

motion and found Spivey in violation of probation. The court sentenced Spivey to six years of incarceration.

On March 1, 2007, Spivey moved for a new trial, claiming that : 1) the revocation was defective because it was not initiated properly or verified; 2) he was not informed of the conditions of probation that he was charged with violating; 3) he was not personally served with a “petition, order, summons, or warrant”; 4) revocation of probation was an improper sanction for his work release violation; and 5) revocation of probation was improper because Spivey’s positive test for opiates occurred before the start of his probation and was insufficient evidence of substance abuse. On April 5, 2007, the court denied the motion for a new trial without holding a hearing.

Spivey filed an application for leave to appeal the denial of his motion for a new trial, raising the same state law grounds he had raised in his motion for a new trial. Exhibits 5 and 6. On October 23, 2007, the Court of Special Appeals of Maryland summarily denied leave to appeal. Spivey has not initiated state post-conviction proceedings in regard to either his original conviction or the revocation of his probation.

PETITIONER’S CLAIMS

Spivey raises the following claims: 1) he was found in violation of the terms of his probation before he started serving his probation; 2) revocation of his probation was improper because he had already been disciplined by the Baltimore County Detention Center; 3) he was not served personally with a “petition, order, summon, or warrant”; and 4) he never received the conditions of probation he was charged with violating. Petition, pp. 5-6.

ANALYSIS

Under *Rose v. Lundy*, 455 U.S. 509 (1982), a petitioner for federal habeas corpus relief must

first exhaust each claim by pursuing remedies available in state court. Exhaustion is satisfied by seeking review of each claim in the highest state court with jurisdiction to consider the claim. *See* 28 U.S.C. § 2254(b)-(c); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 848, (1999); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). In Maryland, this may be accomplished by proceeding with certain claims on direct appeal (and thereafter seeking certiorari to the Court of Appeals) and with other claims by way of a post-conviction petition, followed by petitioning the Court of Special Appeals for leave to appeal. “Where questions concerning exhaustion arise, the petitioner bears the burden of demonstrating that state remedies have, in fact, been exhausted.” *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994). Spivey does not allege, and the record does not suggest, that he has yet to avail himself of available state remedies.

CONCLUSION

Spivey must exhaust his claims in the state courts before they can be considered in this court. Accordingly, the court will dismiss the petition without prejudice for lack of exhaustion. An Order follows.

Date: September 8, 2009

/s/
Andre M. Davis
United States District Judge