Priovolos v. PA Department of Corrections et al Doc. 5

UNITED STATES DISTRICT COURT
FOR THEMIDDLE DISTRICT OF PENNSYLVANIA

ERNEST PRIOVOLOS,	:	
Petitioner	:	**No. 1:17-CV-00073**
	:	
v.	:	**(Judge Rambo)**
	:	
PA STATE ATTORNEY	:	
GENERAL, et al.,	:	
Respondents	:	

MEMORANDUM

On January 12, 2017, the Court received and docketed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254[1] from pro se Petitioner Ernest Priovolos. (Doc. No. 1.) By Order dated May 10, 2017, in accordance with United States v. Miller, 197 F.3d 644 (3d Cir. 1999) and Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000), Petitioner was advised that he could (1) have the petition ruled on as filed, that is, as a § 2254 petition for writ of habeas corpus and heard as such, but lose his ability to file a second or successive petition, absent certification by the court of appeals, or (2) withdraw his petition and file one all-inclusive § 2254 petition within the one-year statutory period prescribed by the Antiterrorism

[1] Petitioner utilized a habeas form for § 2241 habeas petitions and has indicated that his petition is filed pursuant to § 2241 rather than § 2254. (Doc. Nos. 1 and 4.) However, the Court notes that a habeas corpus petition pursuant to 28 U.S.C. § 2254 is the proper mechanism for a state prisoner to challenge the "fact or duration" of his confinement. Preiser v. Rodriguez, 411 U.S. 475, 498-99 (1973). However, Petitioner will not be required to submit an amendment, but rather, the Court will liberally construe the petition as one filed pursuant to § 2254.

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Effective Death Penalty Act ("AEDPA"). (Doc. No. 3.) Petitioner did not return the Notice of Election Form but, rather, filed a document entitled "request for a hearing" (Doc. No. 4) wherein he indicated that his petition should be a § 2241 habeas petition, not a § 2254 habeas petition.[2]

The Petitioner names as Respondent the Pennsylvania Department of Corrections and the Attorney General of Pennsylvania. However, the proper respondent in a petition for a writ of habeas corpus is the state officer who has official custody of the Petitioner. See Rule 2 of the Rules Governing Section 2254 Cases in the United States District Court and advisory committee notes (1976), 28 U.S.C. foll. § 2254; see also Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004) ("[T]he proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.").

However, while Petitioner provides that his place of confinement is SCI-Rockview, Bellefonte, Pennsylvania (Doc. No. 1), he provides what appears to be a residential mailing address where he requests the documents in this case be sent. (Id.) A search by this Court of publicly available records confirms that Petitioner has been released from custody of the Pennsylvania Department of Correction's ("DOC").[3]

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[2] The Court has already addressed this issue supra.

[3] See Pa. SAVIN Search Form (Priovolos, Ernest) ("out of custody" / "paroled"), at https://www.vinelink.com (last accessed July 14, 2017); Pa. DOC's Inmate Locator (Priovolos,

The Court will now give preliminary consideration to the habeas petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. foll. § 2254. See Patton v. Fenton, 491 F.Supp. 156, 158-59 (M.D. Pa. 1979).

Discussion

A § 2254 habeas corpus petition may be brought by a state prisoner who seeks to challenge either the fact or duration of his confinement in prison. See Preiser v. Rodriguez, 411 U.S. 475, 486-87 (1973). Federal habeas corpus review is available only "where the deprivation of rights is such that it necessarily impacts the fact or length of detention." Leamer v. Fauver, 288 F.3d 532, 540 (3d Cir. 2002). Where "a judgment in petitioner's favor would not affect the fact or duration of petitioner's incarceration, habeas relief is unavailable." Suggs v. B.O.P., No. 8-3613, 2008 WL 2966740, at *4 (D.N.J. July 31, 2008).

In Custody

The United States Supreme Court has "interpreted the statutory language as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." Maleng v. Cook, 490 U.S. 488, 490–91 (1989); see also Spencer v. Kemna, 523 U.S. 1 (1998). Although the

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Enrest) (no records) at http://www.cor.pa.gov/Inmates/Pages/Inmate-Locator.aspx#.WWfHz4TythE (last accessed July 14, 2017). See generally Fed. R. Evid. 201; Llarraza v. Chuta, No. 1:15-CV-2406, 2017 WL 1246363, at *2 (M.D. Pa. Feb. 10, 2017) (taking judicial notice of SAVIN and DOC Inmate Locator search results).

"in custody" language does not require that a prisoner be physically confined in order to challenge his sentence in habeas corpus, see e.g., Jones v. Cunningham, 371 U.S. 236, (1963) (prisoner who is on parole is "in custody"), the Supreme Court "ha[s] never held ... that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has fully expired at the time his petition is filed." Maleng, 490 U.S. at 491; see also Drakes v. INS, 330 F.3d 600 (3d Cir. 2003). Thus, "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." Maleng, 490 U.S. at 492.

As the Supreme Court has noted in Daniels v. United States, 532 U.S. 374 (2001), habeas corpus and similar collateral remedies "are not available indefinitely and without limitation." Id. at 375. Once a state conviction "is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies (or because the defendant did so unsuccessfully) the conviction may be regarded as conclusively valid." Lackawanna County v. Coss, 532 U.S. 394, 403 (2001); see also Maleng, 490 U.S. at 492 (federal habeas corpus relief should not be extended "where a habeas petitioner suffers no present restraint from a conviction.").

Petitioner's pending action is set forth in four (4) sparsely worded paragraphs. Based upon a careful review of Priovolos' filing, it is unclear as to whether he is presently serving a sentence imposed upon him or whether he suffers any restraint from his conviction. Indeed, his Petition and exhibits attached thereto indicate the potential that his sentence and parole have now expired. Accordingly, this Court is unable to undertake an informed determination as to Petitioner's status and Petitioner is directed to address the in custody/collateral consequence issue. Further action will not be taken by this Court until this issue is initially addressed by Petitioner.

Exhaustion

Habeas corpus relief cannot be granted unless all available state remedies have been exhausted, or there is an absence of available state corrective process, or circumstances exist that render such process ineffective to protect the rights of the applicant. See 28 U.S.C. § 2254(b)(1). The exhaustion requirement is grounded on principles of comity in order to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. See Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoke one complete round of the State's established

appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999). Fair presentation also requires the petitioner to raise the claim in a procedural context in which the state courts can consider it on the merits. Id.

It is not necessary for a petitioner seeking federal habeas relief to present his federal claims to state courts both on direct appeal and in a PCRA proceedings. Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984). However, a petitioner is not deemed to have exhausted the remedies available to him if he has a right under the state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c); Castille v. Peoples, 489 U.S. 346, 350 (1989). The petitioner bears the burden of demonstrating that he has satisfied the exhaustion requirement. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000).

In the instant matter, Petitioner fails to provide any information as to whether he has either filed a direct appeal or pursued collateral proceedings in state court before filing the instant habeas petition. Moreover, because of Priovolos' sparse petition, it is unclear to this Court if the alleged detainer Petitioner complains about was in response to a parole violation. If, in fact, it was for a parole violation, Petitioner has not demonstrated that he has properly exhausted this claim.

To properly exhaust a claim involving a determination by the Parole Board, the petitioner must first seek administrative review with the Parole Board. See 37 Pa.Code § 73.1(a). Once the Parole Board has rendered a final decision, the petitioner must seek review in the Commonwealth Court. See 42 Pa.C.S.A. § 763(a). Unlike appeals and collateral review of convictions, a petitioner challenging the Commonwealth Court's denial of parole relief must seek review in the Pennsylvania Supreme Court in order to satisfy the exhaustion requirement. Pagan v. Pa. Bd. of Prob. and Parole, No. 08-150, 2009 WL 210488, *3 (E.D. Pa. 2009); see also Brown v. Pa. Bd. of Prob. and Parole, No. 09-2486, 2010 WL 2991166 (E.D. Pa. 2010). If the petitioner fails to seek review from the Supreme Court of Pennsylvania, then the state claim is unexhausted. See Williams v. Wynder, 232 F. App'x. 177, 181 (3d Cir. 2007). "[T]he Superior Court maintains exclusive jurisdiction over appeals from Court of Common Pleas parole orders, and the Commonwealth Court has exclusive jurisdiction over administrative parole orders." Commonwealth v. McDermott, 547 A.2d 1236, 1240 (Pa. Super. 1988); 42 Pa.C.S.A. §§ 742, 762(a)(1). Further, "attempts to circumvent the Commonwealth Court's exclusive jurisdiction over administrative parole matters via Post Conviction Hearing Act and habeas corpus petitions have

been rejected." Id. citing Commonwealth v. LeGrande, 567 A.2d 693, 695 (Pa. Super. 1989).

Accordingly, from the face of the petition, it appears that Petitioner's claim is unexhausted. Petitioner is directed to also file a response addressing whether his claim has been properly exhausted as set forth above.

Conclusion

In accordance with the above, within twenty (20) days of the date of this Memorandum's accompanying Order, Petitioner shall file a response addressing the issues of whether he is in custody or suffers a present restraint from a conviction. Petitioner shall also address whether his claim has been properly exhausted. An appropriate Order follows.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: July 18, 2017

UNITED STATES DISTRICT COURT
FOR THEMIDDLE DISTRICT OF PENNSYLVANIA

ERNEST PRIOVOLOS,	:	
Petitioner	:	**No. 1:17-CV-00073**
	:	
v.	:	**(Judge Rambo)**
	:	
PA STATE ATTORNEY	:	
GENERAL, et al.,	:	
Respondents	:	

ORDER

AND NOW, this 18th day of July, 2017, in accordance with the accompanying Memorandum, **IT IS ORDERED THAT**:

1. Within twenty (20) days of the date of this Order, Petitioner shall file a response addressing the issues of whether he is in custody or suffers a present restraint from a conviction and whether his claim has been properly exhausted;
2. No further action shall be taken by this Court with respect to this matter pending resolution of the above issues; and
3. Failure of Petitioner to respond to this Order may result in dismissal of his action.

s/Sylvia Rambo
SYLVIA H. RAMBO
United States District Judge