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

JEREMIAH LYLE VAN TASSEL Petitioner	:	
	:	Case No. 1:21-cv-172 Erie
v.	:	Magistrate Judge Richard A. Lanzillo
MICHAEL CLARK, Respondent	:	

RESPONDENT DISTRICT ATTORNEY OF ERIE COUNTY'S
RESPONSE TO THE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

AND NOW, this 20th day of December, 2021, comes the Respondent District Attorney's Office of Erie County, by and through Assistant District Attorney Gregory M. Reichart, and pursuant to the Order of this Honorable Court received on July 12, 2021, files this Response opposing the subject Petition for Writ of Habeas Corpus ("Writ" or "Petition"). In support thereof, the Respondent avers the following:

I. Procedural History.

After a three-day jury trial, on April 19, 2018, Jeremiah Lyle Van Tassel, hereinafter referred to as "Petitioner", was found guilty after a trial by jury guilty of Count 1 - Rape of a Child (F1); Count 2 - Sexual Assault (F1); Count 3 - Involuntary Deviate Sexual Intercourse With a Child ("IDSI") (F1); Count 4 – Aggravated Indecent Assault of Child (F1); Count 5 - Corruption of Minors (F3); Count 6 – Indecent Assault (F3); and Count 7 – Indecent Assault (F3).

On June 5, 2018, Petitioner was sentenced to the following:

Counts 1: 72-144 months in incarceration;

Count 2: Merged with Count 1;

Count 3: 72-144 months in incarceration, consecutive to Count 1;

Count 4: 48-96 months in incarceration, consecutive to Count 3;

Count 5: 3-6 months in incarceration, consecutive to Count 4;

Count 6: Merged with Count 5;

Count 7: Merged with Count 6; and

Count 8: 3-6 months in incarceration, consecutive to Count 5.

The aggregate sentence for Petitioner then is 198 - 396 months in incarceration, or 16.5 - 33 years.[1]

Petitioner filed a post-sentence Motion for Post-Conviction Collateral Relief ("PCRA") on April 3 2019, wherein he claimed effectively two claims; that he had ineffective assistance of counsel[2] and that the trial court showed hostility and bias in its jury instructions, alleging that the court instructed the victim in this case (Petitioner's daughter) had no reason to lie and that Petitioner had reason to lie as he faced consequences as a result of his criminal charges. PCRA Petition, pg. 4. On April 9, 2019, William J. Hathaway, Esquire, was appointed as counsel for Petitioner on his PCRA. On October 2, 2019, the trial court filed its Notice of Intent to Dismiss PCRA without a hearing. A Notice of Appeal on Petitioner's PCRA was timely filed by Petitioner on December 18, 2019 following a November 21, 2019 order from the trial court dismissing Petitioner's PCRA.

On February 12, 2020, the trial court issued an Opinion effectively referring the Superior Court to the reasons recited in the trial court's October 2, 2019 Notice of Intent to Dismiss. On July 13, 2020, the Superior Court affirmed the trial court's opinion concerning Petitioner's PCRA.[3] According to Petitioner, a Petition for Allowance of Appeal was prepared by Attorney Hathaway

[1] No direct appeal of Petitioner's trial and sentence was ever filed.

[2] Notably, Petitioner was *pro se* from the time of his plea withdrawal on June 16, 2017 in addition to his trial in April of 2018.

[3] Appeal Docket Number 1859 WDA 2019.

on or around August 12, 2020 but was never filed with any row office concerning the Supreme Court of Pennsylvania.

On July 6, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus in which he raised the following issues:

1. That Petitioner was given "a choice of defense attorneys who refused to defend" or "proceeding *pro se;*"
2. (Ostensibly) that Attorney Hathaway, acting as appellate counsel, never filed the Petitioner's Allowance of Appeal to the Supreme Court of Pennsylvania; and
3. That the trial judge "vouched" for the prosecution witness (the Petitioner's daughter) and that the prosecutor made improper arguments during closing argument.

Claims 1 and 3 of the instant Petition are substantially the same as the first and second raised by Attorney Hathaway in the PCRA. Claim 2 is not clearly raised as grounds for the instant Petition but it shall be treated as same by the undersigned for purposes of discussion of the instant Petition.

II. Statute of Limitations.

Pursuant to 28 U.S.C. §2244(d)(1):

> "a 1-year period of limitation shall apply to the 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;
> ...or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered though the exercise of due diligence."

28 U.S.C. §2244(d)(1) provides that a one-year period of limitations applies to an application for writ of habeas corpus, to run from the latest of the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. §2244(d)(1)(A).

In addition, pursuant to §2244(d)(2), "the time during which a properly filed application for 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." *See also Rinaldi v. Gillis*, 248 Fed. Appx. 371, 2007 U.S. App. LEXIS 22471 (3d Cir. 2007). Therefore, this Honorable Court must determine whether any "properly filed" applications for post-conviction collateral relief that would toll the statute were pending during the limitations period.

With respect to state actions, a PCRA petition must be filed within one year of the date the judgment becomes final. 42 Pa.C.S. §9545(b)(1). A judgment becomes final "at the conclusion of direct review…or at the expiration of time for seeking the review." 42 Pa.C.S. §9545(b)(3). In the case at bar, Petitioner's judgment became final on July 5, 2018 upon the Superior Court appeal date running concerning a direct appeal of the jury verdict. Petitioner's application for relief on the instant Writ was filed on July 6, 2021.

Thus, working back from July 6, 2021, the Petitioner's case was disposed of by the trial court on June 5, 2018. The thirty-day window for Petitioner's direct appeal period would have ended on July 5, 2018, thus Petitioner's claim became final on that day. On April 3, 2019, the PCRA Petition was filed. The trial court filed its Notice of Intent to Dismiss PCRA on October 3, 2019 and was followed up by a denial on November 21, 2019. On December 18, 2019, Petitioner filed an appeal on his PCRA to the Superior Court, and the Superior Court's affirming of the trial court's decision was filed on August 27, 2020. The Superior Court's decision would have become

final on September 27, 2020, after the discretionary appeal date to the Supreme Court would have passed.

With Petitioner's appeal timeline in place, Respondent calculates the statute of limitations under 28 U.S.C. §2244, and finds that the Writ was filed one two hundred and eighty-three days (283) from the date of the discretionary appeal was due to the Supreme Court on his PCRA (September 27, 2020). However, Petitioner's direct appeal was due by July 5, 2018 and was never exercised, thus the instant Petition was filed one thousand ninety-eight (1,098) days later. Therefore, pursuant to 28 U.S.C. §2244(d)(1)(a),.the instant Petition was received by the Court on July 6, 2021 it appears to have been filed within the statute of limitations. However, though Respondent calculates the instant Writ to be filed before the expiration of the statute of limitations, Respondent reserves the right to further argue the statute of limitations claim should its calculation be wrong and does not waive this argument in the event said calculation is in error.

III. Exhaustion of the Issue and Procedural Defect.

Respondent further argues *arguendo* that Petitioner has not exhausted all claims that arises in the instant Writ.

The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2254(b)(1)(A), requires that a state petitioner exhaust their available state court remedies before seeking federal habeas corpus relief. Habeas courts cannot grant relief based on a habeas petition under §2254 unless a petitioner has exhausted the remedies available in the courts of the state. It is the Petitioner's burden to prove that the claim is exhausted. *O'Halloran v. Ryan*, 835 F.2d 506, 508 (3d Cir. 1987). To satisfy the exhaustion requirement, the claim must have been fairly presented to the state court. *Tome v. Strickman*, 167 Fed. Appx. 320, 2006 U.S. App. LEXIS 3734 (3d Cir.

2006). A claim has been fairly presented to a state court when it is fundamentally the same claim and was raised to the Superior Court either on direct appeal or during PCRA proceedings. *Id.*

A habeas petitioner may successfully exhaust a claim by bringing it to the Superior Court on either direct appeal or during PCRA proceedings. *Branch v. Tennis*, 2009 U.S. Dist. LEXIS 33906 (E.D. Pa. April 22, 2009) (*citing Leyva v. Williams*, 504 F.3d 357 (3d Cir. 2007). Fair presentation mandates that the claim brought in federal court be a "substantial equivalent" of what was presented to the state courts. *Tome*, 167 Fed. Appx. at 322.

A claim is unexhausted and unreviewable in federal court if the petitioner has the right under state law to raise the question presented by any procedure. 28 U.S.C. §2254(c). Thus, a state prisoner must exhaust his state court remedies before a federal court may grant him habeas relief in order to provide the state with the necessary opportunity to pass upon and correct alleged violations of its prisoner's federal rights. *Tome*, at 322 (3d Cir. 2006). Furthermore, the Supreme Court has mandated that a petition raised under 28 U.S.C. §2254 which includes at least one unexhausted claim as well as exhausted claims is a "mixed petition" and it must be dismissed on this basis without prejudice. *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198 (1982). Finally, claims premised upon the ineffective assistance of PCRA counsel are cognizable under the Post-Conviction Relief Act, meaning a subsequent PCRA can be filed to raise claims of alleged ineffectiveness of counsel on the first PCRA. *Commonwealth v. Robinson*, 635 Pa. 592, 139 A.3d 178, 181-187 (2016).

Petitioner raises (at most) three (3) in the instant Writ, which have previously been enumerated in Part I of this Response. Claim 1 of the instant Petition was a claim raised by Attorney Hathaway in the PCRA as denial of counsel; Claim 2 had not germinated prior to the

filing of this instant Petition Claims 3 is purportedly a claim of improper jury instruction and improper arguments. Petition For Writ of Habeas Corpus, pp. 3-8.

With respect to Claims 1 and 3, they have previously been raised by Petitioner and thus are deemed exhausted by state court claims, although no appeal was ever filed to the Supreme Court of Pennsylvania; however, the arguments concerning improper statements made during closing arguments have not previously been raised by Petitioner until the instant Petition was filed. Ergo, a portion of Claim 3 and all of Claim 2 raised by Petitioner have not previously addressed on either direct appeal or on a PCRA; thus, these claims are not exhausted. Petitioner's writ then should be considered a "mixed petition;" that is, a petition that contains at least one unexhausted claim. Thus, and in accordance with the Supreme Court's ruling, this instant petition should be dismissed on the grounds that it is mixed petition.

Additionally, this Court is further precluded from reviewing this petition's unexhausted claims under the "procedural defect doctrine." A federal habeas petitioner must present every claim raised in the federal petition to each level of state court. *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996)(*rehearing* en banc *denied*). Pennsylvania state law provides that failure to preserve an issue for appeal results in a waiver of said issue. *Commonwealth v. Cortes*, 442 Pa. Super. 258, 659 A.2d 573 (1995). A petitioner in Pennsylvania who fails to preserve an issue for appeal constitutes procedural default for purposes of federal habeas review. *Hull v. Kyler*, 190 F.3d 88 (3d Cir. 1999).

In the case *sub judice*, Petitioner has procedurally defaulted on Claim 2 and parts of Claim 3, as they have failed to have been properly presented to the courts as mandated by state law; additionally, Claim 2 can be raised as a subsequent PCRA in accordance with settled case law.

Robinson, supra. Thus, the remedy Petitioner has not yet exhausted with respect to Claim 2 involves the filing of a subsequent PCRA Petition.

Furthermore, a petitioner can only overcome procedural defect by showing 1) "cause for the default and "actual prejudice" resulting from the alleged violation of federal law, or that 2) failure to consider the claims will result in a "fundamental miscarriage of justice." *Leyva*, at F.3d 357 (3d Cir. 2007). In the case at bar, Petitioner has made no claim whatsoever that either of the two aforementioned exceptions apply to his writ, nor that are they applicable to his writ, nor has he presented evidence in support thereof. Thus, Petitioner has failed to overcome procedural default in his petition and it should be dismissed.

In addition, trial court issues in Pennsylvania are waived if they are not raised on the first opportunity for review. *Commonwealth v. Rush*, 838 A.2d 651, 660 (Pa. 2003). Claims that could have been raised on direct appeal cannot be raised in a PCRA proceeding. *Commonwealth v. Ford*, 809 A.2d 325, 329 (Pa. 2002) (*cert. denied*, 540 U.S. 1150 (2004)). In short, because Petitioner did not raise the issues enumerated above (lack of representation, ineffective assistance of counsel, and a challenge to jury instructions and improper closing arguments made by the Commonwealth) are waived due to Petitioner's failure to address said claims in a direct appeal to the Superior Court of Pennsylvania. Thus, in concert to the reasons argued above, Petitioner's claim for relief should be dismissed.

IV. The Merits of the Petition.

Once again, assuming *arguendo* this Writ is not dismissed for failing to satisfy the exhaustion requirement, the issues raised within this Writ are without merit.

The burden of proof in a habeas proceeding is on the petitioner, who must establish by a preponderance of the evidence the facts that support his claim for relief. *Jackson v. Howard*, 403 F.Supp. 107 (W.D. Pa. 1975), citing *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824 (1965).

With respect to Claim 1, Petitioner's claim of a coercion of choice of counsel or lack thereof is undermined by the record. In two specific and separate colloquies prior to trial, Petitioner was asked if he had been forced or pressured in any way shape or form in making his decision to move forward without counsel, and in both instances Petitioner answered he was not; had he felt differently, Petitioner did not inform either the prosecution or the court to his apparent feelings on the matter until (conveniently) he was convicted and after no less than two (if not three) colloquies on the subject. (*See* Pro Se Colloquy Transcript, 7/18/2017 pg. 10, Pro Se Colloquy Transcript, 11/30/2017, pg. 5, Sentencing Transcript, 6/5/2018 pg. 9). Thus, Petitioner's claim of coercion is without merit and must be dismissed.

Additionally, it is settled law that prevailing on an ineffective assistance of counsel claim, a petitioner must prove first that counsel's performance was deficient and also that that the deficient performance actually prejudiced the defendant. To do so requires a showing that counsel's errors were so serious that they ceased to function as "counsel" as guaranteed by the Sixth Amendment of the United States Constitution. *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000). Actual prejudice is established when and only when a petitioner shows that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A "reasonable probability" is one sufficient to undermine the confidence in the outcome of the trial proceedings. *Id.* The instant Writ has made no such showing concerning any of the claims raised within it.

Furthermore, to be eligible for relief under the Post-Conviction Relief Act in Pennsylvania, a petitioner must plead and prove by a preponderance of evidence that their conviction or sentence resulted from one or more of the following: i) a violation of the Pennsylvania or United States Constitution which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place; ii) ineffective assistance of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S.A. §9543(a)(2)(i-iii). Finally, counsel cannot be held ineffective in Pennsylvania for failing to pursue a meritless claim. *Commonwealth v. Rega*, 933 A.2d 997 (Pa. 2008). Counsel is strongly presumed to have rendered adequate legal assistance, and to have made all decisions in the exercise of reasonable professional judgment and sound strategy. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

The right for a defendant to have their appeal heard by the Supreme Court of Pennsylvania is discretionary in nature.[4] In addition, there exists no federal constitutional right on appeal to have counsel. *Ross v. Moffitt*, 417 U.S. 600, 610 (1974). In Pennsylvania, a defendant is not entitled to counsel on a discretionary appeal. *Commonwealth v. Liebel*, 825 A.2d 630-633-034 (Pa. 2003). Thus, prejudice cannot attach to any perceived failure on the part of PCRA counsel, as it is an appeal Petitioner is not entitled to in the first right.

Petitioner raises ineffective assistance of trial counsel in Claim 2 in the instant Writ. However, Petitioner makes no such argument or factual claim apart from bare assertions in his Petition and an attached brief ostensibly from PCRA counsel, which may have been prepared but there exists no evidence Petitioner wished it to be filed.[5] Instead, Petitioner relies on an occluded,

[4] *See* Pa.R.A.P. 1114.

[5] At best, Petitioner would be entitled to a restoration of his discretionary appellate rights on his PCRA to the Supreme Court of Pennsylvania, and not entitled to a complete retrial.

bare and self-serving argument which do not assert any viable non-frivolous grounds to appeal. Furthermore, while it is true that a failure to appeal is a per se violation of Sixth Amendment rights to a *direct* appellate court, such a standard is not held when the matter is appealed to a discretionary court, which is the case here (the Supreme Court of Pennsylvania).[6]

Finally, with respect to Claim 3, Petitioner had no "suspect" jury instruction with respect to vouching on the part of the court due to the relevant jury instruction in question are standard jury instructions that do not infer either (1) that the victim was to be believed and (2) that Petitioner was not to be believed. *See* Pennsylvania Standard Suggested Jury Instructions, 4.13 (B)(Crim), 3.09 (Crim). Concerning Petitioner's bare assertions that the prosecutor made improper statements, a prosecutor's statements are improper when and only when the remarks "caused the defendant substantial prejudice by so infecting the trial with unfairness as to make resultant conviction a denial of due process. *United States v. Sharief*, 190 F.3d 71, 78 (2nd Cir., 1999). Petitioner asserts blindly that the prosecutor made claims that rendered his trial to be a denial of due process. Setting aside the fact that Petitioner (colloquied and presumed to be his own counsel) failed to object at the time, all the comments made by the prosecutor during closing argument caused no such harm as to rise to prejudice at all, let alone substantial prejudice; they were all comments made by the prosecuting attorney within the rights the prosecution has to argue at its closing argument. (Trial Transcript Day 3, pgs. 44-72). Thus, Petitioner's final claim for relief must be dismissed.

V. Conclusion

Petitioner has failed to properly exhaust his claims in state court and to overcome procedural default. Further, he has failed to meet his burden of proof and the petition is without

[6] *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

merit. Therefore, for the aforementioned reasons, Respondent District Attorney of Erie County respectfully requests that the instant Petition for Writ of Habeas Corpus be dismissed.

Respectfully submitted,

/s/ Gregory M. Reichart
Assistant District Attorney
140 West Sixth Street, Room 506
Erie, PA 16501
(814) 451 6483
greichart@eriecountypa.gov
PA ID No. 311692
Counsel for Respondent District Attorney of Erie County

CERTIFICATE OF SERVICE

On this day, I hereby certify that a true and accurate copy of the "Response to the Petitioner's Petition for Writ of Habeas Corpus" is being served upon the Petitioner in the manner described below which satisfies the requirements of F.R.C.P. 5:

JEREMIAH LYLE VAN TASSEL
NL0329
10745 Route 18
Albion, PA 16475-0001