IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

FREDERICK RUSSELL, # 81782 PETITIONER

VS. CIVIL ACTION NO. 2:10cv28-KS-MTP

RONALD KING RESPONDENT

REPORT AND RECOMMENDATION

THIS MATTER is before the Court on a Motion [13] to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted or, in the Alternative, Pursuant to 28 U.S.C. § 2254(b), filed by Respondent. Having considered the submissions of the parties, all documents made a part of the record of this case and applicable law, the undersigned recommends that the motion be granted and that Frederick Russell's Petition [1] for Writ of Habeas Corpus be dismissed without prejudice for failure to exhaust his state remedies.

FACTS AND PROCEDURAL HISTORY

On May 9, 2007, Petitioner was convicted of possession of marijuana with intent to sell in the Circuit Court of Wayne County, Mississippi and was sentenced to serve eight years in the custody of the Mississippi Department of Corrections (MDOC). *See* Petition at 3. Petitioner had previously been convicted of aggravated assault in 1993. *See* Response [8-2] to Court Order at 9; ecf. doc. no. 13-1 at 3; Response [14] to Motion to Dismiss at 2. In the instant Petition, filed by Petitioner *pro se* on February 9, 2010, Petitioner does not challenge his convictions or sentences but, rather, challenges the MDOC's denial of parole eligibility to him on his current sentence. According to Petitioner, and as set forth in the record, he has been found to be ineligible for parole on his current sentence because of his prior aggravated assault conviction. *See* Petition; ecf. doc. no. 13-1 at 8. Petitioner argues that he is eligible for parole pursuant to Miss. Code

Ann. § 47-7-3(1)(g),[1] which allows certain prisoners convicted of only nonviolent crimes after June 30, 1995 to be considered for parole. Petitioner argues that because he has not been convicted of a violent crime after June 30, 1995, he is eligible for parole and should be granted a parole hearing. He argues that the denial of parole eligibility to him constitutes a violation of his due process and equal protection rights, as well as a violation of the *Ex Post Facto* clause. *See* Petition [1]; Response [10] to Court Order; Response [14] to Motion to Dismiss.

Prior to filing this action, Petitioner challenged the denial of parole eligibility in the MDOC's Administrative Remedy Program (ARP), and Petitioner was denied relief at all three steps of the ARP process.[2] On April 1, 2009, Petitioner was provided with a Certificate

---

[1] This section provides in pertinent part: "(1) Every prisoner who has been convicted of any offense against the state of Mississippi, and is confined...for a definite term...of one (1) year or over...whose record of conduct shows that such prisoner has observed the rules of the department, and who has served not less than one-fourth (1/4) of the total of such term.....may be released on parole as hereinafter provided, except that:...(g) No person shall be eligible for parole who is convicted...after June 30, 1995, *except that an offender convicted of only nonviolent crimes after June 30, 1995, may be eligible for parole* if the offender meets the requirements in subsection (1) and this paragraph...For purposes of this paragraph, 'nonviolent crime' means a felony other than...aggravated assault...." (emphasis added). Prior to an amendment effective April 7, 2008, only first-time offenders convicted of nonviolent crimes could be eligible for parole. Respondents argue that under the current version of the statute, in order for an offender to be eligible for parole on a crime committed after June 30, 1995, he or she can never have been convicted of a violent crime and, therefore, because Petitioner was convicted of aggravated assault prior to June 30, 1995, he is ineligible for parole on any crimes committed after June 30, 1995. *See* Motion to Dismiss at 3-4. This is consistent with a May 5, 2008 memorandum from Christopher Epps, Commissioner of the MDOC, regarding the April 7, 2008 amendments to the statute, which states that "to be eligible for parole an offender can never have been convicted of a violent felony...." *See* [10-2] at 6. Petitioner argues, however, that because his aggravated assault conviction occurred prior to June 30, 1995, and he has only been convicted of a non-violent crime after June 30, 1995, he is eligible for parole. *See* Response [14] at 2. Petitioner's interpretation appears to be more in line with the wording of the statute.

[2] Miss. Code Ann. § 47-5-801 grants the MDOC the authority to adopt an administrative review procedure at each of its correctional facilities. Pursuant to this authority, the MDOC has set up an Administrative Remedy Program (ARP) "through which an offender may seek formal review of a complaint relating to any aspect of their incarceration." *MDOC Inmate Handbook* (*available at* http://www.mdoc.state.ms.us/Inmate_Handbook/CHAPTER%20VIII.pdf), ch. VIII,

documenting completion of the three-step ARP process and informing him of his right to seek judicial review within thirty days.[3] *See* [13-1]. Thereafter, Petitioner filed suit in the Circuit Court of Greene County challenging the ARP decision. By Order filed September 8, 2009, the court affirmed the decision of the ARP, finding that it "was not arbitrary or capricious, was supported by substantial evidence, was not beyond to [sic] powers of the ARP, and was not in violation of the rights of the plaintiff." *See* Exh. B to Motion to Dismiss. Petitioner appealed to the Mississippi Supreme Court, and requested that he be allowed to proceed *in forma pauperis*. The court noted that the trial court had already found that Petitioner was not entitled to appeal *in forma pauperis* and had denied his request on October 20, 2009[4] and, therefore, the court denied Petitioner's Motion to Proceed *In Forma Pauperis* on November 18, 2009. *See* Exh. C to Motion to Dismiss. By Order entered January 7, 2010, Petitioner's appeal was dismissed for

---

¶ 3. The ARP is a three step process. Inmates initially submit their grievance to the division head or adjudicator in writing, within thirty days after an incident has occurred. If, after screening, a grievance is accepted into the ARP, the request is forwarded to the appropriate official, who will issue a First Step Response. If the inmate is unsatisfied with this response, he may appeal to the Superintendent or Warden of the institution, who will then issue a Second Step Response. If still aggrieved, the inmate may appeal to the Commissioner of MDOC, where a Third Step Response is issued. At this time, the Administrator of the ARP will issue the inmate a certificate stating that he has completed the exhaustion of his administrative remedies and can now proceed to court. *See MDOC Inmate Handbook*, ch. VIII; *see also Cannady v. Epps*, 2006 WL 1676141, at * 1 (S.D. Miss. June 15, 2006).

[3] Miss. Code Ann. § 47-5-807 provides that "[a]ny offender who is aggrieved by an adverse decision rendered pursuant to any administrative review procedure...may, within thirty (30) days after receipt of the agency's final decision, seek judicial review of the decision."

[4] The trial court had cited to *Tubwell v. Anderson*, 776 So. 2d 654 (Miss. 2000) in denying Petitioner's motion to proceed *in forma pauperis* on appeal. In *Tubwell*, the Mississippi Supreme Court noted that it had previously interpreted Miss. Code Ann. § 47-5-76 - which provides that the MDOC shall pay indigent inmates' court costs in civil actions pertaining to conditions of confinement - "as requiring the MDOC to pay an indigent inmate's court costs in condition of confinement lawsuits only at the trial, rather than the appellate, level." *Tubwell*, 776 So. 2d at 658 (citing *Moreno v. State*, 637 So. 2d 200 (Miss. 1994)).

failure to pay the costs of appeal, pursuant to MRAP 2(a)(2).[5] *See* Exh. D to Motion to Dismiss.

In the Motion to Dismiss, Respondent contends that Petitioner has failed to state a claim upon which habeas relief can be granted or, in the alternative, that the Petition should be dismissed for failure to exhaust available state court remedies, pursuant to 28 U.S.C. § 2254(b).

DISCUSSION

Exhaustion of state remedies is a mandatory prerequisite to federal habeas relief under 28 U.S.C. § 2254:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that–
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> . . . .
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

To satisfy the exhaustion requirement, the petitioner must first present his claims to the highest state court in a procedurally proper manner so that it is given a fair opportunity to consider and pass upon issues before they come to federal court for habeas corpus review. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 844-45 (1999). This is so because state courts, "like federal courts, are

---

[5] "An appeal may be dismissed upon motion of a party or on motion of the appropriate appellate court (i) when the court determines that there is an obvious failure to prosecute an appeal; or (ii) when a party fails to comply substantially with these rules. When either court...determines that dismissal may be warranted under this Rule..., the clerk of the Supreme Court shall give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen (14) days after notification, the appeal shall be dismissed by the clerk of the Supreme Court." The docket reflects that following denial of Petitioner's Motion to Proceed *In Forma Pauperis*, a Deficiency Notice was issued to Petitioner on November 19, 2009. *See Russell v. Epps*, Case No. 2009-TS-01588 (available at http://www.mssc.state.ms.us/appellate_courts/generaldocket.html).

obliged to enforce federal law." *Id.* at 844. Exhaustion results from the petitioner's pursuit of his claims through state courts either by direct appeal or by post-conviction proceedings. *See Orman v. Cain,* 228 F.3d 616, 619-20 & n.6 (5th Cir. 2000).

As noted *supra*, Petitioner's appeal of the trial court's affirmance of the ARP decision was dismissed due to his failure to pay costs and, therefore, he has failed to exhaust the claims asserted therein. *See*, *e.g.*, *Ruff v. Bradley*, 2007 WL 670952, at * 2 (N.D. Miss. Feb. 28, 2007) (holding that petitioner's failure to pay costs on appeal of denial of petition seeking review of ARP decision after motion to proceed *in forma pauperis* was denied constituted failure to exhaust). Thus, Petitioner has not "give[n] the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan,* 526 U.S. at 840-41, 844-45, 847-48.

Respondent argues that Petitioner's claims are procedurally barred because "there is no opportunity available for Russell to present his claims to the state court in which such claims would be deemed procedurally proper."[6] *See* Motion to Dismiss at 6. However, it appears that Petitioner may have other state avenues to pursue his constitutional challenges to the denial of parole eligibility. The court further notes that it is unclear whether Petitioner has presented the constitutional claims presented herein - denial of due process, violation of equal protection clause and violation of *Ex Post Facto* clause - to the state courts. A copy of the complaint filed by

[6] "If a petitioner fails to exhaust state remedies, but the court to which he would be required to return to meet the exhaustion requirement would now find the claim procedurally barred, then there has been a procedural default for purposes of federal habeas corpus relief." *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001) (citations omitted); *see also O'Sullivan,* 526 U.S. at 848 (holding that failure to present claim to state's highest court in timely manner results in procedural default of those claims); *see also Sones v. Hargett,* 61 F.3d 410, 416 (5th Cir. 1995) (stating that "[w]hen...state remedies are rendered unavailable by the petitioner's own procedural default, federal courts are barred from reviewing those claims.").

Petitioner in the Greene County Circuit Court action is not part of the record. In his ARP grievance, the only constitutional violation specifically mentioned by Petitioner is his *Ex Post Facto* claim.[7] *See* [13-1]. Thus, it appears that Petitioner *may* have the right to pursue these claims through the ARP and in state court. Accordingly, the court finds that Petitioner's claims should be dismissed without prejudice for failure to exhaust.

NOTICE OF RIGHT TO OBJECT

In accordance with the rules, any party within fourteen days after being served a copy of this report, may serve and file written objections to the report, with a copy to the judge, the magistrate judge and the opposing party. The District Judge at the time may accept, reject or modify in whole or part, the recommendations of the Magistrate Judge, or may receive further evidence or recommit the matter to this Court with instructions. The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendations contained within this report within fourteen days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions accepted by the district court to which the party has not objected. *Douglass v. United Servs. Automobile Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir. 1996).

THIS, the 21st day of September, 2010.

s/ Michael T. Parker
United States Magistrate Judge

[7] Even if it were exhausted, this claim has no merit. Article I, § 10, cl. 1 of the U.S. Constitution prohibits states from "pass[ing] any...ex post facto Law." Thus, "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (citation omitted). Changes to parole eligibility can retroactively increase punishment. *See Wallace v. Quarterman*, 516 F.3d 351 (5th Cir. 2008). "The controlling inquiry is whether retroactive application of the new law...creates 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Kyles v. Garrett*, 2010 WL 3303736, at * 4 (S.D. Tex. Aug. 19, 2010) (quoting *Garner v. Jones*, 529 U.S. 244, 250 (2000)). There has clearly been no retroactive increase in Petitioner's punishment, as he was not eligible for parole prior to the 2008 amendment to the parole statute at issue herein.