner's Notice of Appeal as a request for a certificate of appealability under [28 U.S.C. § 2253\(c\)\(1\)](#). (Doc. 13, Civil No. 06–1266, M.D. Pa.). On April 3, 2007, the Third Circuit issued an Order and denied Petitioner's request for a certificate of appealability since it found that Petitioner's habeas petition filed in Civil No. 06–1266, M.D. Pa. was clearly untimely and since Petitioner made showing that he was entitled to equitable tolling of the AEDPA statute of limitations. (*Id.*).^{FN4}

^{FN4}. See also Doc. 9–1, Ex. B, Civil No. 13–1315, M.D. Pa.

As stated, on August 13, 2012, Petitioner filed his third petition for writ of habeas corpus with this court. (Doc. 6, Civil No. 12–1315). Petitioner raises the following grounds: (1) “First Post–Conviction–Counsel [PCRA Petition appellate counsel] rendered ineffective assistance according to the United States Constitution”; (2) “Trial–Counsel rendered ineffective assistance according to the United States Constitution”; (3) “The Petitioner has the right to effective attorney”; and (3) “The confrontation clause in the United States Constitution was violated in trial-court.” (Doc. 6, pp. 5–9). As stated, Petitioner also filed a Memorandum of Law in support of his habeas petition with attached exhibits. (Doc. 7).

On September 5, 2012, Respondent Dauphin County District Attorney (“Respondent”) filed a Motion to Dismiss and/or File a Partial Answer with attached Exhibits, A–C. (**Doc.9**). Respondent states that Petitioner's present habeas petition should be dismissed as a successive petition and, dismissed as not timely filed within the AEDPA one-year statute of limitations. Respondent also states that Petitioner does not even raise cognizable [§ 2254](#) habeas claims since the U.S. Supreme Court's decision in *Martinez v. Ryan*, does not provide Petitioner with ability to reopen his previous habeas petition and does not afford Petitioner with an exception to the one-year statute of limitations of the AEDPA. Further, Respondent states that the case of *Martinez v. Ryan* was not found to apply retroactively to cases on

collateral review. (Doc. 9, p. 4). Respondent also requests, based on the stated reasons in his Motion to Dismiss Petitioner's habeas petition, this court to deny as moot Petitioner's Doc. 1 “Motion for Stay and Abeyance.” (Doc. 9, p. 5, ¶ 20). Petitioner's response to Respondent's Motion to Dismiss was due September 19, 2012, and to date, Petitioner has not filed a response.

II. State Procedural History.

On March 11, 1996, Petitioner was convicted by a jury in the Dauphin County Court of Common Pleas (“CCP”) for first degree murder and criminal conspiracy and sentenced to life imprisonment without parole. (Doc. 6, p. 1).^{FN5} On June 11, 1997, the Superior Court of Pennsylvania affirmed the judgment of sentence. (*Id.*, p. 2). On October 28, 1997, the Supreme Court of Pennsylvania denied Petitioner's petition for allowance of appeal. (Doc. 9–1, Ex. C, p. 18).

^{FN5}. See also Doc. 9–1, Ex. A, Civil No. 13–1315, M.D. Pa.

*4 On November 24, 1997, Petitioner filed a petition for relief under the Post Conviction Relief Act (“PCRA”), [42 Pa.C.S.A. §§ 9541, et seq.](#) On August 21, 1998, the CCP denied Petitioner's PCRA petition. (*Id.*). On August 24, 1999, the Superior Court of Pennsylvania affirmed the denial of PCRA relief. (*Id.*).

Petitioner filed two other PCRA Petitions with the CCP, his second Petition on March 25, 2002, and his third Petition on October 2, 2007. (*Id.*, p. 19). Both of these Petitions were denied by the CCP. (*Id.*).

On May 17, 2012, Petitioner filed his fourth PCRA Petition with the CCP. On July 25, 2012, the CCP dismissed Petitioner's PCRA Petition.^{FN6} (See Court of Common Pleas of Dauphin County Criminal Docket Number: CP–22–CR–0002716–1995).^{FN7} On August 27, 2012, Petitioner filed an appeal with the Superior Court of Pennsylvania. (*Id.*). As stated, it appears that Petitioner's Notice of Appeal with the Pennsylvania Superior Court

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regarding the CCP's dismissal of Petitioner's fourth PCRA Petition is still pending. (*See* Doc. 6, p. 7).

[FN6](#). *See also* Doc. 9–1, Ex. C, pp. 18–22, and Doc. 7, pp. 27–32, Civil No. 13–1315, M.D. Pa.

[FN7](#). We take judicial notice of the Pennsylvania state court docket sheet in this matter, which are available through Pennsylvania's Unified Judicial Docket System docket research at <http://ujportal.pacourts.us/>, Court of Common Pleas of Dauphin County Criminal Docket Number: CP–22–CR–0002716–1995. *See* <http://ujportal.pacourts.us>.

III. Discussion.

As stated, Petitioner filed his first [§ 2254](#) habeas petition with this Court on January 27, 2000. (Civil No. 00–0163, M.D. Pa.). On August 21, 2000, Petitioner filed a motion to dismiss his first [§ 2254](#) habeas case. (Civil No. 00–0163, Doc. 6). On August 21, 2000, this Court granted Petitioner's motion to dismiss. (Civil No. 00–0163, Doc. 8). This Court however provided Petitioner with 120 days from the date of dismissal to file an all-inclusive [§ 2254](#) habeas petition. (Civil No. 00–0163, Doc. 9). On December 21, 2000, this Court closed the Civil No. 00–0163 case because Petitioner did not re-file his all-inclusive [§ 2254](#) habeas petition. (*Id.*).

Petitioner filed his second [§ 2254](#) habeas petition with this Court on June 26, 2006, claiming ineffective assistance of counsel and actual innocence. (Civil No. 06–01266, M.D. Pa.). On July 25, 2006, this Court dismissed Petitioner's [§ 2254](#) habeas petition. (Civil No. 06–01266, Doc. 5). This Court found that Petitioner's AEDPA statute of limitations was expired. (*Id.*). This Court further found that the because the Civil No. 06–01266 habeas petition was a successive filing, it had to be analyzed under the guidelines of [28 U.S.C. § 2244\(b\)\(2\)](#). (*Id.*). This Court noted that Petitioner voluntarily withdrew his original petition in 2000, and thus, this Court did not address the merits of Petitioner's

first claim. (*Id.*). Petitioner did not re-file his first habeas petition as per the Court's allowance in the dismissal order, therefore, the Civil No. 00–0163 case was closed. (*Id.*). Petitioner's second petition was filed on June 26, 2006, in his Civil No. 06–01266 case, which was not within the Court's 2000 timetable. (*Id.*). This Court analyzed whether or not Petitioner's reliance on the miscarriage of justice exception to [§ 2254\(b\)\(1\)\(A\)](#) was warranted. (*Id.*). This Court found that the miscarriage of justice exception did not apply as Petitioner did not supply any evidence to persuade the Court that no juror would have found him guilty beyond a reasonable doubt in order to prove he was actually innocent of the crime. (*Id.*). Thus, this Court dismissed Petitioner's second habeas petition in Civil No. 06–01266 case. (*Id.*).

*5 Petitioner then filed a Notice of Appeal with the Third Circuit Court of Appeals (U.S.C.A. No. 06–4234 (3d Cir.)). On April 3, 2007, the Third Circuit issued an Order and denied Petitioner's request for a certificate of appealability. (Doc. 13, Civil No. 06–01266).^{[FN8](#)}

[FN8](#). *See also* Doc. 9–1, p. 16, Ex. B, Civil No. 13–1315, M.D. Pa.

On August 13, 2012, Petitioner filed his instant petition for writ of habeas corpus. (Doc. 6). As mentioned, Petitioner raises the following grounds: (1) “First Post–Conviction Counsel rendered ineffective assistance according to the United States Constitution”; (2) “Trial–Counsel rendered ineffective assistance according to the United States Constitution”; (3) The Petitioner has the right to effective attorney”; and (3) “The confrontation clause in the United States Constitution was violated in trial-court.” (Doc. 6).

As stated, Petitioner again challenges his March 1996 (over 16 1/2 years old) conviction for first degree murder and criminal conspiracy and, his sentence of life imprisonment without parole. As relief in his present habeas petition, Petitioner requests, in part, this Court grant an “Evidentiary Hearing on the merits of each

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claim.” (Doc. 6, p. 14).

We agree with Respondent and find that Petitioner's third habeas petition should be dismissed as a second or successive habeas petition because he did not obtain permission from the Third Circuit to file a second or successive petition and, since his present claims do not qualify as claims that can be raised under the narrow exceptions of a properly filed second petition. We also agree with Respondent that Petitioner's instant habeas petition is time barred under his one-year AEDPA statute of limitations. (Doc. 9).

Furthermore, we also take judicial notice of this Court's records pertaining to Petitioner's first habeas petition under [§ 2254](#), *i.e.* his Civil No. 00–0163 case, and his second habeas petition under [§ 2254](#), his Civil No. 06–01266 case. [Louder v. Coleman, 2009 WL 4893193 at *2 \(W.D.Pa.\)](#). Thus, in deciding Petitioner's present habeas petition, we take judicial notice of this Court's records and the records of the Third Circuit. *Id.*

As the *Louder* Court stated:

This power of the court to summarily dismiss a petition, which, considered along with items annexed thereto and things of which judicial notice may be had, shows on its face that the petitioner is not entitled to relief includes the power of the court to dismiss the petition where it discloses that it is not in compliance with AEDPA's second or successive requirements. [Mickens v. Chamberlain, No. 2:08–CV–950, 2008 WL 4298536 \(W.D.Pa., Sept. 17, 2008\)](#); [Scott v. Klem, NO. 4:CV–05–1337, 2005 WL 1653165 \(M.D.Pa., July 12, 2005\)](#).

Id., *3.

Since Petitioner Gale's present habeas petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), *i.e.* April 24, 1996, the AEDPA applies to his case. *Id.*

In *Louder*, the Court stated:

*6 AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive [Section 2254](#) applications. [Tyler v. Cain, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 \(2001\)](#). In AEDPA, Congress enacted strictures on the filing of second or successive habeas petitions in response to the abuse of the habeas writ by prisoners. *See Chambers v. United States, 106 F.3d 472, 475 (2d Cir.1997)* (“The purpose of the gatekeeping restrictions was to prevent abuse of the habeas writ.”). Congress provided that “[b]efore 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\(b\)\(3\)\(A\)](#).

The allocation of these gatekeeping responsibilities to the Court of Appeals provided by [Section 2244\(b\)\(3\)\(A\)](#), has essentially divested the District Courts of subject matter jurisdiction over habeas petitions that are second or successive within the meaning of that subsection. *See, e.g., Robinson v. Johnson, 313 F.3d 128, 140 (3d Cir.2002)* (“From the district court's perspective, it [*i.e.*, [Section 2244\(b\)\(3\)\(A\)](#)]'s gatekeeping assignment to the Courts of Appeals] is an allocation of subject-matter jurisdiction to the court of appeals.”). The gatekeeping provisions of AEDPA provide that if the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed by the Court of Appeals in all cases. [28 U.S.C. § 2244\(b\)\(1\)](#). And if the prisoner asserts a claim that was not presented in a previous petition, the claim must be dismissed by the Court of Appeals unless it falls within one of two narrow exceptions. One of these exceptions is for claims predicated on newly discovered facts that call into question the accuracy of a guilty verdict. [§ 2244\(b\)\(2\)\(B\)](#). The other is for certain claims relying on new rules of constitutional law. [§ 2244\(b\)\(2\)\(A\)](#).

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However, even if a habeas petitioner's second or successive petition falls within either of these categories, he may not simply come to the District Court and file his second or successive petition, rather he must seek leave of the Court of Appeals to do so. In other words, he must convince, in the first instance, the Court of Appeals that his second or successive petition comes within this narrow exception permitted by AEDPA and have the Court of Appeals grant him leave to file such second or successive petition. [28 U.S.C. § 2244\(3\)\(A\)](#).FN1

FN1. [Section 2244\(3\)\(A\)](#) provides that “[b]efore 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.” (emphasis added).

Id., *3 (Emphasis added).

As discussed above, Petitioner's first habeas petition in case Civil No. 00–0163 was dismissed after the District Court granted Petitioner's motion to dismiss. (Civil No. 00–0163, Doc. 8). The District Court provided Petitioner with 120 days from the date of dismissal to file an all-inclusive [§ 2254](#) habeas petition. (Civil No. 00–0163, Doc. 9). On December 21, 2000, the District Court closed the case because Petitioner did not re-file his all-inclusive [§ 2254](#) habeas petition. (*Id.*).

*7 Petitioner's second [§ 2254](#) habeas petition, Civil No. 06–01266, included claims of ineffective assistance of counsel and actual innocence. On July 25, 2006, the District Court dismissed Petitioner's second [§ 2254](#) habeas petition. (Civil No. 06–01266, Doc. 5). The District Court found that the statute of limitations was expired. (*Id.*). The Court further found that the because the petition was a successive filing, it had to be analyzed under the guidelines of [28 U.S.C.A. § 2244\(b\)\(2\)](#). (*Id.*). The Court noted that Petitioner voluntarily withdrew his original petition in 2000, thus the Court did not address the merits

of his first claim. (*Id.*). Petitioner did not re-file the petition as per the Court's allowance in the dismissal order, therefore, the case was closed. (*Id.*). The second petition was filed on June 26, 2006, which was well after the time allowed by the Court in its dismissal Order issued in Petitioner's Civil No. 00–0163 case. (*Id.*). The Court analyzed whether or not Petitioner's reliance on the miscarriage of justice exception to [§ 2254\(b\)\(1\)\(A\)](#) was warranted. (*Id.*). The Court found that the miscarriage of justice exception did not apply as Petitioner did not supply any new evidence that persuaded the Court that no juror would have found him guilty beyond a reasonable doubt in order to prove he was actually innocent of the crime. (*Id.*). Therefore, the Court dismissed Petitioner's second habeas petition. (*Id.*).

As the *Louder* Court stated:

where a prior petition was addressed on the merits and the subsequent petition raises issues that could have been raised in the first petition or, otherwise constitutes an abuse of the writ, the subsequent petition is “second or successive” within the meaning of subsection (3)(A) and cannot be filed in the district court without authorization from the Court of Appeals. *See, e.g., Whab v. United States*, 408 F.3d 116, 118 (2d Cir.2005) (“for a subsequent petition to be considered ‘second or successive,’ bringing into play AEDPA's gatekeeping provisions, the disposition of an earlier petition must qualify as an adjudication on the merits.”); *Greene v. White*, 223 F.3d 1001, 1002 n. 1 (9th Cir.2000) (“The present petition is not a ‘second or successive petition’ because the earlier petition, filed in 1993, was not adjudicated on the merits.”).

Id., *4.

In *Hart v. Warden, FCI Schuylkill*, Civ. Docket 3:CV–09–0192, slip op. pp. 3–5 (M.D. Pa. April 30, 2009) (Conaboy, J.), the Court outlined the requirements for dismissal of a successive petition, stating:

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[28 U.S.C. § 2244\(a\)](#) and Rule 9 of the Rules Governing Section [§ 2254](#) Cases in the United States District Courts, as made applicable to 28 U.S.C. by Rule 1, set forth the authority for determination as to whether second or successive habeas corpus petitions may be reviewed by federal district courts.

Prior to the 1996 amendments, [§ 2244](#) authorized dismissal of a successive habeas petition “that presented no new ground not heretofore presented and determined.” [McCleskey v. Zant](#), 499 U.S. 467, 483, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). [§ 2244](#) provided:

*8 (a) No circuit or district judge shall be required to entertain an application for writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

The Supreme Court in *McCleskey* expanded [§ 2244](#) to also preclude a person from raising a new claim in a subsequent habeas petition that he could have raised in his first habeas petition:

Our most recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice.

[McCleskey](#), 499 U.S. at 489.

In relevant part, section [§ 2244\(a\)](#) now provides:

No Circuit or district judge shall be required to

entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for writ of habeas corpus, except as provided in section [§ 2255](#).

Hart v. Warden, FCI Schuylkill, Civ. Docket No. 3:09–CV–0192 (M.D. Pa. April 30, 2009) (Conaboy, J.); [Jennings v. BOP](#), 2009 WL 1181221, *3 (M.D.Pa.).

In his third [§ 2254](#) habeas petition, Civil No. 12–1315, Petitioner again challenges his March 1996 conviction for first degree murder and criminal conspiracy and, his sentence of life imprisonment. Petitioner again claims ineffective assistance of counsel: (1) “First Post–Conviction–Counsel rendered ineffective assistance according to the United States Constitution”; (2) “Trial–Counsel rendered ineffective assistance according to the United States Constitution”; (3) The Petitioner has the right to effective attorney”; and (3) “The confrontation clause in the United States Constitution was violated in trial-court.” (Doc. 6).

Petitioner does not offer any new evidence for the court to consider in his third habeas petition. (Doc. 1, 6). Furthermore, Petitioner does not offer any explanation as to why his habeas petition was not filed within the time allowed by the District Court in his first habeas Petition, Civil No. 00–0163. (*Id.*). Instead, Petitioner now contends in his Memorandum (Doc. 7) that the case of [Martinez v. Ryan](#), — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), allows him habeas relief for his procedurally defaulted claim by showing cause for the default and prejudice and a violation of federal law. We disagree with Petitioner and agree with Respondent that Petitioner's reliance on *Martinez v. Ryan* is misplaced. (Doc. 9, p. 4).

*9 In *Boyd v. Rozum*,, the Court articulated:

[I]n *Martinez*, the United States Supreme Court held

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that inadequate assistance by PCRA counsel may establish “cause” for a procedural default if the PCRA counsel was ineffective under the standards enunciated in the oft-cited *Strickland* case. [Strickland v. Washington](#), 466 U.S. 668, 104 S.Ct., 2052, 80 L.Ed.2d 674 (1983). However, this is only applicable to situations where PCRA counsel failed to raise issues of trial counsel's alleged ineffectiveness, and thereby procedurally defaulted the claims on federal habeas review.

[2012 WL 3595301 *2 \(W.D.Pa. August 21, 2012\)](#).

Furthermore, In *Vogt v. Coleman*, the Court stated:

Martinez did not provide that post-conviction counsel's ineffectiveness could establish an exception to or equitable tolling of AEDPA's one-year statute of limitations for filing a federal habeas corpus petition.

[2012 WL 2930871 *4 \(W.D.Pa. July 18, 2012\)](#)
(citations omitted).

Respondent also cites to *Vogt v. Coleman* for the proposition that *Martinez* is not a proper basis to reopen a habeas petition” and Respondent states that *Martinez* was not held to be retroactive to cases on collateral review. (Doc. 9, p. 4). We agree with the Court in *Vogt v. Coleman* and find that *Martinez* is not a basis to allow Petitioner Gale to proceed with his third habeas petition. As the Court pointed out in the recent case of *Vogt v. Coleman*, Petitioner Vogt's motion with the Third Circuit to file a second or successive habeas petition, under [§ 2244\(b\)](#), based on the *Martinez* case was denied on May 31, 2012. *Id.*, *2. The Court in *Vogt v. Coleman*, agreed with the Fifth Circuit Court of Appeals in [Adams v. Thaler](#), 679 F.3d 312 (5th Cir.2012), that “the *Martinez* decision is simply a change in decisional law and is ‘not the kind of extraordinary circumstance that warrants relief under Rule 60(b)(6)’....” The Court in *Vogt v. Coleman* cited to other district courts which have held consistent with the *Adams v. Thaler* case, and concluded that

“*Martinez* does not support a finding of extraordinary circumstances.” *Id.*, *4. We agree with this conclusion of the *Vogt v. Coleman* Court.

We also find as the Court in *Vogt v. Coleman* found, that “there is nothing in *Martinez* that amounts to a change in the law that is applicable to Petitioner's [Vogt's] situation” since “[t]he Court's consideration of Petitioner's [Vogt's] habeas petition was limited to the threshold issue of timeliness.” *Id.* The Court in *Vogt v. Coleman* stated as follows:

Martinez held that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.” [Martinez](#), 132 S.Ct. at 1315. *Martinez* qualified the Supreme Court's holding in [Coleman v. Thompson](#), 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) and recognized a “narrow exception” to what was settled law that post-conviction counsel's ineffectiveness was irrelevant to establishing cause for procedural default. However, *Martinez* did not provide that post-conviction counsel's ineffectiveness could establish an exception to or equitable tolling of AEDPA's one-year statute of limitations for filing a federal habeas corpus petition. See [Kingsberry v. Maryland](#), No. AW12-1556, 2012 U.S. Dist. LEXIS 77746, at *2-3, 2012 WL 2031991 (D.Md. June 4, 2012) (“*Martinez* did not address equitable tolling in the context of ineffective assistance of counsel”); [Heard v. Hobbs](#), No. 5:12CV00091, 2012 U.S. Dist. LEXIS 68344, at *1-2 (E.D.Ark. May 16, 2012) (citing court's ruling in petitioner's related case finding that “the holding in *Martinez* in no way relates to timeliness of a federal habeas petition”); [Heard v. Hobbs](#), No. 5:11 CV000218, 2012 U.S. Dist. LEXIS 67541, at * 1-2 (E.D.Ark. May 15, 2012) (same). As such, *Martinez* provides no relief to Petitioner.

*10 *Id.*

In our case, Petitioner Gale's counsel raised issues of

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ineffective assistance of counsel claims in the Petitioner's first PCRA Petition which were denied by the CCP on September 15, 1998. (*See* 3:06–CV–1266, M.D. Pa., Doc. 5). Petitioner has not offered any explanation as to why he did not timely file his first § 2254 habeas petition within the time allowed by this Court. Moreover, this Court has already dismissed Petitioner Gale's second habeas petition and found that his AEDPA statute of limitations was expired. (*Id.*). This Court further found that because the Petitioner second habeas petition was a successive filing, it had to be analyzed under the guidelines of [28 U.S.C.A. § 2244\(b\)\(2\)](#). (*Id.*). The second petition was filed on June 26, 2006, which clearly was not within the Court's 2000 timetable. (*Id.*). This Court analyzed whether or not Petitioner's reliance on the miscarriage of justice exception to § 2254(b)(1)(A) in his second habeas petition was warranted and ultimately dismissed Petitioner's habeas petition. (*Id.*). Further, as mentioned, on March 22, 2007, the Third Circuit issued an Order and denied Petitioner's request for a certificate of appealability stating that his second habeas petition was untimely filed and that Petitioner did not make a showing sufficient to warrant equitable tolling. (Doc. 13, Civil No. 06–1266 case). Petitioner's recourse was to file another [§ 2244](#) application with the Third Circuit Court. Petitioner simply filed the present habeas petition on August 13, 2012, Doc. 6, well beyond the AEDPA statute of limitations, and which is clearly a second or successive petition, without receiving required permission from the Third Circuit to do so.

We agree with Respondent that Petitioner fails to show that his instant claims fall within any of the statutory exceptions outlined above, and there is no indication that Petitioner was granted leave to file a second or successive petition by the United States Court of Appeals for the Third Circuit. Further, even if Petitioner Gale did file a motion with the Third Circuit to file a second or successive habeas petition, as indicated above, in the case of *Vogt v. Coleman*, Petitioner Vogt's motion with the Third Circuit to file a second or successive habeas petition, under [§ 2244\(b\)](#), based on the *Martinez* case was denied.

Therefore, we will recommend that the Court grant Respondent's Motion to Dismiss (Doc. 9) and dismiss Petitioner's instant § 2254 habeas petition as untimely, and as a second or successive petition because this Court lacks subject matter jurisdiction over it. *See Louder v. Coleman*, [2009 WL 4893193, *5](#). We will also recommend that the Court deny Petitioner's "Motion for Stay and Abeyance" (Doc. 1) as moot.

IV. Recommendation.

For the reasons set forth above, we respectfully recommend that the Court grant Respondent's Motion to Dismiss (**Doc.9**) and dismiss Petitioner Gale's third § 2254 Habeas Petition (**Doc.6**) as untimely and as a second or successive § 2254 petition. We further recommend that Petitioner's "Motion for Stay and Abeyance" be denied as moot. (**Doc.1**).
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