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

| | | |
|---|---|---|
| LAWRENCE EGGLESTON,<br><br>Petitioner,<br><br>vs.<br><br>MARK WAHL, SCI-WAYMART WARDEN; DISTRICT ATTORNEY OF ALLEGHENY COUNTY, PENNSYLVANIA, ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA,<br><br>Respondents. | ) | 2:24-cv-00306<br><br>**ELECTRONICALLY FILED** |

**MEMORANDUM OPINION**

Petitioner, Lawrence Eggleston ("Eggleston"), is a state prisoner. Currently before the Court is his fourth petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he challenges the validity of his 1981 conviction that was obtained at Case No. CP-02-CR-00005125-1980 in the Court of Common Pleas of Allegheny County. (ECF No. 1). The Petition was received without the filing fee or a motion for leave to proceed *in forma pauperis*. The Court may dismiss the petition prior to service if it plainly appears that Eggleston is not entitled to habeas relief. That is the case here because the instant petition is a second or successive petition and Eggleston does not assert that he has received from the United States Court of Appeals for the Third Circuit an order authorizing this Court to consider it, as required by 28 U.S.C. § 2244(b)(3)(A). Accordingly, the instant petition will be summarily dismissed for lack of jurisdiction and a certificate of appealability will be denied. 28 U.S.C. § 2243; Rule 4 of the Rules Governing Section 2254 Cases In The United States District Courts.

## I. Relevant Background

On September 9, 1981, a jury returned a verdict finding Eggleston guilty of Murder in the First Degree. A penalty hearing was conducted on September 22, 1981, at which time the jury returned a verdict of life imprisonment. The Superior Court affirmed the judgment of conviction on December 14, 1984, and the Pennsylvania Supreme Court denied Eggleston's Petition for Allowance of Appeal on April 24, 1985.

On October 18, 1985, Eggleston filed *pro se* a Petition under Pennsylvania's Post-Conviction Relief Act. His PCRA Petition was denied on October 6, 1995, and the Superior Court affirmed the denial of the PCRA Petition on January 13, 1997. The Pennsylvania Supreme Court denied Eggleston's Petition for Allowance of Appeal on May 31, 1997.

On June 19, 1987, Eggleston filed his first federal Petition for Writ of Habeas Corpus in this Court, which was docketed at Civil Action No. 87-1388, claiming he was being denied due process because of inordinate delay. On August 12, 1987, a Magistrate Judge filed a Report and Recommendation recommending that the Petition be denied as Eggleston had not exhausted the issue as it had not been presented to the state courts prior to proceeding in federal habeas corpus. On September 18, 1987, the District Court dismissed the petition and adopted the Report and Recommendation filed on August 12, 1987, as the opinion of the court. (See attached Exhibit 1 - Report and Recommendation and Opinion; Civil Action No. 87-1388).

On March 30, 1998, Eggleston filed a second federal Petition for Writ of Habeas Corpus in this Court, which was docketed at Civil Action No. 98-0596. On November 30, 1998, the Magistrate Judge filed a Report and Recommendation recommending that the Petition be dismissed without prejudice because it contained both exhausted and unexhausted claims.

Eggleston thereafter moved to withdraw his Petition without prejudice and on February 4, 1999, the motion was granted. (See attached Exhibit 2 - Civ. Act. No. 98-0596, ECF No. 21).

On January 12, 2000, Eggleston filed a third Petition for Writ of Habeas Corpus in this Court, which was docketed at Civil Action No. 00-0102, raising an ineffective assistance of trial counsel claim (with five sub-parts), an after discovered evidence claim, and a due process claim contending that the trial jury was never sworn in and consequently no valid judgment existed. Eggleston's judgment of conviction became final in 1984, long before the effective date of AEDPA, April 24, 1996. In *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1999), the Court of Appeals for the Third Circuit held that AEDPA's one-year limitations period became effective on the date of the AEDPA statute, i.e., April 24, 1996. Consequently, the Court of Appeals held that "habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2244(d)(1)'s time limit."

Eggleston's third petition, however, was not filed until January 12, 2000. Both the Magistrate Judge and the District Judge found that Eggleston's petition was untimely. (See attached Exhibit 3 - Civ. Act. No. 00-cv-102, ECF Nos. 13 and 14). The Report noted that it did not appear from the record that Eggleston had attempted to present any of his unexhausted claims to the Pennsylvania state courts after his motion to withdraw had been granted on February 4, 1999.

On March 5, 2013, Eggleston filed an application under 28 U.S.C. § 2244 for leave to file a second or successive petition with the Court of Appeals for the Third Circuit. *See* Third Circuit Court of Appeals Case No. 13-1578. On March 28, 2013, the Court of Appeals denied the application, finding that

> Eggleston does not seek to challenge his judgment of conviction or sentence in reliance on a new rule of constitutional law. He also does not meet his burden to

> show that the factual predicate for his claims "could not have been discovered previously through the exercise of due diligence," and that the facts underlying his claims, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i-iii).

Order, March 28, 2013 (See attached Exhibit 4 - CTA3 Case No. 13-1578).

Now, almost eleven years after his application to file a second or successive petition was denied, Eggleston has filed the instant fourth petition, again challenging his conviction at Case No. CP-02-CR-00005125-1980. He now raises a new ground for relief:

> Petitioner's pre-trial proceedings were conducted by and held before a deputy coroner, ten years after the 1968 Pennsylvania Constitutional Amendment stripped coroners of their power to act as a committing magistrate.

Pet., at ¶ 12.[1]

## II. Standard of Review

Federal district courts have a duty under Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts, to screen and summarily dismiss a habeas petition prior to any answer or other pleading when the petition "appears legally insufficient on its face." *McFarland v. Scott*, 512 U.S. 849, 856 (1994); *see also United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000) (explaining that courts may dismiss petitions where "none of the grounds alleged in the petition would entitle [the petitioner] to relief").

## III. Discussion

As discussed, this is Eggleston's fourth habeas petition filed in this Court. The first petition was voluntarily withdrawn, the second petition was dismissed without prejudice as it contained

[1] Prior to filing this federal petition, Eggleston filed *pro se* a PCRA petition in January 2023 raising this same issue. The PCRA court dismissed the petition as untimely on February 15, 2023, and on January 18, 2024, the Superior Court of Pennsylvania affirmed the dismissal of the PCRA court's dismissal of the petition. *See* ECF No. 1-1.

both exhausted and unexhausted claims, and the third petition was dismissed with prejudice as it was found to be untimely. Consequently, the Court must first address whether it has jurisdiction over the instant fourth Petition.

AEDPA limits a district court's jurisdiction over second or successive § 2254 petitions. Specifically, § 2244(b)(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." 28 U.S.C. § 2244(b)(3)(A). Rule 9 of the Rules Governing Section 2254 Cases similarly provides that, "[b]efore presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4)."

The term "second or successive" under § 2254 has a specific definition. *See Magwood v. Patterson*, 561 U.S. 320, 332 (2010). A petition is not second or successive simply because it follows a prior petition. *See Panetti v. Quarterman*, 551 U.S. 930, 944 (2007); *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005). Subject to exceptions not relevant here, a petition is second or successive if: (1) a court decided an earlier petition on the merits; (2) the prior and new petitions challenge the same conviction; and (3) the petitioner could have raised the new claims in the earlier petition. *See United States v. Irizarry*, No. 00-333, 2014 WL 7331940, at *3 (D.N.J. Dec. 18, 2014); *Candelaria v. Hastings*, No. 12-3846, 2014 WL 2624766, at *3 (D.N.J. June 12, 2014) (listing exceptions); *see also Benchoff*, 404 F.3d at 817.

If a § 2254 petition is second or successive, the filing of such a petition is only permissible under narrow circumstances, specifically:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

The Court denied Eggleston's third § 2254 petition as untimely under AEDPA's one year limitation period. Courts have held "that the dismissal of a first federal petition as untimely constitutes an adjudication on the merits, rendering any later-filed petition 'second or successive.'" *Taylor v. Bonds*, No. 17-7270, 2017 WL 6514603, at *2 (D.N.J. Dec. 20, 2017) (listing cases); *see also Rohn v. Horton*, 508 F. App'x 170, 171 (3d Cir. 2013). Next, both the third petition and the instant petition challenge Eggleston's conviction at Case No. CP-02-CR-00005125-1980. Finally, Eggleston could have raised the issue he raises in the instant petition well before he filed his third § 2254 petition in 2000.

Accordingly, the instant Petition is second or successive, and Eggleston does not allege, nor does it appear, that he has received permission from the Court of Appeals for the Third Circuit to file a second or successive habeas petition. As a result, the petition will be dismissed as this Court does not have jurisdiction over the instant case. 28 U.S.C. § 2244(b)(3)(A).

In such a situation, this Court may "if it is in the interest of justice, transfer such action . . . to any other such court . . . in which the action . . . could have been brought at the time it was

filed." 28 U.S.C. § 1631. The Court finds that it is not in the interest of justice to transfer this case to the Court of Appeals as it does not appear that Eggleston's claim falls within the narrow grounds for filing a second or successive petition. 28 U.S.C. § 2244(b)(2). Consequently, the Petition will be dismissed for lack jurisdiction.[2] The dismissal of this case does not prevent Eggleston from seeking authorization directly from the Court of Appeals for the Third Circuit.

## IV. Certificate of Appealability

Reasonable jurists would agree that Eggleston has not shown that he obtained leave from the United States Court of Appeals for the Third Circuit to file a second or successive habeas corpus petition. Reasonable jurists would also agree that this Court lacks jurisdiction and authority to consider the second or successive habeas petition without proof of such leave. Accordingly, a certificate of appealability will be denied.

## V. CONCLUSION

For these reasons, the instant petition will be summarily dismissed for lack of jurisdiction and a certificate of appealability will be denied.

An appropriate Order will issue.

s/Arthur J. Schwab
United States District Judge

Dated: March 20, 2024

cc: LAWRENCE EGGLESTON
AP-6355
SCI WAYMART
P.O. Box 256
Waymart, PA 18472
(via U.S. First Class Mail)

[2] This Report and Recommendation should not be read as a comment upon the merits of any claim that Eggleston could raise in a second or successive habeas petition challenging his judgment of sentence, or whether such a petition would be subject to dismissal on other grounds.

# EXHIBIT 1

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

| | | |
|---|---|---|
| LAWRENCE EGGLESTON, Petitioner | ) | |
| vs. | ) | Civil Action No. 87-1388 |
| GEORGE PETSOCK, Superintendent, Respondent AND The Attorney General of the Commonwealth of Pennsylvania, Additional Respondent | ) | |

MAGISTRATE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that the petition be dismissed and that a certificate of probable cause be denied.

II. REPORT

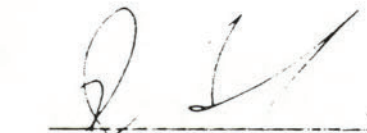
Petitioner is a prisoner presently incarcerated at the State Correctional Institution at Pittsburgh, Pennsylvania, and he brings this habeas corpus action under 28 U.S.C. Section 2254, challenging his conviction of criminal homicide, robbery and violation of the Uniform Firearms Act and his sentence of life imprisonment imposed before the Court of Common Pleas of Allegheny County, Pennsylvania, at Criminal Docket No. CC8005125 and CC8005875 on December 9, 1982. Petitioner appealed his conviction to the Superior Court asserting he had been denied effective assistance of counsel. The Superior Court affirmed on December 14, 1984. The Supreme Court of Pennsylvania denied

his petition for allowance of appeal on April 24, 1985. Petitioner then filed a Post Conviction Hearing Act petition on October 18, 1985. That petition was denied by Judge McGregor on November 25, 1986. Petitioner filed a pro se notice of appeal to the Superior Court on December 4, 1986. His attorney, John Halley, filed a notice of appeal on December 18, 1986. Petitioner's pro se notice of appeal was dismissed on February 13, 1987, since a notice of appeal had been filed by counsel. Petitioner claims he is entitled to relief because he claims he is being denied due process as the Commonwealth has failed to pursue his appeal in the state court. Petitioner claims that no action has been taken by his attorney, John Halley, to pursue his appeal.

Prior to proceeding in federal habeas corpus, a state prisoner must present his federal constitutional issues to the highest court of the state. 28 U.S.C. Section 2254(b) and (c); Picard v. Connor, 404 U.S. 270 (1971). In Schandelmeier v. Cunningham, ____ F.2d ____ (3d Cir. December 2, 1986), the court specifically held that where a habeas petitioner bases his petition upon delay in the state courts he must present that issue to the state courts prior to proceeding in federal habeas corpus. Petitioner has not presented to the courts of the Commonwealth of Pennsylvania his claim that he is being denied due process by delay in disposition of his appeal by the Superior Court. It is further noted that the district attorney has advised Judge

McGregor of the need for him to file an opinion so that petitioner's appeal may proceed before the Superior Court. Since petitioner has not exhausted available state court remedies as to the issue he is presenting to this court, it is recommended that the petition be dismissed and that a certificate of probable cause be denied.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.



ILA JEANNE SENSENICH
Chief U.S. Magistrate

Dated: August 12, 1987

cc: The Honorable Hubert I. Teitelbaum, Senior Judge
United States District Court

Lawrence Eggleston, P-6355
P.O. Box 99901
Pittsburgh, PA 15233

Michael W. Streily
Assistant District Attorney
401 Allegheny County Court House
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Attorney General's Office
4th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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

| | | |
|---|---|---|
| LAWRENCE EGGLESTON, Petitioner | ) | |
| vs. | ) | Civil Action No. 87-1388 |
| GEORGE PETSOCK, Superintendent, Respondent AND The Attorney General of the Commonwealth of Pennsylvania, Additional Respondent | ) | |

MEMORANDUM ORDER

Petitioner's petition for writ of habeas corpus was received by the Clerk of Court on June 22, 1987, and was referred to Chief United States Magistrate Ila Jeanne Sensenich for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1), and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate's report and recommendation, filed on August 12, 1987, recommended that the petition be dismissed and that a certificate of probable cause be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on petitioner on August 13, 1987, by delivery to the State Correctional Institution at Pittsburgh, where he is incarcerated and on respondents on August 13, 1987. No objections have been filed. After review of the pleadings and documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 10th day of September, 1987;

IT IS HEREBY ORDERED that the petition is dismissed.

IT IS FURTHER ORDERED that a certificate of probable cause is denied.

The report and recommendation of Magistrate Sensenich, dated August 12, 1987, is adopted as the opinion of the court.

HUBERT I. TEITELBAUM, Senior Judge
United States District Court

cc: Ila Jeanne Sensenich
Chief U.S. Magistrate

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# EXHIBIT 2

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



| | | |
|---|---|---|
| LAWRENCE EGGLESTON, Petitioner | ) | |
| vs. | ) | Civil Action No. 98-596 |
| | ) | Judge Robert J. Cindrich/ |
| JAMES PRICE, Respondent; and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent. | ) | Magistrate Judge Sensenich |

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that the Petition for a Writ of Habeas Corpus be dismissed, and that a certificate of appealability be denied.

II. REPORT

Petitioner, Lawrence Eggleston, filed this Petition for a Writ of Habeas Corpus in accordance with 28 U.S.C. § 2254. He is challenging his conviction in the Court of Common Pleas of Allegheny County, Pennsylvania, for Murder in the First Degree and related convictions for which he is presently serving a life sentence.[1] The Commonwealth has answered the petition and argues that it should be dismissed because it contains both exhausted and non-exhausted claims.[2] A review of the record and relevant law

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[1] Pet. ¶¶ 1,4 and 5.

[2] Doc. No. 15 at 15.

reveals that this is a mixed petition and should be dismissed in accordance with Rose v. Lundy, 455 U.S. 509 (1982).

Procedural History

Petitioner was charged at CC No. 8005125A in the Court of Common Pleas of Allegheny County with one count of Criminal Homicide.[3] Petitioner was also charged at CC No. 8005875A with one count of robbery and one count of Firearms Not to be Carried Without a License.[4] He was found guilty by a jury of Murder in the First Degree, robbery and the firearms violation on September 1, 1981.[5] Petitioner was sentenced to life imprisonment.[6]

On September 24, 1981, Petitioner, through counsel Frank E. Reilly of the Office of the Public Defender, filed a Motion for New Trial and in Arrest of Judgment.[7] The trial judge granted the Office of the Public Defender leave to file additional reasons to support the motion after reviewing the transcript.[8] Consequently, on October 1, 1981, a second Motion for a New Trial and/or Arrest of Judgment was filed. This motion was filed by

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[3] Commw. Ex. 24.

[4] Id.

[5] Id.

[6] Commw. Ex. 13 at 2.

[7] Commw. Ex. 1.

[8] Id.

private attorney Paul Gettleman, who also filed a Supplemental Motion for a New Trial and/or Arrest of Judgment.[9] On October 18, 1982, the trial court denied Petitioner's Motion for a New Trial and Supplemental Motion for New Trial.[10]

Petitioner filed an Appeal from Judgment of Sentence entered December 9, 1982 with the Pennsylvania Superior Court.[11] He raised the following claim in this appeal:

> I. Was the [Petitioner] denied effective assistance of counsel when trial counsel failed to request an instruction on 'mere presence at the scene' when that was the total basis of the defense, when trial counsel introduced evidence of the co-defendant's conviction and when trial counsel did not object to prosecutor questioning [Petitioner] about pre-arrest silence?[12]

The Superior Court affirmed the judgment of sentence by memorandum and per curiam order dated December 14, 1984.[13]

Petitioner filed a timely Petition for Allowance of Appeal with the state Supreme Court.[14] He raised the following claim:

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[9] Commw. Exs. 2 and 3.

[10] Commw. Ex. 4.

[11] Commw. Ex. 5.

[12] Id. at 2.

[13] Commw. Ex. 6.

[14] Commw. Ex. 7.

I. Whether the petitioner was denied effective assistance of counsel?[15]

The state Supreme Court denied the Petition for Allowance of Appeal by per curiam order dated April 24, 1985.[16]

On December 13, 1985, Petitioner filed a pro se Petition under the Post Conviction Hearing Act, 42 Pa.C.S.A. § 9541, et seq. ("PCHA").[17] He raised the following claims:

> (1) Trial Counsel and Post-Trial Counsel were Ineffective When They Failed to Raise and Preserve The Challenging of Probable Cause for Petitioner's arrest.
>
> (2) Trial Counsel Was Ineffective When He Postponed Petitioner's Trial Against Petitioner's Desires. Post-Trial counsel was equally ineffective for failing to preserve issue.
>
> (3) Trial Counsel was ineffective in Failing to File Ominous [sic] Pre-Trial Motion to suppress Petitioner's Taped Recorded Statement.
>
> Post-Trial counsel was equally infective [sic] in failing to argue and/or preserve issue.
>
> (4) Trial counsel was ineffective in failing to file Ominbus [sic] Pre-Trial Motion To supresse [sic] the identification of Commonwealth's witness Maurice Roberts.
>
> Post-Trial counsel was equally ineffective in failing in failing [sic] to argue/preserve said issue.

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[15] Id. at 3.

[16] Commw. Ex. 8.

[17] Commw. Ex. 9.

(5) Trial Counsel was ineffective When He failed to Afford Petitioner With Due Process in the right of confrontation of witnesses against him.

Post-trial counsel was equally ineffective in failing to argue/preserve said issue.

(6) Post-trial counsel was ineffective when he failed to preserve the ruling of Judge Ross in denying Petitioner's pre-trial application without affording a hearing.

(7) Post-trial counsel was ineffective when he failed to preserve for appeallate [sic] review the issue of the jury being exposed to the case, and discussing it amongest [sic] themselves before the trial was over.

(8) Post-trial counsel was ineffective when he failed to preserve the issue concerning portions of Petitioner's statement which referred to him being on parole and convicted of a previous robbery.[18]

The trial court denied the PCHA petition by order dated November 25, 1986.[19] Petitioner appealed this decision to the Superior Court, raising the following claims:

I. Whether lower court erred in denying [Petitioner's] petition for post conviction relief in November, 1986?

II. Whether trial counsel was ineffective in failing to include in post-trial motions all issues proper for appeal and preserved at trial?

III. Whether appellate counsel was ineffective in failing to include in his

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[18] Id. at 3.

[19] Commw. Ex. 10.

> appeal all issues raised in the lower court?[20]

The Superior Court affirmed the judgment of the trial court by order and memorandum dated March 1, 1988.[21] That court also granted counsel leave to withdraw.[22] It does not appear that an appeal from the judgment of the Superior Court was made on Petitioner's behalf to the state Supreme Court.

On January 8, 1993, Petitioner, through counsel David O'Hanesian, filed a Motion for Post-Conviction Relief ("PCRA"), 42 Pa.C.S. § 9541, et seq.[23] He raised the following claims:

> In previous proceedings he had claimed that trial counsel was ineffective for failing to raise the issue of lack of probable cause to arrest him based on statements of Anthony G. Eberhardt, who was not reliable. He now had evidence that Eberhardt had perjured himself when he implicated petitioner. Counsel submitted an affidavit by Eberhardt and asserted that it would have affected the outcome of the trial[24]
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> 11. a. Post-trial counsel was ineffective in failing to raise the issue of Judge George H. Ross denying Petitioner's pre-trial application to suppress his statement

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[20] Commw. Ex. 12 at 1.

[21] Commw. Ex. 13.

[22] Id.

[23] Commw. Ex. 15.

[24] Id. ¶¶ 6, 7, and 9.

> and identification in a photo array. In fact, post-trial counsel in his reasons in support of his motion for a new trial in front of Judge James R. McGregor mistakenly set forth that these motions had been made before Judge McGregor when they had been made before Judge Ross.
>
> 11. b. Post-trial counsel was ineffective in failing to preserve the issue concerning Petitioner's statement to the police which referred to the fact that Petitioner was on parole from a robbery conviction when he was arrested. This prejudicial information was heard by the jury.[25]

Petitioner, through counsel O'Hanesian, filed a Supplemental Motion for Post Conviction Relief on August 27, 1993,[26] raising the following claims:

> 13. Trial counsel was ineffective in failing to object to the introduction of evidence of Anthony G. Eberhadts' statement to the District Attorney, which implicated the Petitioner in the crime but denied the Petitioner the right to cross-examine Eberhardt because he was not called as a witness at trial. . . .
>
> 14. Trial counsel was ineffective in failing to call Anthony G. Eberhardt as a witness in the Petitionrers [sic] case because Eberhardt would have disavowed implicating the Petitioner in the crime.[27]

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[25] Id. ¶¶ 11. a. and 11. b.

[26] Commw. Ex. 16.

[27] Id. ¶¶ 13 and 14.

On October 6, 1995, the trial court denied Petitioner's PCRA petition.[28]

Petitioner, through counsel Shirley Novak, appealed this decision to the Pennsylvania Superior Court.[29] He raised the following claims:

> I. Is a co-defendant's exculpatory statement made subsequent to trial, considered after discovered evidence cognizable under the post-conviction relief act?
>
> II. Was trial counsel ineffective for failing to discover exculpatory evidence?
>
> III. Was prior counsel ineffective for failing to raise as error that the jury was never sworn to try the [Petitioner]?[30]

On January 13, 1997, the Superior Court affirmed the judgment of the trial court which denied the PCRA.[31] Petitioner, again through Shirley Novak, appealed this decision to the state Supreme Court[32] by raising the following claims:

> I. Is a co-defendant's exculpatory statement made subsequent to trial, considered after discovered evidence cognizable under the post-conviction relief act?

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[28] Commw. Ex. 18.

[29] Commw. Ex. 19.

[30] Id. at 3.

[31] Commw. Ex. 20.

[32] Commw. Ex. 21.

> II. Was trial counsel ineffective for failing to discover exculpatory evidence?
>
> III. Was prior counsel ineffective for failing to raise as error that the jury was never sworn to try the [Petitioner]?[33]

On May 21, 1997, the state Supreme Court denied the appeal by per curiam order.[34]

Claims Presented in Federal Habeas Petition

Petitioner raises the following claims in his federal habeas petition:

> 1. In the Post Conviction Hearing held concerning, then trial counsel Frank Reilly failing to interview then call as a witness, Anthony G. Eberhardt based on his statement [Petitioner refers to exhibit "A" to the petition].
>
> 2. Petitioner states he was denied his Constitutional Rights pursuant to the Fifth, Sixth, and Fourteenth Amendment when at trial, counsel failed to object to prosecutorial failure to produce its key witness (and basis for probable cause) Anthony G. Eberhardt, to testify and for cross-examination as this witness provided the arresting dectictives [sic] with information leading to probable cause for arrest, trial, and ultimate conviction of the petitioner. This further will constitute illegal suppression of evidence by the Commonwealth, especially given the fact that the witness on which probable cause is based is not credible.

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[33] Id. at 4.

[34] Commw. Ex. 22.

> 3. Petitioner next contends that he was denied his Constitutional Rights under the Fifth, Sixth, and Fourteenth Amendment, as the Commonwealth produced hear-say [sic] evidence at trial that was not objected to by trial counsel.
>
> 4. The petitioner next contends, that hee [sic] was denied his Constitutional Rights pursuant to Fifth, Sixth, and Fourteenth Amendment in that the Commonwealth failed to produce its key witness, Anthony Eberhardt in court for purpose of the ability of petitioner to confront and cross-examine him.
>
> 5. Subsequent to his trial co-defendant Anthony Eberhardt sponteneously [sic] submitted a noterized [sic] statement which exhonorated [sic] the petitioner Larry Eggleston.
>
> 6. The petitioner contends that trial counsel was ineffective for failing to raise as error that the jury was never sworn to try the petitioner.
>
> 7. The petitioner states that Shirley Novak, appointed to the petitioner to represent him in the Pennsylvania Supreme Court failed to raise issues petitioner requested (except for the non-sworn jury issue)(non-jury issue was raised from Superior to Supreme) and therefore is ineffective counsel.[35]

Discussion

The Commonwealth mistakenly identifies Petitioner's claims as those attached to paragraph twelve of the Petition. Paragraph twelve identifies issues Petitioner claims he presented

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[35] Pet. at 5(c)-(l).

in proceedings other than his direct appeal. The claims presented in the instant petition are listed in paragraph thirteen and the pages Petitioner attached to that paragraph. Although many of the claims are similar, they are not identical.

Review of the claims raised in this Petition and those raised before the state courts shows that the first question which this Court must address is whether Petitioner has exhausted his available state court remedies. Wise v. Fulcomer, 958 F.2d 30, 33 (3d Cir. 1992) (prior to addressing merits, the court must first address threshold inquiries including abuse of the writ, exhaustion, and procedural default.)

Exhaustion

A federal court may not grant an application for writ of habeas corpus by a state prisoner until he has exhausted available state remedies. 28 U.S.C. § 2254(b) and (c). "To satisfy the exhaustion requirement the petitioner must present every claim raised in the federal petition to each level of the state courts." Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996) (citing Picard v. Conner, 404 U.S. 270 (1971)); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997)(petition for cert. filed (U.S. Apr. 23, 1998) (No. 97-8812). Exhaustion does not require that the highest court rule on the merits of a petitioner's claims; it does, however, require that the state court be given a fair opportunity to review them. Doctor, 96 F.3d at 678; Burkett v.

Love, 89 F.3d 135, 138 (3d Cir. 1996); Bond v. Fulcomer, 864 F.2d 306, 309 (3d Cir. 1989). A petitioner has not exhausted his available state remedies as long as "he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Yet, "[a] petitioner who has raised an issue on direct appeal, . . . is not required to raise it again in a state post-conviction proceeding." Lambert, 134 F.3d at 513 (citing Evans v. Court of Common Pleas, Delaware County, Pennsylvania, 959 F.2d 1227, 1230 (3d Cir. 1992)). Petitioner bears the burden of establishing that exhaustion has been met. Ross v. Petsock, 868 F.2d 639, 643 (3d Cir. 1989).

Exhaustion Analysis

Petitioner asserts at Claim Seven that his PCRA appellate counsel, Shirley Novak, was ineffective for failing to present issues to the state Supreme Court as he requested. Petitioner has the right to effective assistance of counsel on his first direct appeal from his criminal conviction. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Attorney Novak undertook representation of Petitioner at the appellate stage of his second PCRA. She filed a brief raising three claims before the Superior Court,[36] and she filed a Petition for Writ of Allocatur in the state Supreme Court

[36] Commw. Ex. 19 at 2.

raising the same three claims.[37] Petitioner does not identify exactly which claims he sought to have raised that attorney Novak failed to include. Nonetheless, Petitioner is not entitled to counsel on post collateral attacks to his conviction. Coleman v. Thompson, 501 U.S. 722, 752 (1991)(citing Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987)). Consequently, there is no Sixth Amendment right to effective assistance of counsel in state post-conviction proceedings. Coleman, 501 U.S. at 752; Tillett v. Freeman, 868 F.2d 106, 108 (3d Cir. 1989). Because Petitioner does not have a right to counsel for purposes of collateral attacks, he bears the risk of a failure of counsel to raise his claims. Coleman, 501 U.S. at 752-53. Thus, the failure of Petitioner's second post-conviction counsel to raise his claims does not excuse his failure to exhaust his state court remedies.

In his direct appeals from his criminal conviction, Petitioner challenged the effective assistance of trial counsel as to a jury instruction, allowing the introduction of a co-defendant's conviction, and failure to object to Petitioner's pre-arrest silence.[38] These claims are not raised in the federal habeas petition. Thus, questions of exhaustion of the issues presented in this petition must be resolved by turning to Petitioner's two collateral attacks.

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[37] Commw. Ex. 21.

[38] Commw. Ex. 5 at 2.

As to his first PCHA petition, the decision of the Superior Court denying relief was not appealed to the Pennsylvania Supreme Court.[39] PCHA counsel was permitted to withdraw after pursuing the appeal in the Superior Court.[40] Petitioner did not pursue an appeal pro se or seek other counsel. Thus, the claims raised in the first PCRA petition can not satisfy the requirements of exhaustion because the claims were not presented to each level of the state courts for review. Doctor, 96 F.3d at 678.

In his second PCRA petition, Petitioner presented the following claims on appeal to both the Superior and state Supreme Courts: 1) the after discovered exculpatory statement of his co-defendant, Anthony Eberhardt, 2) ineffectiveness of trial counsel for failure to discover the exculpatory statement, and 3) the failure to swear the jury.

Claims One, Five and Six

Claim One challenges the effectiveness of trial counsel, Frank Reilly, for his failure to interview Eberhardt. This was presented as the second claim to both appellate courts in the second PCRA, and thus is exhausted. Claim Five, the exculpatory statement by Anthony Eberhardt, was also raised as the first claim in the second PCRA and subsequent appeals and is thus exhausted.

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[39] Commw. Exs. 9-14.

[40] Commw. Ex. 13 at 7.

Petitioner has satisfied the requirements of exhaustion as to Claim Six (jury not sworn) of this habeas petition by raising it as the third and final claim in the appeals for his second PCRA petition. Based on the record, Claims One, Five and Six satisfy the requirements of exhaustion.

Claims Two, Three, Four and Seven

Claim Seven has not been addressed by the state courts, but it involves the effectiveness of counsel who represented Petitioner in his second collateral attack, and thus does not raise a constitutional claim. Claim Two, as presented by Petitioner, addresses more than his Sixth Amendment right to effective assistance of counsel as to the failure to discover the exculpatory statement, because the claim also questions the existence of probable cause for his arrest. The second part of this claim was not presented in the second PCRA appeals. Claim Three challenges trial counsel's failure to object to hearsay evidence. This claim was not raised in the state courts during the second PCRA. Claim Four, the Commonwealth's failure to produce Anthony Eberhardt for purposes of confrontation has not been presented to the state courts. Thus, Petitioner has failed to satisfy the requirements of exhaustion with respect to Claims Two, Three and Four. He also has not satisfied the exhaustion requirement as to Claim Seven, but this claim does not allege a violation of his federal constitutional rights. Accordingly, Petitioner has failed to

exhaust his state court remedies as to Claims Two, Three, Four and Seven.

Excusing Exhaustion

The total exhaustion requirement allows for exceptions when the non-exhausted claims are procedurally barred from further review in state court. Toulson v. Beyer, 987 F.2d 984, 986-87 (3d Cir. 1993). To excuse exhaustion, "state law must clearly foreclose state court review of unexhausted claims." Toulson, 987 F.2d at 987 (citing, Gibson v. Scheidemantel, 805 F.2d 135, 139 (3d Cir. 1986)).

> If federal law 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.

In Banks v. Horn, 126 F.3d 206 (3d Cir. 1997), the court reversed and remanded to the district court to dismiss the petition without prejudice as mixed, determining that although some of the petitioner's claims would appear to be procedurally barred, that determination should be made by the state courts. The court of appeals stated:

> [I]n the absence of a state court decision indicating that a habeas corpus petitioner

> is clearly precluded from state court relief, the district court should dismiss the claim for failure to exhaust even if it is not likely that the state court will consider petitioner's claim on the merits.

Banks, 126 F.3d at 211 (citing Toulson, 987 F.2d at 988-89). Thus, the Court of Appeals requires that a federal habeas petitioner must first raise his claims in the state court, even if it appears that the claims are procedurally barred. Banks, 126 F.3d at 213. No state court has precluded Petitioner from relief based on his failure to pursue Claims Two, Three, Four and Seven in his second PCRA. Therefore, Petitioner has not exhausted his state court remedies as to these claims.

Mixed Petition

Petitioner has presented a federal petition containing both exhausted and non-exhausted claims which is considered to be a 'mixed petition.' Rose v. Lundy, 455 U.S. 509, 521-22 (1982). A section 2254 habeas petition which contains any non-exhausted claims "must be dismissed without prejudice for failure to exhaust all state created remedies." Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). The exhaustion requirement is to be "rigorously enforced." Rose, 455 U.S. at 518.

Petitioner has presented both exhausted and non-exhausted claims in his federal petition. Accordingly, it is recommended that the Petition for a Writ of Habeas Corpus be dismissed, without

prejudice, for Petitioner's failure to satisfy the requirements of exhaustion.

Certificate of Appealability

Title 28 U.S.C. § 2253, which was enacted as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, codifies the standards governing the issuance of a certificate of appealability from an order denying a habeas petition. Amended section 2253 provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Drinkard v. Johnson, 97 F.3d 751, 756 (5th Cir. 1996), cert. denied, 117 S.Ct. 1114 (1997).

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right" as to each issue for which issuance of the certificate is sought. 28 U.S.C. § 2253(c)(2); Santana v. U.S., 98 F.3d 752, 757 (3d Cir. 1996). The AEDPA made no substantive changes in the "substantial showing" standard by which a certificate of appealability, formerly a certificate of probable cause, is governed. Cox v. Norris, 133 F.3d 565, 569 n.2 (8th Cir. 1997), petition for cert. filed, (U.S. May 5, 1998) (No. 97-9013); Tiedeman v. Benson, 122 F.3d 518, 521 (8th Cir. 1997). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issue differently, or

the issues deserve further proceedings." Cox, 133 F.3d at 569. See Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980)) (standard used for certificates of probable cause).

Here, Petitioner has failed to satisfy the requirements of exhaustion; thus he cannot make a substantial showing of the denial of a constitutional right. Therefore, it is recommended that a certificate of appealability be denied.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

ILA JEANNE SENSENICH
U.S. Magistrate Judge

Dated: November 30, 1998

cc: The Honorable Robert J. Cindrich
United States District Judge

Lawrence Eggleston, AP-6355
S.C.I. Pittsburgh
P.O. Box 99901
Pittsburgh, PA 15233
(Certified Mail, Return Receipt Requested)

Stephen A. Zappala, Jr.
Russell K. Broman
Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, PA 15219

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



| | | |
|---|---|---|
| LAWRENCE EGGLESTON, | ) | |
| Petition | ) | |
| | ) | |
| vs. | ) | Civil Action No. 98-596 |
| | ) | Judge Robert J. Cindrich/ |
| JAMES PRICE, | ) | Magistrate Judge Sensenich |
| Respondent | ) | |

ORDER

AND NOW, this 4 day of Feb., 1999;

The Petitioner having filed a traverse dated July 31, 1998 with a motion to withdraw his federal petition for writ of habeas corpus without prejudice within the traverse;

IT IS HEREBY ORDERED that petitioner's motion to withdraw his federal petition for writ of habeas corpus, without prejudice is granted.

Robert J. Cindrich
U.S. District Judge

cc: Lawrence Eggleston, AP-6355
SCI Pittsburgh
P.o. Box 99901
Pittsburgh, PA 15233

Russell K. Broman,
Assistant District Attorney
Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, PA 15219

# EXHIBIT 3

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

| | | |
|---|---|---|
| LAWRENCE EGGLESTON, Petitioner | ) | |
| vs. | ) | Civil Action No. 00-102<br>Judge Robert J. Cindrich/<br>Magistrate Judge Sensenich |
| JOSEPH CHESNEY, Superintendent, Respondent. | ) | |

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MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that the Petition for Writ of Habeas Corpus be dismissed as untimely and that a certificate of appealability be denied.

II. REPORT

Petitioner, Lawrence Eggleston, filed this Petition for Writ of Habeas Corpus in accordance with 28 U.S.C. § 2254. He is challenging his conviction in the Court of Common Pleas of Allegheny County, Pennsylvania, for Murder in the First Degree and related convictions for which he is presently serving a life sentence. For the reasons that follow, the Petition should be dismissed because it was filed outside the one-year limitations period provided for in 28 U.S.C. § 2244(d).

**A. Relevant Procedural History**

Petitioner was charged at CC No. 8005125A in the Court of Common Pleas of Allegheny County with one count of Criminal Homicide. He was also charged at CC No. 8005875A with one count

of Robbery and one count of violation of the Uniform Firearms Act. On September 10, 1981, a jury found him guilty of one count each of Murder in the First Degree, Robbery and Firearms Not to be Carried Without a License. On September 22, 1981, a penalty hearing was conducted and the jury returned a verdict of life imprisonment.

On September 24, 1981, Petitioner, through counsel Frank E. Reilly of the Office of the Public Defender, filed a Motion for New Trial and in Arrest of Judgment. The trial judge granted the Office of the Public Defender leave to file additional reasons to support the motion after reviewing the transcript. Consequently, on October 1, 1981, a second Motion for a New Trial and/or Arrest of Judgment was filed. This motion was filed by private attorney Paul Gettleman, who also filed a Supplemental Motion for a New Trial and/or Arrest of Judgment. On October 18, 1982, the trial court denied Petitioner's post trial motions. On December 9, 1982, Petitioner was sentenced to life imprisonment.

On December 16, 1982, Petitioner filed a Notice of Appeal from his judgment of sentence. On February 9, 1984, the Trial Court filed its Opinion wherein it held that Petitioner's claims were without merit. The Superior Court affirmed the judgment of sentence by Memorandum and *per curiam* Order dated December 14, 1984. Petitioner filed a timely Petition for Allowance of Appeal

with the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal by *per curiam* Order dated April 24, 1985.

On December 13, 1985, Petitioner filed a pro se Petition under the Post Conviction Hearing Act, 42 Pa.C.S.A. § 9541, et seq. ("PCHA"). The Trial Court denied the PCHA petition by Order dated November 25, 1986. Petitioner filed a timely appeal from this decision to the Pennsylvania Superior Court. The Superior Court affirmed the judgment of the Trial Court by Order and Memorandum dated March 1, 1988. That Court also granted counsel leave to withdraw. It does not appear that an appeal from the judgment of the Superior Court was made on Petitioner's behalf to the Supreme Court of Pennsylvania.

On January 8, 1993, Petitioner, through counsel David O'Hanesian, filed a Motion for Post-Conviction Relief ("PCRA"), 42 Pa.C.S. § 9541. Petitioner filed a Supplemental Motion for Post Conviction Relief on August 27, 1993. On October 6, 1995, the Trial Court denied Petitioner's PCRA Petition. Petitioner, through counsel Shirley Novak, filed a Notice of Appeal to the Pennsylvania Superior Court. On January 13, 1997, the Superior Court affirmed the judgment of the Trial Court, which denied the PCRA Petition. Petitioner appealed this decision to the Supreme Court of Pennsylvania and on May 21,

1997, the Supreme Court of Pennsylvania denied the appeal by *per curiam* Order.

On March 30, 1998, Petitioner filed a federal Petition for Writ of Habeas Corpus in this Court, which was docketed at Civil Action No. 98-596. On November 30, 1998, a Report and Recommendation was filed that recommended that the Petition be dismissed because it contained both exhausted and unexhausted claims. On February 4, 1999, Petitioner's Motion to Withdraw his Petition without Prejudice was granted by the District Court.

On January 12, 2000, Petitioner filed the instant Petition for Writ of Habeas Corpus in this Court. It does not appear from the record that Petitioner attempted to present any of his unexhausted claims to the Pennsylvania state courts after his Motion to Withdraw his Petition without Prejudice was granted on February 4, 1999.

**B. Time Period for Filing Federal Habeas Corpus Petitions**

Respondent Commonwealth first asserts that the instant Petition should be dismissed as untimely under the one-year limitations period applicable to federal habeas corpus petitions. In making this assertion, Respondent relies on the amendments to the federal habeas corpus law that were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 142 Cong. Rec. H3305-01 (April 24, 1996). In section 101 of AEDPA, Congress imposed a new, one-year

limitations period applicable to state prisoners, which provides as follows.

> (d) (1) 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 applicant 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.
>
> (2) The 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 shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (as amended).

In analyzing whether a petition for writ of habeas corpus has been timely filed under the new one-year limitations period,

a federal court must undertake a two-part inquiry. First, the court must determine the date that the petitioner's direct review became "final" for purposes of triggering the one-year period under section § 2244(d)(1)(A). Second, the Court must determine whether any "properly filed" applications for post-conviction or collateral relief were pending during the limitations period that would toll the statute pursuant to section 2244(d)(2).

Petitioner was sentenced on December 9, 1982; the Superior Court affirmed his judgment of sentence on December 14, 1984, and the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal on April 24, 1985. Consequently, with respect to the limitations period under AEDPA, direct review of Petitioner's conviction and sentence concluded on or about July 24, 1984, following the expiration of the ninety-day time period allowed for filing a writ of certiorari in the United States Supreme Court. *See* Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000) (noting that a judgment becomes final at the conclusion of direct review or the expiration of time for seeking such review, including the time for filing a writ of certiorari in the Supreme Court); Kapral v. United States, 166 F.3d 565, 575 (3d Cir. 1999) (same for 28 U.S.C. § 2255 motions).

Petitioner's judgment became final in 1984, long before the effective date of the AEDPA. In Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998), the United States Court of Appeals for the

Third Circuit agreed with other courts of appeals in holding that the new one-year limitations period in the AEDPA became effective on the effective date of the AEDPA statute, *i.e.*, April 24, 1996. Consequently, the Court held that "habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2244(d)(1)'s time limit."

Notwithstanding, Petitioner did not file his federal Habeas Petition by April 23, 1997; instead, his current Petition was not filed in this Court until January 12, 2000. Consequently, this Court must determine whether Petitioner can take advantage of the "tolling" provision in section 2244(d)(2).

As stated above, section 2244(d)(2) provides that "[t]he 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 shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).[1] With respect to the instant Petition, the state court records reveal that Petitioner was pursuing his state PCRA proceeding from January 6, 1993 through May 21, 1997. Even adding the ninety-day time period in which he could have

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[1] In Lovasz v. Vaughn, 134 F.3d 146 (3d Cir. 1998), the Court of Appeals for the Third Circuit addressed the question of what constitutes a "properly filed application" under the AEDPA. In Lovasz, our Circuit determined that " 'a properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." *Id.* at 148.

petitioned the United States Supreme Court for certiorari,[2] Petitioner's post-conviction proceedings concluded on or about August 21, 1997.[3] Consequently, Petitioner had until August 21, 1998 to file his petition for writ of habeas corpus in federal court. As stated above, Petitioner's current habeas corpus Petition was filed on January 12, 2000, almost sixteen months following the expiration of his one-year limitations period. Although Petitioner was pursuing his prior federal habeas corpus Petition at Civil Action No. 98-596 during this time period, the Third Circuit, as well as the Fifth and Ninth Circuits, have held that the time period that a federal habeas corpus petition is pending does not toll the limitations period under section 2244(d)(2). *See* Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999); Jiminez v. Rice, 222 F.3d 1210, 1213 (9th Cir. 2000); Grooms v. Johnson, 208 F.3d 488, 489 (5th Cir. 1999).[4]

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[2] Our Circuit has not yet considered the issue whether "pending" under section 2244(d)(2) includes the time to file a petition for a writ of certiorari in the United States Supreme Court. However, every court of appeals that has considered this issue has concluded that there is no tolling during that time period. *See* Isham v. Randle, 226 F.3d 691, 694 (6th Cir. 2000); Coates v. Byrd, 211 F.3d 1225 (11th Cir. 2000); Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 1834 (2000); Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir.), *cert. denied*, 120 S.Ct. 808 (2000). *See also* Jiminez v. Rice, 222 F.3d 1210, 1213 (9th Cir. 2000) (citing cases with approval and holding that the time a federal habeas corpus petition is pending does not toll the limitations period). In the instant case, this Court need not decide the issue as resolution of the matter does not effect the outcome.

[3] *See* Swartz, 204 F.3d at 420 (holding that the one-year period of limitations was tolled from the date AEDPA took effect until petitioner's state PCRA petition was no longer pending).

[4] *But see* Walker v. Artuz, 208 F.3d 357, 359-61 (2d Cir. 2000) (holding that section 2244(d)(2) does toll the limitations period while a federal petition is pending), *cert. granted*, Duncan v. Walker, 121 S.Ct. 480 (Nov. 13,

(continued...)

Review of the state court record reveals that Petitioner's Petition for writ of habeas corpus was not timely filed.[5] Accordingly, the Petition should be dismissed as untimely in accordance with the directives in 28 U.S.C. § 2244(d).

**C. Certificate of Appealability**

Section 102 of the AEDPA, 28 U.S.C. § 2253(c), as amended, codified the standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. Amended section 2253 provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." Petitioner does not make the required substantial showing. Accordingly, a certificate of appealability should be denied.

**III. CONCLUSION**

For the foregoing reasons, it is recommended that the Petition for Writ of Habeas Corpus be dismissed as untimely and that a certificate of appealability be denied.

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[4](...continued)
2000); Petrick v. Martin, 236 F.3d 624 (10th Cir. 2001) (same).

[5] In his Brief in Response to the Commonwealth's Answer, Petitioner provides that he was unable to comply with the one-year limitations period because he was on pyschotropic medication from the time period between December 30, 1998 through November 20, 1999. Even assuming the truth of this unsupported statement, this time period is after the expiration of Petitioner's one-year limitation period, and, therefore, does not provide any equitable basis for tolling.

In accordance with the Magistrates Act, 28 U.S.C. §636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

ILA JEANNE SENSENICH
U.S. Magistrate Judge

Dated: March 6, 2001

cc: The Honorable Robert J. Cindrich
United States District Judge

Lawrence Eggleston, AP-6355
S.C.I. Frackville
1111 Altamont Boulevard
Frackville, PA 17931
(CERTIFIED MAIL, RETURN RECEIPT REQUESTED)

Ronald W. Wabby, Jr.
Office of the District Attorney
County of Allegheny
401 Allegheny County Courthouse
Pittsburgh, PA 15219

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

CASE CLOSED

| | | |
|---|---|---|
| LAWRENCE EGGLESTON, Petitioner | ) | |
| vs. | ) | Civil Action No. 00-102 |
| | ) | Judge Robert J. Cindrich/ |
| JOSEPH CHESNEY, Respondent | ) | Magistrate Judge Sensenich |

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MEMORANDUM ORDER

Petitioner's petition for writ of habeas corpus was received by the Clerk of Court on January 18, 2001 and was referred to United States Magistrate Judge Ila Jeanne Sensenich for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on March 6, 2001, recommended that the Petition for Writ of Habeas Corpus be dismissed as untimely and that a certificate of appealability be denied. The parties were allowed ten (10) days from the date of service to file objections. Service of report and recommendation was made on petitioner at SCI Frackville and on counsel for respondent. After review of the pleadings and documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 30 day of March, 2001;

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is dismissed as untimely;

IT IS FURTHER ORDERED that a certificate of appealability is denied.

The report and recommendation of Magistrate Judge Sensenich, dated March 6, 2001, is adopted as the opinion of the court.

Robert J. Cindrich
United States District Judge

cc: Ila Jeanne Sensenich
U.S. Magistrate Judge

Lawrence Eggleston, AP-6355
SCI Frackville
1111 Altamont Boulevard
Frackville, PA 17931

Ronald M. Wabby, Jr.,
Assistant District Attorney
Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, PA 15219

# EXHIBIT 4

DLD-161 March 14, 2013

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

C.A. No. **13-1578**

In re: LAWRENCE EGGLESTON, Petitioner

Present: AMBRO, SMITH and CHAGARES, Circuit Judges

Submitted is Petitioner's application pursuant to 28 U.S.C. § 2244 to file a second or successive habeas corpus petition

in the above-captioned case.

Respectfully,

Clerk

MMW/TRA/mb

ORDER

The application under 28 U.S.C. § 2244 for an order authorizing the District Court to consider a second or successive petition under 28 U.S.C. § 2254 is denied. A second or successive petition must be certified by a court of appeals to contain newly discovered evidence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2). Eggleston does not seek to challenge his judgment of conviction or sentence in reliance on a new rule of constitutional law. He also does not meet his burden to show that the factual predicate for his claims "could not have been discovered previously through the exercise of due diligence," and that the facts underlying his claims, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i-ii).

By the Court,

/s/D. Brooks Smith
Circuit Judge

Dated: March 28, 2013
MB/cc: Lawrence Eggleston
District Attorney Allegheny County

**A True Copy**

Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.