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United States District Court,

E.D. Pennsylvania.
Walter J. POSTLEY
v.
Gerald ROZUM, et al.
Civil Action No. 08–4479.

Dec. 30, 2009.
Walter J. Postley, Somerset, PA, pro se.

Ryan Dunlavey, Phila District Attorney, Philadelphia, PA, for Gerald Rozum, et al.

ORDER

TIMOTHY J. SAVAGE, District Judge.

***1 AND NOW,** this 30th day of December, 2009, upon consideration of the Petition for Writ of Habeas Corpus (Document No. 1), the Report and Recommendation filed by United States Magistrate Judge David R. Strawbridge and the petitioner's objections to the Report and Recommendation, and after a thorough and independent review of the record, it is **ORDERED** that:

1. The petitioner's objections are **OVERRULED;**

2. The Report and Recommendation of Magistrate Judge Strawbridge is **APPROVED** and **ADOPTED**[FN1]; and

> FN1. Magistrate Judge Strawbridge's report reflects a thorough review of the record and a thoughtful analysis of the issues raised. Accordingly, there is no need to amplify, except to consider a change in the procedural history that has occurred since the report was issued. At the time the Report and Recommendation was issued, the petitioner's second PCRA petition was still pending in the state court. However, on December 2, 2009, Judge Sheila Woods–Skipper denied petitioner's second PCRA petition as untimely.
>
> Petitioner objects to Magistrate Judge Strawbridge's conclusion that his petition was untimely. He argues that the habeas limitations period was tolled by the filing of his second PCRA petition. In *Pace v. DiGuglielmo,* 544 U.S. 408, 417, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005), the Supreme Court held that a state post-conviction petition rejected by the state court as untimely is not "properly filed" and does not toll the statute of limitations under 28 U.S.C. § 2244(d)(2). In *Pace,* the petitioner claimed that this ruling was unfair, because "a petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out ... that he has not properly filed, and thus that his federal habeas petition is time barred." *Pace,* 544 U.S. at 416 (internal quotation marks omitted). The Supreme Court explained that this situation can be avoided "by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Id.* at 416. See *Rhines v. Weber,* 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). However, this device can only operate to toll the limitations period if the petition was filed within the applicable time period. In this case, petitioner did not file his habeas petition within that period. Because the state court determined that petitioner's second PCRA petition was untimely, the statute of limitations under § 2244(d)(2) was not tolled.

3. The petition for writ of habeas corpus is **DENIED.**

4. There is no probable cause to issue a certificate of appealability.

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE, United States Magistrate Judge.

Before the Court for Report and Recommendation is the *pro se* petition of Walter J. Postley ("Postley" or "Petitioner") for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated at the State Correctional Institution in Somerset, Pennsylvania serving a sentence that arises out of a prosecution in Philadelphia County. [FN1] In his petition, he claims he received ineffective assistance of counsel; that the Commonwealth failed to meet its burden of proof; and that the trial court erred with respect to the jury instructions and what he contends was inaccurate information included in a trial court opinion. In addition, he asserts error regarding the dismissal of his PCRA petition without a hearing. In light of the fact that a second PCRA petition is still pending in the state courts, he also asks that the Court stay further consideration of his habeas petition until the conclusion of that collateral state court process. For the reasons that follow, we find that his claims are untimely and that a stay is not warranted. We recommend that his request for a stay of proceedings be denied and that his petition be dismissed.

FN1. We note that while Petitioner is currently confined within the Western District of Pennsylvania, which includes Somerset County, *see* 28 U.S.C. § 118(c), venue is proper here in that his confinement grew out of a prosecution and conviction within the Eastern District of Pennsylvania. *See* 28 U.S.C. § 2241(d).

I. FACTUAL AND PROCEDURAL BACKGROUND[FN2]

FN2. In preparing this Report, we have considered Petitioner's form petition dated September 8, 2008 (Doc. No. 1) ("Pet."); Respondents' Answer to Petition for Habeas Relief, with appended exhibits, filed on April 6, 2009 (Doc. No. 7) ("Resp't Ans."); and Petitioner's Answer to Commonwealth's Response to Petition for Writ of Habeas Corpus submitted on June 2, 2009 (Doc. No. 10) ("Pet'r Reply"). We have also considered the parties' briefing with respect to the request for stay: Postley's Motion for a Stay of Proceedings (Doc. No. 11) ("Mot. for Stay"); Respondents' Response in Opposition to Petitioner's Motion for a Stay of Proceedings (Doc. No. 12); and Petitioner's Response in Opposition to Respondent's Response to Petitioner's Motion for a Stay of Proceedings (Doc. No. 17).

We have not had the benefit of the original and complete state court record, which is presently in the custody of the state courts pending disposition of Petitioner's second PCRA petition. However, we have concluded that the absence of the full state court record does not preclude the disposition of the present petition. The parties have provided us with copies of the Common Pleas Court and Superior Court opinions on both direct appeal and the first PCRA action, as well as the PCRA petition that Postley filed most recently that is still being adjudicated in the state court. In addition, we have reviewed the publicly-available docket sheet maintained by the Philadelphia Court of Common Pleas in No. CP–51–CR–0707461–1999, portions of which both parties also have appended to their various filings. *See* http://ujsportal.pacourts.us/DocketSheets/CPReport.aspx?matterID=103960623 (last visited Nov. 20, 2009).

Postley was tried in October 2000 before a jury in the Philadelphia Court of Common Pleas in connection with a 1998 double murder. The testimony at trial showed that Postley and two co-defendants charged in connection with the crime, Tiarike Hodges and Brandon Baker, drove together to a Philadelphia pizza parlor and that Hodges and Postley then entered with their guns loaded. Hodges shot one victim in the head, and Postley killed the other with two shots to the back. Both Baker and Hodges subsequently entered guilty pleas as to the charges brought against them and Baker testified against Postley when Postley alone was tried. On October 13, 2000, a jury found him guilty of first degree murder (as to the victim he shot), third degree murder (as to the victim Hodges shot), criminal conspiracy, and possession of an instrument of crime. The jury did not agree to impose the death penalty,

and Postley was sentenced to life imprisonment for the first-degree murder conviction. Following pre-sentence investigations, the trial court judge, the Honorable Jane Cutler Greenspan, sentenced him to a consecutive term of imprisonment of 10–30 years on the third-degree murder conviction, and concurrent terms of 10–20 years for conspiracy and 2–5 years for the PIC conviction. *Commonwealth v. Postley,* No. 0746 1/3 (Phila.Ct.Comm.Pl. Feb. 15, 2001) [Resp't Ans. at Ex. A].

***2** Postley appealed his conviction, raising a single claim concerning the substitution of a juror that had occurred during trial. The Superior Court affirmed the conviction, *Commonwealth v. Postley,* No. 261 EDA 2001, slip op. at 3, 803 A.2d 796 (Pa.Super.Ct. Apr. 16, 2002) [Resp't Ans. at Ex. B], and, on October 10, 2002, the Pennsylvania Supreme Court denied his request for *allocator. Commonwealth v. Postley,* No. 213 EAL 2002, 809 A.2d 903 (Pa.2002) (table).[FN3]

FN3. There is no suggestion in the record or the parties' submissions that Postley sought *certiorari* in the United States Supreme Court.

On or about March 17, 2003,[FN4] Petitioner filed a *pro se* application for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons.Stat. Ann. § 9541 *et seq.* Counsel was appointed and filed an amended PCRA petition,[FN5] asserting that trial counsel was ineffective in failing to object to allegedly improper comments by the prosecutor during closing argument. On December 29, 2003, after issuing a notice of its intention to dismiss the case without a hearing, the PCRA Court denied the petition on the merits. *Commonwealth v. Postley,* No. 07461/3 July Term 1999 (Phila.Ct.Comm.Pl. Dec. 29, 2003) (Greenspan, J.) [Resp't Ans. at Ex. C]. Postley waived his right to counsel and pursued an appeal *pro se.* The Superior Court affirmed the dismissal, *Commonwealth v. Postley,* 366 EDA 2004 (Pa.Super.Ct. May 15, 2007) [Resp't Ans. at Ex. D],[FN6] and the Pennsylvania Supreme Court again denied discretionary review. *Commonwealth v. Postley,* 320 EAL 2007, 932 A.2d 1287 (Pa. Oct. 3, 2007).

FN4. In referring to the filing date of a *pro se* PCRA petition, we would ordinarily look for evidence as to the date upon which the prisoner handed the petition to prison officials for mailing, which may be suggested by the date of postmark and/or the date of any signature on the petition. *See also Commonwealth v. Castro,* 766 A.2d 1283 (Pa.Super.Ct.2001) (applying the prisoner mailbox rule to PCRA petition by crediting the petitioner with having filed his petition on date of postmark). Without the benefit of the actual state court record, neither the petition itself nor the envelope in which it presumably was mailed are available to us.

The state court docket sheet lists the filing date as March 17, 2003, and the Superior Court referred to that date specifically as the filing date in its opinion disposing of the PCRA petition on appeal. *Commonwealth v. Postley,* 366 EDA 2004, slip. op. at 2 (Pa.Super.Ct. May 15, 2007). The parties in this litigation seem to have employed that date as well, without suggesting in any way that it is inaccurate. *See, e.g.,* Resp't Ans. at 4 (referring to filing date as March 17, 2003); Pet'r Reply at 2 (failing, in procedural history discussion, to indicate a filing date or to contest the characterization of his PCRA petition having been filed on March 17, 2003). Given that we ultimately conclude, as explained *infra,* that Postley's federal habeas petition is untimely by more than a month, we do not believe that any discrepancy by a few days in the filing of the PCRA petition, e.g., the difference between when Petitioner presumably handed his PCRA petition to prison officials for mailing and the date it reached its destination in the state court, is of any consequence.

FN5. The state court docket sheet does not reflect the filing of an amended petition, by counsel or anyone else. The opinion of Judge Greenspan (now Justice Greenspan) on behalf of the PCRA Court of December 29, 2003, however, refers to Attorney Sondra Rodriguez having filed an amended petition on July 31, 2003. *See* Resp't Ans. at Ex. C, p. 1.

FN6. The copy of the Superior Court opinion provided by Respondents as Exhibit D to their response to the petition is incomplete, presumably due to a clerical error. The final page included is clearly not the final page of the memorandum opinion, as it leaves off with "Following our review of the record, we agree with the above analysis by the trial court, and for the same reasons, find Postley's ineffectiveness". *See* Resp't Ans. at Ex. D (page 9 of 9). However, the opening paragraph of the memorandum opinion states conclusively, "We affirm.", and the reported decision in the table at 929 A.2d 245 confirms that the disposition was the affirmance of the lower court's dismissal of the petition. Therefore, the fact that the copy of the opinion that was presented to us was incomplete does not impede our review of this matter.

On or about December 3, 2007,[FN7] Petitioner filed a second *pro se* PCRA petition. In that petition, Postley sought to raise 13 claims.[FN8] (Doc. No. 12, Resp't Ex. E.) According to the state court docket, that second PCRA petition was assigned to Judge Greenspan and was in "initial review status" on May 14, 2008. *See* http://ujsportal.pa courts.us/DocketSheets/CPReport.aspx?matterID=103960623 (last visited Nov. 20, 2009). The docket does not reflect any further activity until August 14, 2009, when the Honorable Sheila Woods–Skipper apparently filed a notice of her intention to dismiss the petition pursuant to Rule 907 of the Pennsylvania Rules of Criminal Procedure . [FN9] *See id.* Postley filed his response to that notice on September 3, 2009. *See id.* As confirmed by the docket, then, Petitioner's second PCRA petition is still pending in the state court.

FN7. This is the date on the state court docket sheet and the date stamped on the copy of the petition that the Respondents have provided. *See* Doc. No. 12, at Resp't Ex. E ("DISTRICT ATTORNEY'S COPY" of form stamped "RECEIVED DEC 03 2007 PCRA UNIT"). The petition form does not provide a place for the petitioner to indicate either the date upon which he executed it or the date upon which he handed the petition to prison officials for mailing. Ultimately, the precise date of this filing is of no consequence.

FN8. One claim repeated the single claim asserted in the prior PCRA action: that counsel was ineffective for not objecting to the prosecutor's closing statements. *See* PCRA Pet. at p. 3a, Issue No. 5. Postley did not seek to raise in the second PCRA petition the claim litigated on direct appeal concerning the propriety of the trial court's substitution of a particular juror.

FN9. We take judicial notice of the fact that Judge Woods–Skipper is the supervising judge of the trial court criminal division of the First Judicial District and that Judge Greenspan left the bench of the Philadelphia Court of Common Pleas due to an appointment as a justice of the Pennsylvania Supreme Court in July 2008.

On or about September 8, 2008, approximately nine months after filing his second PCRA petition, Petitioner filed the present *pro se* petition for writ of habeas corpus.[FN10] Petitioner raises five "issues" [FN11] in his habeas petition: (1) ineffective assistance of counsel relating to trial counsel's failure "to raise the issue of conflicting testimony by the Commonwealth[']s witness"; (2) trial court error due to the trial court having "giv[en] its opinion of first and third degree homicide"; (3) a failure by the Commonwealth "to establish a prima facia [sic] case against the petitioner," apparently particularly with respect to conspiracy but also as to "fir[ing] any weapon or committ[ing] any crime"; (4) trial court error in its opinion on direct appeal, in which Judge Greenspan allegedly "stipulated to inaccurate information that was not provided or testified to at trial"; and (5) trial court error in dismissing the first PCRA petition without a hearing in which Postley would have had the opportunity to present evidence of and preserve the record as to trial counsel's ineffectiveness. (Pet. at 9–9a.) [FN12]

FN10. Although the petition was docketed on September 15, 2008, the federal court deems a *pro se* petitioner's habeas petition filed at the moment he delivers it to prison authorities for

mailing. *See Burns v. Morton,* 134 F.3d 109, 113 (3d Cir.1998) (citing *Houston v. Lack,* 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)). Petitioner dated the habeas petition September 8, 2008, and we will assume for purposes of this Report that he presented it to prison authorities on that date.

FN11. For reasons not apparent to us, Postley obliterated that standard language of the habeas form petition, replacing the phrases "Ground one," "Ground two," etc. with "Issue One," "Issue Two," etc. *See* Pet. at 9–10. In addition, he amalgamates several claims in each "issue," for example, alleging the denial of the effective assistance of counsel at all stages but only providing information on a failure by trial counsel to have taken a particular action. *See, e.g.,* Pet. at 9.

FN12. As to two of the "issues," Postley does not provide supporting facts as requested in the form but instead asks us to "[r]efer to memorandum of law." (Pet. at 9.) He did not, however, provide a memorandum of law with his petition, nor has he filed one subsequently or sought leave to file one prior to our preparation of this Report. *See also* Resp't Ans. at 1, n. 1 (noting that "Petitioner has not filed a memorandum of law explaining his claims" and citing that as one reason, along with the untimeliness of his petition, for Respondents' reservation of argument on the procedural propriety and merits of his claims); Pet'r Reply at 4 (suggesting that he "will file a Memorandum, when the Commonwealth files a proper answer" instead of "stalling").

***3** In their answer filed on April 6, 2009, Respondents contend that Postley's petition is untimely and must be dismissed. *See* Resp't Ans. at 1–6. On June 2, 2009, Petitioner filed a response, pointing out an error Respondents made regarding the date of a particular filing and generally asserting that his habeas petition was timely because his second PCRA petition was still pending in state court and was tolling the statute of limitations. *See* Pet'r Reply at 4. In addition, Postley filed a separate motion to stay proceedings and has asked the Court to hold his federal habeas petition in abeyance while he seeks to exhaust any state court relief that may be available to him through the pending second PCRA petition.[FN13] Respondents oppose his motion, contending that Petitioner has not alleged sufficient facts to satisfy the requirements for a stay. They also contend that a stay would be futile because no further relief is available to him under the PCRA and due to the untimeliness of his habeas petition. (Doc. No. 12.) Petitioner responded to Respondents' filing on November 9, 2009, asserting that a stay is appropriate because his petition is timely and because he is properly pursuing PCRA claims in state court. The matter is ripe for review.

FN13. Petitioner does not describe how the pending second PCRA petition relates to the present habeas petition in terms of an overlap of claims. However, our review of the list of issues appended to his second PCRA petition reveals some commonality. *Compare* PCRA Pet. Issue # 13 *with* Hab. Pet. Issue One; PCRA Pet. Issue # 4 *with* Hab. Pet. Issue Two; PCRA Pet. Issue # 6 *with* Hab. Pet. Issue Three; PCRA Pet. Issue # 11 *with* Hab. Pet. Issue Four; PCRA Pet. Issue # 12 *with* Hab. Pet. Issue Five.

II. DISCUSSION

We first consider Postley's request for a stay of proceedings in that his request, if granted, would not permit our further evaluation of his petition until such time as he had finished exhausting any available state court remedies for those claims raised in his pending PCRA petition. We then proceed to address the challenge made by Respondents to the timeliness of Postley's habeas petition.

A. Request for stay

In *Rhines v. Weber,* 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), the Supreme Court determined that a district court need not dismiss a petition that it determines contains both exhausted and unexhausted claims. The Court approved of a "stay and abey" procedure available in "limited circumstances," specifically, where there is "good cause for the petitioner's failure to exhaust his claims first in the state court." 544

U.S. at 277. *Rhines* thus permits a federal court to stay disposition as to exhausted claims contained in the habeas petition and hold it in abeyance while the petitioner completes the exhaustion process. Once the petitioner fully exhausts his claims, the district court may then lift the stay and review the petition in its entirety. *Id.* at 277–78.[FN14]

FN14. As Respondents note in passing, *see* Doc. 12 at 6, *Rhines* was decided in the case of a "mixed petition," that is, one containing both exhausted and unexhausted claims. *See Rose v. Lundy,* 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (describing "mixed" petitions). In a subsequent decision, *Pace v. DiGuglielmo,* 544 U.S. 408, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005), which did *not* involve a mixed petition but rather a petition found to be untimely, the Court discussed in dicta the manner in which the stay and abey procedure might be employed to avoid harsh results preventing federal habeas review. *See Pace,* 544 U.S. at 416. The Court of Appeals for the Third Circuit recently interpreted *Pace* as sanctioning the use of the stay and abey procedure in a context outside that of mixed petitions. In *Heleva v. Brooks,* 581 F.3d 187 (3d Cir.2009), the court held that the district court erred in assuming that the stay and abey procedure would not be available to a petition consisting of only unexhausted claims, e.g., a petition that was not "mixed." *Heleva,* 581 F.3d at 191–92. The dissent objected that the majority's holding employed dicta from *Pace* to overrule, *sub silentio,* the 1982 *Rose v. Lundy* decision that had required dismissal of petitions containing only unexhausted claims, expressing doubt that this would have been the Supreme Court's intention in *Pace. See id.* at 193–97 (Chagares, J., dissenting).

> Postley's federal petition is not "mixed," as it contains no claims yet presented to the Superior Court but rather contains claims only presented thus far to the PCRA Court in his second PCRA petition. *See* note 13, *supra.* As Respondents have not challenged the availability of a *Rhines* stay on this basis, however, and given that we agree with Respondents that there are other bases upon which to deny the requested stay regardless of whether "stay and abey" is available for a petition containing only unexhausted claims, we need not assess how *Heleva* might apply in the circumstances of this case.

In his papers requesting a stay, Postley fails to cite any authority in support of his request or to even acknowledge the standard he must meet to be given a stay. *See* Doc. Nos. 11, 17. He argues only that a stay "is the appropriate action to permit [him] to pursue and exhaust these claims in the state court, and to permit him to return to this court for habeas review." (Doc. No. 17 at 3.) We agree with Respondents that a stay is inappropriate in this case in that Postley has not established good cause justifying his failure to have presented his five unexhausted claims either on direct appeal or in his first PCRA petition.[FN15] As previously explained, on direct appeal, he raised only a claim as to the substitution of a juror. He could have, but did not, raise an issue as to: the trial court allegedly having "erred when it instructed the jury by giving its opinion of first and third degree homicide" (Pet. at 9, "Issue Two"); the Commonwealth allegedly having "failed to establish a prima facia [sic] case against the petitioner" (*id.,* "Issue Three"); or the trial court allegedly having "erred in [its] opinion on direct appeal" by "stipulat[ing] to inaccurate information that was not provided or testified to at trial" (*id.,* "Issue Four"). In his first PCRA petition, he raised only an issue as to the alleged ineffectiveness of trial counsel for failure to have objected to allegedly improper comments made by the prosecutor during the trial's closing arguments.[FN16] He could have, but did not, assert that trial counsel was ineffective for "fail[ing] to raise the issue of conflicting testimony by the Commonwealth[']s witness," (Pet. at 9, "Issue One"), nor did he raise the issues concerning the trial court or prosecutor's actions.[FN17] *Commonwealth v. Postley,* No. 366 EDA 2004 at 2 n. 3 (Pa.Super.Ct. May 15, 2007).

FN15. Put more precisely, perhaps, we would speak of "four" claims that could have been presented earlier. The fifth claim raised in

Postley's habeas petition does not state a cognizable claim for federal habeas corpus relief, as it reflects only Petitioner's complaint that the PCRA Court should not have dismissed his first PCRA petition without first holding an evidentiary hearing. Obviously such a claim could not have been presented on direct appeal or in the first PCRA action itself. However, neither is it a claim upon which this Court may grant habeas relief. *See* 28 U.S .C. § 2254(a) (making habeas relief available "only on the ground that [the petitioner] is in custody in violation of the Constiutiton or laws or treaties of the United States"). Postley's current incarceration is not the result of a defect in the PCRA process, nor does the PCRA process set forth at 42 Pa. Cons.Stat. § 9541 *et seq.* create any due process right in Postley to an evidentiary hearing. *See, e.g., Commonwealth v. Barbosa,* 819 A.2d 81, 85 (Pa.Super.Ct.2003) (observing that right to evidentiary hearing is not absolute and that no hearing is necessary if PCRA Court can determine from the record that no genuine issues of material fact exist); Pa. R.Crim. Proc. 907(1) (providing that court may give notice of intent to dismiss if it determines from the papers that "no purpose would be served by any further proceedings").

FN16. As stated above, Postley initiated that PCRA action *pro se,* but counsel was appointed and apparently filed an amended petition. *See Commonwealth v. Postley,* No. 07461/3, July Term 1999, at 1 (Phila.Ct.Comm.Pl. Dec. 29, 2003). Judge Greenspan's opinion resolving the first PCRA petition did not describe the claim(s) set forth in the original *pro se* petition filed in March 2003. She did, however, identify this ineffectiveness claim as having been made by appointed counsel in the amended PCRA petition that she filed on July 31, 2003. *Id.*

> While we do not have before us a copy of Petitioner's *pro se* petition, we accept his characterization, in the filings that he submitted directly to this Court, that the only ground for relief raised in the first PCRA action was the ineffectiveness claim as to trial/appeal counsel for failure to have challenged the propriety of the prosecutor's closing argument. *See* Pet. at 5–6, ¶ 11(a). To the extent that Postley now claims that PCRA counsel was ineffective in not raising certain issues on PCRA review, we see no evidence that counsel in any way prevented Petitioner from raising these claims if he believed them to have merit or even that counsel was advised that Petitioner wished to bring those claims as part of his PCRA petition.

FN17. It appears that Postley did seek to raise additional claims that may correspond with Issues Two and Three of his federal habeas petition as part of the PCRA appeals process. The Superior Court's memorandum opinion resolving Postley's PCRA appeal refers to two additional arguments that Postley sought to make, apparently in his brief to the Superior Court: that "the trial court abused its discretion by failing to properly instruct the jury, and that the verdict was against the weight of the evidence[.]" *Commonwealth v. Postley,* No. 366 EDA 2004 at 2 n. 3 (Pa.Super.Ct. May 15, 2007). It is possible that these issues relate to "Issue Two" of the federal habeas petition, concerning trial court error in the jury instructions "by giving its opinion of first and third degree homicide" (Pet. at 9), and "Issue Three," concerning the alleged failure by the Commonwealth "to establish a prima facia [sic] case against the petitioner." (*Id.*) The Superior Court, however, found those claims to be waived both because they were not included in the PCRA petition and because Postley did not raise them on direct appeal when they could have been raised. *See Postley,* No. 366 EDA 2004 at 2 n. 3 (citing *Commonwealth v. Lambert,* 568 Pa. 346, 797 A.2d 232, 240–41 (Pa.2001), and waiver provision of PCRA, 42 Pa. Cons.Stat. § 9544(b)).

***4** Within the second, pending PCRA petition are the

two claims that were not considered by the Superior Court on the earlier PCRA review, as well as the two other substantive issues upon which Postley also seeks federal habeas relief and a variety of other claims. Postley has not suggested in any way that any of these claims are based upon newlydiscovered evidence or a change in applicable law, and they do not appear to be. Instead, the only apparent excuse for the failure to have properly raised these claims in the first PCRA action is that his appointed PCRA counsel failed to raise them. *See, e.g.,* Second PCRA Pet., Doc. No. 12, Resp't Ex. E at p. 3a, "Issues to be Raised on PCRA Petition," ¶ 9 ("PCRA counsel was ineffective for not arguing the Petitioner [']s claims in his first PCRA, or in an amended petition."); *id.* ¶ 10 ("PCRA counsel was ineffective on Petitioner[']s appeal from de[n]ial of Petitioner [']s PCRA, by not arguing issues that Petitioner wished to have raised on his PCRA petition.").[FN18] The implication of his contentions is that PCRA counsel's failure to have raised these claims in the first PCRA action constitutes sufficient cause, under *Rhines,* for having failed to exhaust these claims before initiating his federal habeas petition.

> FN18. *But see Commonwealth v. Postley,* No. 366 EDA 2004, slip op. at 2 (Pa.Super.Ct. May 15, 2007) (noting that counsel filed an appellate brief on behalf of Postley following dismissal of his PCRA petition but that he subsequently sought permission to proceed *pro se* and, after a *Grazier* hearing, pursued his appeal without the interference of counsel).

We disagree that the circumstances here would constitute good cause to satisfy the *Rhines* standard. Petitioner has presented no evidence that he even directed PCRA counsel to raise these claims such that the failure to have presented the claims may be laid solely at counsel's feet—assuming this could even satisfy the "good cause" requirement. *See* Second PCRA Pet., Doc. No. 12, Resp't Ex. E, at p. 3a, ¶ 10 (indicating that these were issues that Petitioner "wished to have raised on his PCRA petition" but providing no allegation or corroboration of any conveyance of that wish to counsel prior to the submission of the amended petition in July 2003). The same is true as to the claims that could have been brought prior to the PCRA action, on direct appeal. Moreover, unlike the circumstances of the first PCRA action, in which Postley sought to waive counsel and proceed *pro se* on appeal to the Superior Court, there is no evidence that Postley was ever dissatisfied with the performance of his trial counsel in the direct appeal or that he felt that counsel was not being responsive to his requests to preserve certain issues. Petitioner cannot avoid all responsibility for the issues that were or were not presented to the courts in the various stages of direct appeal and PCRA review.

We have no concern that resolving the "good cause" question against Petitioner here would amount to "trap[ping] the unwary *pro se* prisoner," *Rhines,* 544 U.S. at 279 (Stevens, J., concurring), or that it will otherwise lead to an unjust result. The circumstances of events here do not warrant use of the stay and abey procedure.[FN19] Moreover, separate from the issue of good cause under *Rhines,* this case does not present the district court with the sort of situation *Rhines* sought to remedy. The purpose of *Rhines* is to prevent an otherwise unexhausted and reviewable claim from being barred from federal review. There are no such concerns here because the claims Petitioner has raised in his second, pending PCRA petition do not appear to be reviewable under the AEDPA both because they are already untimely, as discussed further *infra,* and because they were also procedurally defaulted in the state court. The PCRA provides that "[a]ny petition filed under this subchapter ... shall be filed within one year of the date the judgment becomes final." 42 Pa. Cons.Stat. § 9545(b). As Petitioner's judgment became final 90 days after the October 10, 2002 denial of his petition for allowance of appeal in the Pennsylvania Supreme Court on direct appeal—that is, on January 8, 2003—Petitioner had only until January 8, 2004 to seek collateral relief under the statute on this issue. The Pennsylvania Supreme Court has stated that the PCRA's one-year statute of limitations acts as a jurisdictional bar and is not subject to equitable tolling. *Commonwealth v. Fahy,* 558 Pa. 313, 737 A.2d 214, 222 (Pa.1999). In addition, the PCRA limitations period is not tolled during the pendency of a PCRA petition.[FN20] Accordingly, the pending PCRA petition, filed on or about December 3, 2007, appears unquestionably untimely, which in turn renders the claims asserted there procedurally defaulted for purposes of federal habeas review. *See Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)

(providing that claim is not reviewable in federal court if review on the merits by the state court was barred by an independent and adequate state procedural rule).[FN21]

FN19. We recognize that Petitioner apparently did attempt at some point during the PCRA appeal process, e.g., after the PCRA Court dismissed his petition on December 29, 2003, to bring these claims to the attention of the Superior Court. This bypass of the lower court was not permitted. *See Commonwealth v. Postley,* No 366 EDA 2004, slip op. at 2 n. 3 (Pa.Super.Ct. May 15, 2007) (citing *Commonwealth v. Lambert,* 568 Pa. 346, 797 A.2d 232, 240–41 (Pa.2001) for the proposition that claims not included in the PCRA petition are waived). *See also* Pa. R.A.P. 302(a) ("Issues not raised before the lower court are waived and cannot be raised for the first time on appeal."). Petitioner also points out that he could not bring these issues before the state court in a second PCRA petition until the adjudication of his first PCRA petition was concluded. *See* Doc. No. 17 at 2 (citing *Commonwealth v. Lark,* 560 Pa. 487, 746 A.2d 585, 588 (Pa.2000), for the proposition that "a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition"). These circumstances, however, do not establish good cause for the failure to have properly presented the claims to the state court in the review of the initial PCRA petition. He has not offered any reason to believe he was unaware, beginning in July 2003, of the identity of the issues that his attorney was in fact pursuing in the first PCRA petition and that he was somehow prevented from including in the initial PCRA review process consideration of these additional claims.

FN20. The PCRA provides three exceptions to the statute of limitations. *See* 42 Pa. Cons.Stat. § 9545(b)(1)(i)-(iii). There is no evidence that any of them would apply here. Specifically, the failure to raise the claims previously was not the result of government interference; the facts upon which the claims are predicated were not unknown to Petitioner; and the claims do not implicate new law. *See id. See also id.* § 9545(b)(4) (clarifying that the term "government interference" "shall not include defense counsel, whether appointed or retained"). Neither Postley's PCRA petition submitted to the state court in December 2007 nor his filings with this Court suggest that these claims could not have been discovered with the exercise of due diligence and litigated earlier, and we see no indication of any government interference preventing him from having litigated all of these claims properly before the PCRA court.

FN21. Petitioner has not raised facts that would establish the cause and prejudice or fundamental miscarriage of justice exceptions to the procedural default rule here. *See Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). To the extent that he contends that claims were not properly presented to the state court due to the error of PCRA counsel, those contentions have simply not been sufficiently supported or corroborated with any documentation as to merit consideration for the "cause" component. While the Supreme Court has recognized that "in certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice" to establish cause, *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000), those circumstances are not present here. "Not just any deficiency in counsel's performance will do ...; the assistance must have been so ineffective as to violate the Federal Constitution." *Id.* The bare assertions that Postley makes in his second PCRA petition that PCRA counsel was "ineffective" in not "arguing" these claims simply fail to meet this high threshold.

***5** For the preceding reasons, we conclude that Postley is not entitled to the stay and abey procedure provided by *Rhines* and that the claims asserted in his federal petition are unreviewable as procedurally defaulted claims.

B. Timeliness of Postley's Habeas Petition

Alternatively, and for the reasons set forth below, we also conclude that Postley's habeas petition is untimely, providing a further rationale for denying his request for a stay of proceedings and requiring that the matter be dismissed with prejudice.

1. Commencement of the limitation period

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one-year period of limitations for filing of an application of a writ of habeas corpus. The statute now provides:

> A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period 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;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the application was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> 28 U.S.C. § 2244(d)(1).

We first consider the date provided by Section 2244(d)(1)(A). As described above, the Pennsylvania Supreme Court denied Postley's petition for allowance of appeal on October 10, 2002. He was then allowed a 90–day period in which he could petition the United States Supreme Court to review his case, *see* U.S. Sup.Ct. Rule 13, but he did not avail himself of that option. (Pet. at 5, ¶ 9(f).) As a result of his failure to seek certiorari, Postley's conviction became final upon the expiration of that period. Section 2244(d)(1) (A) thus dictates the limitations period start date of January 8, 2003.[FN22]

> FN22. Postley does not contend that any of the other subsections of Section 2244(d)(1) are applicable to his petition. Rather, the basis for his assertion of timeliness concerns his calculation of the statutory tolling to which he believes he is entitled. *See* Pet'r Reply at 4 ("Therefore, the statute of limitations is still tolling, and further, this Habeas Corpus Petition is timely."). We discuss that issue further, *infra.*

2. Statutory tolling

We next examine Postley's petition to determine whether he is statutorily entitled to the benefit of tolling the AEDPA limitations period and for what length of time. Section 2244(d)(2) authorizes tolling of the limitations period for the period of 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." 28 U.S.C. § 2244(d)(2). Postley initiated a PCRA action on or about March 17, 2003,[FN23] which tolled the limitations period until October 3, 2007, the date upon which the Pennsylvania Supreme Court denied allocator and thereby ended the pendency of "state post-conviction or other collateral review" of that petition. *See also Lawrence v. Florida,* 549 U.S. 327, 331–36, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (confirming that statutory tolling ends when state court review of post-conviction proceeding is complete; period of time to seek *certiorari* on post-conviction proceeding would not toll limitations period). Postley had already used 68 days of his limitations period prior to the filing of his PCRA petition, thereby leaving him 297 days from October 4, 2007, or until July 27, 2008, to file his federal petition. He did not do so until September 8, 2008.

> FN23. See note 4, *supra,* for a discussion regarding the date on which Postley initiated his first PCRA action.

***6** Postley apparently believes that the timeliness of

his federal petition is secure because he has a second PCRA petition that has been pending since December 2007. That petition, however, appears untimely under the state PCRA provisions concerning the state time bar, as discussed above. Therefore, it cannot have any effect on the limitations questions presented by the federal habeas petition. *See* *Pace v. DiGuglielmo,* 544 U.S. 408, 414, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (holding that a PCRA petition that is untimely is not "properly filed" for purposes of the tolling provision in 28 U.S.C. § 2244(d)(2)). Postley's filing of an untimely PCRA petition did not toll the statute of limitations for the filing of his habeas petition. The limitations period expired on July 27, 2008. It is clear, therefore, that his petition is untimely absent a valid claim that concerns of equity require that the limitations period be tolled.

3. Equitable tolling

The Supreme Court has not squarely addressed the question as to whether equitable tolling is applicable to the AEDPA statute of limitations. *See* *Pace v. DiGuglielmo,* 544 U.S. 408, 418 n. 8, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (noting same). It has noted, however, that, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Id.* at 418. The Court suggested that it would not extend equitable tolling in a case where the petitioner "s[a]t on his rights for years before he filed his PCRA petition" or where "he also sat on them for five more months after his PCRA proceedings became final before deciding to seek relief in federal court." *Id.* With respect to what might satisfy the "extraordinary circumstance" component, we note that the Third Circuit has identified four narrow circumstances in which equitable tolling may be proper: (1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum; or (4) if the claimant received inadequate notice of his right to file suit, a motion for appointment of counsel is pending, or where the court has misled him into believing that he had done everything required of him. *Jones v. Morton,* 195 F.3d 153, 159 (3d Cir.1998).

Postley has alleged no facts, nor do any appear to be available to him, that would present any one of these situations to constitute an extraordinary circumstance. He has offered no evidence that he was misled about the limitations period or prevented from filing in federal court prior to July 27, 2008 when the limitations period expired. We cannot accept that he timely asserted his federal rights mistakenly in the wrong forum when he filed his December 2007 PCRA petition, as we think the distinction between the forums is quite clear.[FN24] We conclude that Postley cannot claim the benefit of any period of equitable tolling of the AEDPA limitations period. Therefore, he is subject to the statutory provision and his petition must be considered to be untimely.

FN24. There is no evidence that Petitioner simply mailed his papers to the wrong court. Rather, he appears to have submitted a petition on the standard Pennsylvania PCRA petition form to the state court; and he submitted his habeas petition to this Court on the Court's standard form for review of a state court conviction.

III. CONCLUSION

***7** Petitioner's request for a stay of his federal habeas petition cannot be granted because he has failed to show the requisite good cause as to why he did not exhaust his unexhausted claims before proceeding to federal court. In addition, the petition in its entirety is untimely because it was filed more than a month after the expiration of the limitations period. The Court is thus precluded from granting any relief on the petition pursuant to 28 U.S.C. § 2244(d)(1).

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a certificate of appealability ("COA") should issue. Under 28 U.S.C. § 2253(c), a habeas court may not issue a COA unless "the applicant has made a substantial showing of the denial of a constitutional right." When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, a COA may not issue unless the prisoner demonstrates that jurists of reason

would find debatable both: (1) whether the petition states a valid claim for the denial of a constitutional right; and (2) whether the district court's procedural ruling was correct. *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

We do not believe a reasonable jurist would conclude that the Court would be incorrect in dismissing Postley's petition with prejudice. Accordingly, a COA should not issue.

Therefore, we make the following:

RECOMMENDATION

AND NOW, this 27th day of November, 2009, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be dismissed and that Petitioner's request to stay his petition be denied. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. E.D.Pa.,2009.

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Not Reported in F.Supp.2d, 2009 WL 5217074 (E.D.Pa.)
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