

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

GEORGE F. ELY,)	
)	Civil Action No. 2: 17-cv-0893
Petitioner,)	
)	United States District Judge
v.)	Nora Barry Fischer
)	
KAREN PSZCZOLKOWSKI, Warden;)	
THE ATTORNEY GENERAL OF THE)	
STATE OF PENNSYLVANIA; and the)	
DISTRICT ATTORNEY OF)	
WASHINGTON COUNTY,)	
PENNSYLVANIA,)	
)	
Respondents.)	

MEMORANDUM ORDER

Petitioner, George Ely, a state prisoner, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 4). The case was referred to United States Magistrate Judge Cynthia Reed Eddy for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and the Local Rules of Court for Magistrate Judges.

The magistrate judge filed a Report and Recommendation on February 20, 2018 (ECF No. 24) recommending that the Petition for Writ of Habeas Corpus be dismissed because the petition is a second or successive petition and Petitioner had not received an order as required by 28 U.S.C. § 2244(b)(3)(A) from the United States Court of Appeals for the Third Circuit authorizing this Court to consider the Petition. Further, the Report and Recommendation recommended that a certificate of appealability be denied.

Petitioner was advised that written objections to the Report and Recommendation were due by March 9, 2018. On March 8, 2018,¹ the Court received a filing from Petitioner in which he states that he wishes to withdraw his Petition because he acknowledges that the Court does not have jurisdiction and seeks assistance “with the necessary application to apply through the Third Circuit Court of Appeals.” (ECF No. 25).

After *de novo* review of the Petition and documents in the case, together with the Report and Recommendation, and the filing by Petitioner in response to the Report and Recommendation, the Court, as explained below, declines to adopt the Report and Recommendation insofar as it recommends that the Petition be dismissed; rather the Court will transfer the Petition to the United States Court of Appeals for the Third Circuit. However, the Court will adopt the Magistrate Judge’s Report and Recommendation in all other respects.

Petitioner, through his recent filing, acknowledges that he was required to obtain authorization from the Court of Appeals pursuant to 28 U.S.C. § 2244. The statute provides that the district court shall dismiss a second or successive petition that has not been authorized by the court of appeals. 28 U.S.C. § 2244(b)(1), (4). Notwithstanding the “dismissal” language in § 2244(b), federal appellate courts have ruled that if the prisoner improperly files a second or successive petition without having first obtained authorization by the court of appeals, the district court has the option of transferring the petition to the court of appeals. The United States Court of Appeals for the Third Circuit permits, but does not mandate, transfer. *Robinson v. Johnson*, 313 F.3d 128, 139 (3d Cir 2002), *cert. denied*, 540 U.S. 826 (2003); *Sewell v. Rozum*, No. 2:13-cv-0714, 2013 WL 3973968 (W.D.Pa. July 31, 2013). *See also* Federal Habeas Manual (Brian Means), § 11:81.

¹ The filing is dated and signed as of March 4, 2018, and has been deemed a “Motion to Withdraw Case.”

AND NOW, this 9th day of March, 2018:

It appearing that Petitioner is challenging the very same conviction which he has previously challenged in this Court (Civil Action No. 08-cv-0001); and

It further appearing that 28 U.S.C. § 2244(b)(3) authorizes the relevant federal circuit court of appeals, and only that court, to determine if a “second or successive” habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. § 2241, *et seq.*) may be filed in a district court. Therefore, it is

ORDERED that the petition for writ of habeas corpus is transferred to the United States Court of Appeals for the Third Circuit for consideration as an application to file a successive petition as required under 28 U.S.C. § 2244(b)(3) **FORTHWITH**; and

IT IS FURTHER ORDERED that the Report and Recommendation (ECF No. 24) is adopted in part, as the opinion of this Court, to the extent set forth herein.

IT IS FURTHER ORDERED that Petitioner’s motion at ECF No. 25 is **GRANTED**.

The Clerk of Court is **ORDERED** to mark this case **CLOSED**.

BY THE COURT:

s/Nora Barry Fischer
Nora Barry Fischer
United States District Judge

cc: GEORGE F. ELY
3573175
Northern Correctional Facility
112 Northern Regional Correctional Drive
Moundsville, WV 26041
(via U.S. First Class Mail)

Jerome A. Moschetta
Washington County District Attorney's Office
(via ECF electronic notification)