

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ANTHONY WHITE, : CIVIL ACTION  
 : NO. 10-731  
Petitioner, :  
 :  
v. :  
 :  
PERRY PHELPS, Warden, and :  
ATTORNEY GENERAL OF THE STATE :  
OF DELAWARE, :  
 :  
Respondents. :

**M E M O R A N D U M**

EDUARDO C. ROBRENO, J.

November 23, 2010

**I. BACKGROUND**

Petitioner Anthony White has filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 ("Petition"), asserting the following four claims: (1) ineffective assistance of counsel; (2) prosecutorial misconduct; (3) the trial court's abuse of discretion violated Petitioner's right to a fair trial; and (4) the Delaware Superior Court abused its discretion by finding Petitioner's "abuse of discretion" and prosecutorial misconduct claims procedurally barred on post-conviction review. (D.I. 1) Claim three contains separate allegations concerning the trial court's "abuse of discretion," namely: (a) the trial court refused to sanction the prosecutor for his blatant disregard of the court's rules, orders, and objections; (b) the trial court refused to give cautionary accomplice liability instructions to the jury; and (c) the trial court refused to sua sponte order a mistrial due to juror

misconduct resulting from an "out of courtroom" voir dire. Id. at p. 9.

According to the Petition, Petitioner has exhausted state remedies for all four claims. However, attached to the Petition is a copy of a "pending [second] state post-conviction motion" filed pursuant to Delaware Superior Court Criminal Rule 61 ("second Rule 61 motion") that Petitioner filed just days before filing the instant Petition. The second Rule 61 motion asserts that the Superior Court failed to address the independent constitutional issue regarding improper jury contact with the trial judge that was raised in Petitioner's first Rule 61 motion, and contends that further review of the claim is permitted under Rule 61(i)(5) in order to prevent a miscarriage of justice. (D.I. 1 at pp. 19, 21) Consequently, when he filed the instant Petition, Petitioner also filed a "Motion to Stay and Abey" the habeas proceeding while he continues to exhaust state remedies via the pending Rule 61 motion in the Superior Court. (D.I. 4) Petitioner asserts that a stay is necessary because there will be "approximately 30 days remaining [in the] one-year limitations period" once he has finished exhausting state remedies. Id. at pp. 5, 6.

## **II. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996**

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in the execution

of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." Woodford v. Garceau, 538 U.S. 202, 206 (2003)(internal citations and quotation marks omitted). Pursuant to AEDPA, a federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

AEDPA imposes procedural requirements and standards for analyzing the merits of a habeas petition in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002); see Woodford, 538 U.S. at 206. For instance, AEDPA effectively precludes petitioners from filing a second or subsequent habeas petition except in the most unusual of circumstances. See United States v. Miller, 197 F.3d 644 (3d Cir. 1999); Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000). Consequently, a petitioner challenging the legality of his detention pursuant to the judgment of a State court must include in one § 2254 petition all the arguments he has to collaterally attack the State judgment. Mason, 208 F.3d at 417-18.

Additionally, except in extremely limited circumstances, a petitioner must file this all-inclusive petition within one year of the date on which the judgment of conviction becomes final by

the conclusion of direct review or the expiration of time for seeking such review. See 28 U.S.C. § 2244(d)(1)(A). The one-year limitations period is subject to statutory and equitable tolling. See 28 U.S.C. § 2244(d)(2)(statutory tolling); Holland v. Florida, - U.S. -, 130 S.Ct. 2549, 2560 (2010) (equitable tolling).

And finally, a petitioner is not entitled to federal habeas relief unless he has exhausted state remedies for his habeas claims. See 28 U.S.C. § 2254(b)(1)(A). A petitioner satisfies the exhaustion requirement by "fairly presenting" the substance of the federal habeas claims to the state's highest court, either on direct appeal or in a post-conviction proceeding, and in a procedural manner permitting the state courts to consider them on the merits. See Duncan v. Henry, 513 U.S. 364, 365 (1995); Castille v. Peoples, 489 U.S. 346, 351 (1989); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997).

### **III. SUMMARY DISMISSAL**

Pursuant to AEDPA, a district court judge may summarily dismiss a habeas application "if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief." Rule 4, 28 U.S.C. foll. § 2254. Sometimes a petitioner will present a federal district court with a mixed petition, which is a petition containing both exhausted and unexhausted habeas claims. See generally Rose v.

Lundy, 455 U.S. 509 (1982). As a general rule, when a petitioner presents a district court with a mixed petition, and the operation of the federal limitations period will not clearly foreclose a future collateral attack, the district court must dismiss the entire petition without prejudice to permit exhaustion of state remedies for the unexhausted claims. See Rhines v. Weber, 544 U.S. 269 (2005); Pliler v. Ford, 542 U.S. 225 (2004); Rose, 455 U.S. at 510, 522; Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997). Recently, however, in Urcinoli v. Cathel, 546 F.3d 269, 275-77, 277 n.9 (3d Cir. 2008), the Third Circuit explained that, prior to dismissing a mixed petition, it would be "good practice" for a district court to provide the petitioner with a choice of three procedural options for proceeding with his mixed petition. The three alternatives include: (1) dismissal of the petition without prejudice in order to enable the petitioner to return to state court to exhaust state remedies; (2) deletion of the unexhausted claims from the petition so that the habeas proceeding would continue with only the remaining exhausted claims; and (3) in limited circumstances, staying the mixed petition and holding the case in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims. Id. at \*3. The language in the Urcinoli decision suggests that a district court should inform a petitioner of these three options before deciding to

dismiss the petition without prejudice even when the operation of the AEDPA one-year period will not clearly foreclose a future collateral attack. Id. at \*6 n.9.

### III. DISCUSSION

#### A. Petitioner's Motion to Stay and Abey

As a general rule, a federal habeas court is authorized to stay a habeas proceeding only if the habeas application contains both exhausted and unexhausted claims, and the petitioner satisfies the following three requirements: there is good cause for the petitioner's failure to exhaust state remedies, the unexhausted claims are potentially meritorious, and there is no indication that the petitioner intentionally engaged in dilatory tactics. Rhines, 544 U.S. at 277; but see Heleva v. Brooks, 581 F.3d 187 (3d cir. 2009)(holding that a habeas petitioner could be eligible for the stay-and-abey procedure even if the petition is not mixed and contains only unexhausted claims). "Good cause" typically requires a showing that requiring exhaustion will result in the petition being time-barred by the one-year limitations period prescribed in 28 U.S.C. § 2244. Heleva, 581 F.3d at 192.

Given the similarity between the juror misconduct issue raised in Claim Three of this Petition and the argument raised in Petitioner's second Rule 61 motion filed in the Delaware Superior Court, and the fact that Petitioner's second Rule 61 motion was

filed pursuant to Rule 61(i)(5),<sup>1</sup> the Court accepts Petitioner's assertion that the instant Petition is mixed. Nevertheless, the Court concludes that Petitioner has failed to demonstrate "good cause" warranting a stay of the instant habeas proceeding, because he has erroneously concluded that there are only 30 days remaining in the one-year limitations period. For instance, assuming that Petitioner has "properly filed" his second Rule 61 motion in the Delaware Superior Court, it appears that only 146 days of the one-year limitations period will have passed when that post-conviction proceeding has concluded, leaving Petitioner with time to comply with AEDPA's one-year limitations period if

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<sup>1</sup>As previously explained, Petitioner already presented his juror misconduct claim to the Delaware State Courts in his first Rule 61 motion, and the State Courts denied the claim as procedurally barred under Delaware Superior Court Criminal Rule 61(i)(3) due to his failure to raise it on direct appeal. This prior presentation to, and denial by, the Delaware State Courts satisfied the exhaustion requirement, and his present pursuit of relief in the Delaware State Courts would appear to be irrelevant to the exhaustion issue. Nevertheless, pursuant to 28 U.S.C. § 2254(c), a petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State [] if he has the right under the law of the State to raise, by any available proceeding, the question presented." In this case, Petitioner has presented the juror misconduct claim to the Superior Court in his second Rule 61 motion under Delaware Superior Court Criminal Rule 61(i)(5). Rule 61(i)(5) asserts that the Rule 61(i)(3) bar is inapplicable to "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." Thus, because Rule 61(i)(5) provides Petitioner with a method for possibly obtaining review of his procedurally defaulted claim, the Court will accept Petitioner's statement that his Petition contains one unexhausted claim.

he diligently pursues relief.<sup>2</sup> Moreover, even if Petitioner correctly asserts that there are only 30 days remaining in the limitations period, Third Circuit precedent indicates that this circumstance does not constitute "good cause." See Heleva, 581 F.3d at 193. Accordingly, the Court will deny Petitioner's Motion to Stay and Abey.

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<sup>2</sup>The limitations period is tolled during the pendency of properly filed applications for state post-conviction relief. See 28 U.S.C. § 2244(d)(1),(2). Here, the Delaware Supreme Court affirmed Petitioner's conviction on September 5, 2008, and there is no indication that Petitioner sought certiorari review in the United States Supreme Court. White v. State, 957 A.2d 2 (Table), 2008 WL 339413 (Del. Sept. 5, 2008). As a result, Petitioner's judgment of conviction became final for habeas purposes 90 days later, on December 4, 2008. See Kapral v. United States, 166 F.3d 565, 575-78 (3d Cir. 1999)(holding that the limitations period under § 2244(d)(1)(A) begins to run upon the expiration of the 90-day period for seeking review in the Supreme Court.) The limitations period started to run on December 5, 2008, and ran for a total of 40 days until he filed his first motion for post-conviction relief pursuant to Delaware Superior Court Criminal Rule 61 on January 14, 2009. (D.I. 1, at ¶ 11) The Delaware Superior Court denied the first Rule 61 motion on May 15, 2009, and Petitioner appealed that decision. (D.I. 3, at pp. 45-88) Consequently, Petitioner's first Rule 61 motion tolled the limitations clock from January 14, 2009 through May 12, 2010, the date on which the Delaware Supreme Court denied re-argument on its decision to affirm the Superior Court's denial of Petitioner's first Rule 61 motion. See 28 U.S.C. § 2244(d)(2); White v. State, 994 A.2d 745 (Table), 2010 WL 1781021 (Del. May 4, 2010), reargument denied (May 12, 2010). The limitations clock started running again on May 13, 2010, and ran another 106 days until August 26, 2010, the date on which Petitioner filed his second Rule 61 motion. If the second Rule 61 motion has been properly filed for § 2244(d)(2) purposes, it will toll the limitations period until the motion and any properly filed post-conviction appeal has been decided. Thus, according to these calculations, only 146 days of the one-year limitations period have lapsed, providing Petitioner with ample opportunity to timely file a habeas petition after exhausting state remedies for all of his habeas claims.

## **B. Summary Dismissal**

Having determined that the "stay and abey" procedure is not warranted in this case, the Court concludes that summary dismissal of the instant mixed Petition is appropriate. Nevertheless, pursuant to Urcinoli, before ordering such a dismissal, the Court will provide Petitioner with the following options. First, Petitioner may delete his unexhausted claim(s) and proceed with his exhausted claim(s). If Petitioner chooses this course of action, he should be aware that, by deleting his unexhausted claim(s), he may be unable to obtain federal habeas review of that claim at any future point in time. See 28 U.S.C. § 2244. Alternatively, Petitioner may opt to have the entire Petition dismissed without prejudice in order to enable him to re-file the entire Petition once the Delaware State Courts have completed their post-conviction review of Petitioner's pending Rule 61 motion. If Petitioner chooses this course of action, he should pay attention to the one-year statute of limitations period applicable to federal habeas petitions to avoid any future re-filing of his Petition from being time-barred by the Federal habeas statute of limitations.

And finally, given the possibility that Petitioner's second Rule 61 proceeding may have been decided by this point in time, thereby eliminating the exhaustion issue, Petitioner may decide to either proceed with the Petition as filed, or amend the

Petition to include additional exhausted claims. The Court will attach a "tailored" AEDPA election form to this Memorandum and Order setting forth these alternatives for Petitioner.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court concludes that the Petition contains both exhausted and unexhausted claims. Having determined that the stay-and-abey procedure is not warranted in this case, the Court will provide Petitioner with an opportunity to inform the Court as to whether: (1) he wishes to delete the unexhausted claim(s) from the Petition and proceed only with the exhausted claim(s); (2) he wishes to have the entire Petition dismissed without prejudice so that he can re-file all claims in a new Petition once he has exhausted state remedies; or (3) if the formerly unexhausted claims are now exhausted, continue with the Petition as filed, or add new exhausted claims to the existing Petition.

An appropriate Order follows.

DATED:

S/Eduardo C. Robreno  
**EDUARDO C. ROBRENO, J.**

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**O R D E R**

**AND NOW**, this 23 day of November, 2010, for the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that:

1. Petitioner Anthony D. White's motion to stay his habeas proceeding is **DENIED** without prejudice. (D.I. 4)
2. **No later than 30 days after the entry of this Order**, Petitioner must file the attached AEDPA Election Form informing the Court how he wishes to proceed, namely, whether he wants to delete the unexhausted claims and proceed with only the exhausted claims in the Petition; dismiss the entire Petition without prejudice to permit re-filing upon exhaustion; or, if exhaustion of state remedies has occurred by the date of this Order, continue with the Petition as filed or amend the Petition to add new exhausted claims. Petitioner's failure to file the AEDPA Election Form by the aforementioned deadline will result in the

Court dismissing the Petition without prejudice for failure to exhaust state remedies.

**AND IT IS SO ORDERED.**

S/Eduardo C. Robreno  
**EDUARDO C. ROBRENO, J.**

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**AEDPA ELECTION FORM**

1. \_\_\_\_\_ All claims in the petition are now exhausted, and I wish the Court to rule on my § 2254 petition as currently pending. I realize that the law does not allow me to file successive or later petitions unless I receive certification to do so from the United States Court of Appeals for the Third Circuit; therefore, this petition will be my one opportunity to seek federal habeas corpus relief.
  
2. \_\_\_\_\_ All claims in the petition are now exhausted, but I wish to amend my § 2254 petition to include all the grounds I have. I will do so within thirty (30) days. I realize that the law does not allow me to file successive or later petitions unless I receive certification to do so from the United States Court of Appeals for the Third Circuit; therefore, this amended all-inclusive petition will be my one opportunity to seek federal habeas corpus relief.
  
3. \_\_\_\_\_ I wish to withdraw my § 2254 petition

without prejudice to file one all-inclusive petition in the future; that is, one that raises all the grounds I have for federal habeas corpus relief. I realize this all-inclusive petition must be filed within the one-year period as defined by 28 U.S.C. § 2244(d). See Swartz v. Meyers, 204 F.3d 417 (3d Cir. 2000).

4. \_\_\_\_\_ I wish to delete the following the unexhausted claim(s) \_\_\_\_\_

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and proceed only with the following exhausted claim(s): \_\_\_\_\_

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\_\_\_\_\_  
\_\_\_\_\_.

5. \_\_\_\_\_ I am not seeking federal habeas corpus relief under § 2254. I am instead seeking relief under \_\_\_\_\_.

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Petitioner