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1 of 1 DOCUMENT

**NAFIS BILAL, Petitioner v. SUPERINTENDENT JERRY WALSH, et al.,
Respondent**

CIVIL ACTION NO. 11-1973

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

2012 U.S. Dist. LEXIS 43663

March 28, 2012, Decided

March 29, 2012, Filed

PRIOR HISTORY: *Commonwealth v. Bilal*, 986 A.2d 1248, 2009 Pa. Super. LEXIS 6346 (Pa. Super. Ct., 2009)

CAROL SANDRA MOORE WELLS
CHIEF UNITED STATES MAGISTRATE JUDGE

COUNSEL: [*1] NAFIS BILAL, Petitioner, Pro se, DALLAS, PA.

For JERRY WALSH, SUPERINTENDENT (SCI-DALLAS), THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents: ANNE PALMER, PHILADELPHIA DISTRICT ATTORNEYS OFFICE, PHILADELPHIA, PA.

For THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, PENNSYLVANIA, Respondent: ANNE PALMER, LEAD ATTORNEY, PHILADELPHIA DISTRICT ATTORNEYS OFFICE, PHILADELPHIA, PA.

JUDGES: CAROL SANDRA MOORE WELLS, CHIEF UNITED STATES MAGISTRATE JUDGE.

OPINION BY: CAROL SANDRA MOORE WELLS

OPINION

MEMORANDUM

Presently before this court is a Petition for a Writ of Habeas Corpus filed, *pro se*, pursuant to 28 U.S.C. § 2254. Nafis Bilal ("Petitioner"), currently incarcerated at the State Correctional Institution at Dallas, Pennsylvania, claims that: (1) trial counsel were ¹ ineffective for inducing him to plead guilty; (2) trial counsel were ineffective for failing to file a direct appeal; and (3) prison officials interfered with his ability to communicate with trial counsel after his guilty plea, which caused him to be unable to file a timely direct appeal. Petition ("Pet.") at 8-9. The Commonwealth responded that the first claim is procedurally defaulted, [*2] asserted that the second lacks merit and deemed the third not cognizable. Response ("Resp.") at 6-26 & n.4. Petitioner filed a Reply; however, the U.S. Supreme Court recently decided *Martinez v. Ryan*, 2012 U.S. LEXIS 2317, 2012 WL 912950 (U.S. Mar. 20, 2012), which provides an new, potential avenue for Petitioner to avoid the procedural default of his first claim. ²

1 At trial, Petitioner was represented by Daniel Stevenson, Esquire and Everett Gillison, Esquire of the Philadelphia Public Defender's office. Petitioner pled guilty to first degree murder, robbery and possessing an instrument of crime on

October 26, 2006. He did not file a direct appeal. Petitioner raised his first claim in his *pro se* PCRA petition. See Resp. Ex. C. However, the first claim is unexhausted because PCRA counsel omitted it in the amended PCRA petition he filed, see Resp. Ex. C, and it was not raised on PCRA appeal. See *Commonwealth v. Bilal*, No. 1499 EDA 2008, slip op. at 1-12 (Pa. Super. Ct. Oct. 2, 2009). It is procedurally defaulted because the PCRA statute of limitations has expired for the claim and Petitioner can no longer exhaust it. See *Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001) (holding that claims time-barred [*3] under the PCRA are procedurally defaulted).

In Pennsylvania, claims of ineffective assistance of trial counsel must be deferred from direct appeal until a collateral proceeding under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46. See *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 738 (Pa. 2002). In light of this requirement, if a Pennsylvania habeas petitioner has defaulted a claim of trial counsel's ineffective assistance because his PCRA counsel failed to raise the claim in the initial PCRA proceeding, the petitioner may demonstrate cause for his default by demonstrating that PCRA counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).³ See *Martinez*, 2012 U.S. LEXIS 2317, 2012 WL 912950 at *8. Until *Martinez* was decided, cause could not be shown in this manner because there is no constitutional right to counsel in PCRA proceedings, *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), nor a constitutional right to the effective assistance of counsel in PCRA proceedings. *Coleman v. Thompson*, 501 U.S. 722, 752-53, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

³ *Strickland* requires a petitioner to demonstrate

that counsel's performance was deficient and that counsel's deficient performance prejudiced [*4] the defense. *Strickland*, 466 U.S. at 687.

Martinez has opened an avenue for cause that *Coleman* previously foreclosed. Hence, it is appropriate to allow Petitioner the opportunity to demonstrate that his PCRA attorney was ineffective for failing to pursue, in the initial PCRA proceeding, Petitioner's first claim of trial counsel ineffective assistance. The best way to do that is to conduct an evidentiary hearing where PCRA counsel could explain why he failed to pursue the defaulted claim. See *Thomas v. Horn*, 570 F.3d 105, 125 (3d Cir. 2009) (explaining that the determination of whether counsel's performance was deficient under *Strickland* requires an evidentiary basis). Before conducting an evidentiary hearing, counsel must be appointed. See *Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts*. Accordingly, this court will order that counsel be appointed to represent Petitioner.

An implementing Order follows.

ORDER

AND NOW, this 28th day of March, 2012, for the reasons explained in the court's Memorandum of today, it is hereby **ORDERED** that counsel will be appointed for Petitioner. It is so **ORDERED**.

BY THE COURT:

/s/ Carol Sandra Moore Wells

CAROL SANDRA MOORE WELLS [*5]

Chief United States Magistrate Judge

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