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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NATHANIEL HEARN,)	
)	
Petitioner,)	
)	
v.)	CIV 08-00848 PHX MHM (MEA)
)	
DORA SCHRIRO and)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE MARY H. MURGUIA:

On or about April 22, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") (Docket No. 12) on August 4, 2008. Respondents contend the Court lacks subject matter jurisdiction over the petition because at the time Petitioner filed this action he was no longer in custody pursuant to the conviction he challenges. Respondents also assert the action for habeas relief may be denied and dismissed because relief on this claim is procedurally barred and because the claim is without merit. Petitioner filed a reply to the answer on January 12, 2009. See Docket No. 18.

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I Procedural History

In the instant habeas petition, Petitioner challenges his conviction in Maricopa County Superior Court docket number CR2003-035096.¹

On June 19, 2003, in Maricopa County Superior Court docket number CR2003-035096, Petitioner was charged by an information with failing to register as a sex offender between March 31, 2003, and June 9, 2003. See Answer, Exh. W. At a preliminary hearing conducted July 1, 2003, Petitioner informed the trial court that he wished to represent himself and the trial court appointed a public defender to be Petitioner's advisory, or "standby" counsel. Id., Exh. Y.

Petitioner filed a motion to dismiss the charges stated in docket number CR2003-035096 on July 14, 2003. Id., Exh. Z at 97 & Exh. CC. Attached to his motion to dismiss the charge of failing to register as a sex offender were copies of sex offender registration forms Petitioner had filed pursuant to Arizona Revised Statutes § 13-3821; the earliest of the registration forms was dated January of 1987. Id., Exh. CC, Attach. The motion to dismiss was denied.

¹ Petitioner has two other section 2254 actions pending in the United States District Court for the District of Arizona. In Docket No. 08-252, filed February 7, 2008, Petitioner challenges his 1982 conviction and sentence on one count of sexual assault. A Report and Recommendation in that matter was filed June 16, 2008, in which the undersigned recommended that the petition be denied and dismissed with prejudice. Petitioner's reply to the answer to his petition in Docket No. 08-448, in which matter he challenges his convictions on charges of robbery and unlawful flight, is due February 10, 2009.

1 On December 18, 2003, in Maricopa County Superior Court
2 docket number CR2003-035096, Petitioner pled guilty to one count
3 of failure to register as a sex offender in exchange for the
4 state's agreement to dismiss an allegation of prior felony
5 convictions. Id., Exh. KK.

6 Petitioner's guilty plea in CR2003-035096 constituted
7 a violation of probation imposed on Petitioner as a result of
8 his conviction in two separate 2002 criminal cases, i.e.,
9 Maricopa County Superior Court docket numbers CR2002-004244 and
10 CR2002-14683. Id., Exh. LL. On June 11, 2004, the trial court
11 revoked Petitioner's probation in both of the 2002 cases and
12 sentenced Petitioner to concurrent prison terms of 2.5 years
13 dating from that date with credit for presentence incarceration
14 of 487 days. Id., Exh. MM. The presentence incarceration
15 credit was altered on May 8, 2007, to 660 days in CR2002-004244
16 and 461 days in CR2002-14683.

17 In the 2003 case Petitioner is challenging (CR2003-
18 35096), also on June 11, 2004, the state trial court denied
19 Petitioner's motion to withdraw from the plea agreement and
20 sentenced Petitioner to the presumptive 2.5 year prison term,
21 which was ordered to run consecutively to the sentences imposed
22 in the 2002 cases. Id., Exh. NN. Petitioner was given credit
23 for 171 days of presentence incarceration, which was amended to
24 343 days of presentence incarceration on May 8, 2007.

25 On March 22, 2005, in Maricopa County docket number
26 CR2004-006251, Petitioner was sentenced to a twelve-year term
27 of imprisonment and a concurrent six-year term of imprisonment,
28

1 The United States District Courts have the power to
2 grant a writ of habeas corpus only to individuals who are "in
3 custody in violation of the Constitution or laws or treaties of
4 the United States." If not actually incarcerated pursuant to
5 the conviction he seeks to reverse, a habeas petitioner must
6 establish that he is subject to conditions that "significantly
7 restrain ... [his] liberty." Jones v. Cunningham, 371 U.S. 236,
8 243, 83 S. Ct. 373, 377 (1963); Virsnieks v. Smith, 521 F.3d
9 707, 717-19 (7th Cir. 2008). When a petitioner is not
10 incarcerated pursuant to the challenged conviction, the
11 collateral consequences of the conviction, i.e., consequences
12 with negligible effects on the petitioner's physical liberty,
13 are insufficient to satisfy the "in custody" requirement. See
14 Maleng v. Cook, 490 U.S. 488, 491-92, 109 S. Ct. 1923, 1925-26
15 (1989); Virsnieks, 521 F.3d at 717-19.

16 Petitioner contends that, because of his conviction in
17 CR2003-035096, the challenged conviction before the Court, and
18 his 1981 conviction for a sexual offense, the prison restricts
19 his recreation, his visits, and

20 many other programs because I refuse to take
21 sex offender treatment... Even though I have
22 received an absolute discharge from this
23 sexual assault charge in 1991 and never
24 recommitted another sex charge D.O.C. is
 still punishing me for this crime and trying
 to compel me to testify against myself and
 they share information with the county
 attorney.

25 Reply at 2.

26 Petitioner has not established that he is "in custody"
27 pursuant to the conviction he seeks to challenge. Any

1 limitation on his current incarceration, resulting from a
2 different conviction, which limitation arises from his prior
3 conviction, is best described as a collateral consequence of the
4 prior conviction. Cf. Williamson v. Gregoire, 151 F.3d 1180,
5 1183 (9th Cir. 1998) (holding that Washington sexual offender
6 registration laws do not render registrant "in custody"); Henry
7 v. Lungren, 164 F.3d 1240, 1242 (9th Cir. 1999) (California);
8 McNab v. Kok, 170 F.3d 1246, 1247 (9th Cir. 1999) (Oregon);
9 Leslie v. Randle, 296 F.3d 518, 521-23 (6th Cir. 2002) (Ohio).
10 Compare Zichko v. Idaho, 24 7 F.3d 1015, 1019-20 (9th Cir. 2001)
11 ("[A] habeas petitioner is 'in custody' for the purposes of
12 challenging an earlier, expired rape conviction, when he is
13 incarcerated for failing to comply with a state sex offender
14 registration law because the earlier rape conviction 'is a
15 necessary predicate' to the failure to register charge.").

16 As argued by Respondents, Petitioner is no longer
17 incarcerated for failing to comply with the registration
18 statute; Petitioner is incarcerated for 2004 property crimes
19 offenses. Accordingly, Petitioner is not suffering the
20 collateral consequence of either his original sex offense or the
21 resulting conviction for failing to register as a sex offender.
22 Because Petitioner cannot show that he was "in custody" on his
23 2003 conviction for failing to register as a sex offender at the
24 time he filed the instant Petition, the District Court lacks
25 subject matter jurisdiction over the petition.

1 **B. Respondents assert the petition must be denied**
2 **because Petitioner waived the right to assert an ineffective**
3 **assistance of counsel claim by electing to represent himself in**
4 **his criminal proceedings.**

5 The only claim for relief stated in the Petition is
6 "ineffective assistance of counsel on his counsel while he was
7 his attorney and the fact [Petitioner] had to choose between
8 ineffective assistance of counsel or to represent himself."
9 Reply at 2.

10 Respondents assert the claim is procedurally barred for
11 Petitioner's failure to properly exhaust the claim in the state
12 courts. Respondents maintain Petitioner has not shown cause for,
13 nor prejudice arising from his procedural default of the claim,
14 and that Petitioner has similarly not established that a
15 fundamental miscarriage of justice will occur absent a review of
16 the merits of the claim. Respondents also contend Petitioner
17 waived any Sixth Amendment ineffective assistance of counsel
18 claim. Additionally, Respondents argue, the claim may be denied
19 on the merits.

20 Prior to 1996, the federal courts were required to
21 dismiss a habeas petition which included unexhausted claims for
22 federal habeas relief. However, section 2254 now states: "An
23 application for a writ of habeas corpus may be denied on the
24 merits, notwithstanding the failure of the applicant to exhaust
25 the remedies available in the courts of the State." 28 U.S.C.
26 § 2254(b)(2) (1994 & Supp. 2008). The undersigned agrees with
27 Respondents that Petitioner procedurally defaulted his habeas
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1 claim in the state courts and that Petitioner has not shown
2 cause nor prejudice with regard to this default.

3 The undersigned also agrees the claim may be denied on
4 the merits. Petitioner waived any claim that he was denied his
5 Sixth Amendment right to the effective assistance of counsel
6 when he choose to represent himself in his criminal proceedings.
7 Additionally, to the extent he asserts he was denied any right
8 to the effective assistance of "standby" counsel, Petitioner has
9 not asserted the deprivation of a right assured by the United
10 States Constitution.

11 In Faretta v. California, 422 U.S. 806, 834 n.46, 95 S.
12 Ct. 2525, 2541 n.46 (1975) the Supreme Court held that a
13 defendant who elected to represent himself could not then
14 complain "that the quality of his own defense" deprived him of
15 his Sixth Amendment right to the effective assistance of
16 counsel. Additionally, the United States Supreme Court has
17 never held that a state criminal defendant is constitutionally
18 entitled to the effective assistance of "standby" or advisory
19 counsel. See Wilson v. Parker, 515 F.3d 682, 697 (6th Cir.
20 2008).

21 The Sixth Circuit reasoned in Wilson:

22 Since [the petitioner] waived his right to
23 counsel, his claim of ineffective assistance
24 of trial counsel necessarily fails. By
25 exercising his constitutional right to
26 present his own defense, a defendant
27 necessarily waives his constitutional right
28 to be represented by counsel. See Faretta,
422 U.S. at 834, 95 S. Ct. 2525. Logically,
a defendant cannot waive his right to counsel
and then complain about the quality of his
own defense. Id. at 834 n.46, 95 S. Ct.

1 2525; Gall v. Parker, 231 F.3d 265, 320 (6th
2 Cir. 2000).

3 Id., 515 F.3d at 696.

4 In a case in which the petitioner alleged he was not
5 afforded effective assistance of counsel prior to the date the
6 petitioner chose to represent himself, a claim similar to that
7 asserted by Petitioner, the Ninth Circuit Court of Appeals
8 noted: "[The petitioner] makes no free-standing claim
9 ineffectiveness assistance of counsel, nor could he. Having
10 failed to show that his decision to represent himself was
11 involuntary, [the petitioner] cannot claim that he was denied
12 the effective assistance of counsel at trial." Williams v.
13 Stewart, 441 F.3d 1030, 1047 n.6 (9th Cir. 2006).

14 Although Petitioner contends his choice was to accept
15 incompetent counsel or to represent himself, the Circuit Courts
16 of Appeal have uniformly concluded that an indigent criminal
17 defendant does not have the right to either counsel of his own
18 choosing or "hybrid" representation. See, e.g., Wilson, 515
19 F.3d at 696.

20 The Faretta right and the appointment of
21 standby counsel inherently conflict which,
22 taking into account that hybrid
23 representation is not required,[] supports
24 the conclusion that there is no right to
25 standby counsel. Certainly there is no
26 Supreme Court precedent clearly establishing
27 such a right. [] When standby counsel is
28 appointed, the.... Therefore, the inadequacy
of standby counsel's performance, without the
defendant's relinquishment of his Faretta
right, cannot give rise to an ineffective
assistance of counsel claim under the Sixth
Amendment. [] [The petitioner] does not
provide, nor could we find, a Supreme Court

1 case holding standby counsel in a capital
2 case should be treated any differently.

3 Simpson v. Battaglia, 458 F.3d 585, 597 (7th Cir. 2006)
4 (internal citations omitted). The Seventh Circuit, in addition
5 to other Circuit Courts of Appeal, have reasoned that, in the
6 context of criminal proceedings in which the defendant was pro
7 per, any "deficiencies" in representation were products of the
8 defendant's self-representation and do not constitute defective
9 assistance of counsel. See, e.g., id., 458 F.3d at 598. See
10 also McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944,
11 944 n.8 (1984) ("[A] defendant who exercises his right to appear
12 pro se 'cannot thereafter complain that the quality of his own
13 defense amounted to a denial of effective assistance of
14 counsel.'"). The Second Circuit Court of Appeals has held that,
15 where counsel was relieved at the defendant's request prior to
16 a plea agreement and thereafter served as "standby counsel," a
17 habeas petitioner could not state a cognizable claim for denial
18 of his Sixth Amendment right to counsel. See Tate v. Wood, 963
19 F.2d 20, 26 (1992).

20 **C. Respondents contend Petitioner's claim fails on the**
21 **merits because his 2003 advisory counsel's performance was not**
22 **deficient for failing to raise the defense that the 1982 plea**
23 **agreement did not require Petitioner to register as a sex**
24 **offender.**

25 As noted by Respondents, prior to the time appointed
26 advisory counsel entered an appearance, Petitioner asserted a
27 defense contradictory to the assertion that he could not be
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1 convicted of failure to register as a sex offender because his
2 plea agreement in the sex offense case did not require him to do
3 so. Additionally, Petitioner has not established that any
4 alleged deficiency was prejudicial because the argument he
5 alleges he could not present was presented to, and rejected by,
6 the state courts in Petitioner's state actions for post-
7 conviction relief.

8 **III Conclusion**

9 The Court may not exercise jurisdiction over the habeas
10 petition because Petitioner is not "in custody" pursuant to the
11 conviction he seeks to challenge. Additionally, Petitioner has
12 completely finished serving the sentence arising from the
13 conviction he seeks to challenge and, accordingly, the action is
14 moot. Furthermore, notwithstanding Petitioner's procedural
15 default of his habeas claim, the claim that Petitioner was
16 denied his constitutional right to the effective assistance of
17 counsel because his advisory counsel failed to facilitate
18 Petitioner's assertion of a particular defense may be denied on
19 the merits of the claim. Petitioner waived any Sixth Amendment
20 claim regarding his right to the effective assistance of counsel
21 by pleading guilty. Additionally, Petitioner has not
22 established that his advisory counsel's alleged failure to raise
23 the asserted defense was prejudicial to Petitioner's conviction.

24 **IT IS THEREFORE RECOMMENDED** that Mr. Hearn's Petition
25 for Writ of Habeas Corpus be **denied and dismissed with**
26 **prejudice.**

