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

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| **ANTHONY MUSTAFA WILLIAMS** | : | **CIVIL ACTION** |
| | : | |
| **v.** | : | |
| | : | |
| **SUPERINTENDENT GILLIS, et. al.** | : | **NO. 00-159** |

**MEMORANDUM AND ORDER**

**Norma L. Shapiro, S.J.** **January 17, 2002**

Anthony Mustafa Williams ("Williams" or "Petitioner") filing this petition for habeas corpus under 28 U.S.C. § 2254, argues his August 27, 1998 sentence upon revocation of probation violated constitutional guarantees of Due Process and the prohibition against Double Jeopardy. Magistrate Judge Peter Scuderi filed a Report and Recommendation ("R&R") that the court deny the petition. After de novo consideration of the record and briefs, including petitioner's objections to the R&R, the R&R will be approved and adopted, and the petition will be denied.

I. Background

The procedural and factual history of this action is complex, but was clearly set forth in Judge Scuderi's R&R, and need not be repeated at great length. Petitioner initially pled guilty to aggravated assault on July 14, 1997 and, under that agreement, received a sentence of 18 months to 4 years. Under

the plea agreement, this 18 month to four year sentence was to run concurrently with a sentence petitioner was already serving in a Buck's County facility and a sentence imposed after pleading guilty to a separate simple assault.

Petitioner, filing a PCRA petition in November, 1997, alleged that the plea agreement was being violated because he did not receive back-time under the agreement. The trial judge held a hearing on the PCRA petition in February, 1998, and both she and the Commonwealth agreed the intent of the sentence was not being implemented. The sentence was vacated and Williams was re-sentenced (without objection) on July 14, 1997, to seven to twenty-three months, followed by two years probation on the simple assault charge.

On August 10, 1998 the Commonwealth filed a violation of probation report and petition based on Williams' alleged assault on a prison guard in April, 1998. The report and petition sought to revoke the two year probationary term. The state court, finding Williams guilty of probation violation, concluded that probation would not benefit the petitioner or society because of his continuing anti-social behavior. The court revoked Williams' probation and sentenced him to two to six years in a state facility, consecutive to the seven to twenty-three month sentence he was serving in the county facility. Williams exhausted his state remedies arising from this revocation and filed this habeas

petition.

Williams argues:

1. The court violated double jeopardy by revoking probation and increasing the agreed upon 4 year sentence to a six year sentence.

2. The court violated due process by revoking probation and increasing the agreed upon sentence.

3. The court violated double jeopardy by failing to give petitioner credit toward the 2-6 year sentence imposed upon revocation of probation for the one-year-three-month period served prior to the revocation.

4. The decision to revoke probation constituted an impermissible second sentence in violation of double jeopardy.

Judge Scuderi, after finding Williams had exhausted state remedies, recommended that the petition be denied because: (1) the state court decision that probation revocation and re-sentencing did not violate double jeopardy was not contrary to or an unreasonable application of Supreme Court precedent; and (2) the revocation procedure did not violate due process.

Williams has filed five objections, grouped into two categories: (1) the R&R mis-stated and wrongly decided his claim of a due process violation; and (2) the R&R mis-stated and wrongly decided his claim that double jeopardy prohibited the term of imprisonment to which he was re-sentenced.

## II. Discussion

### A. **Standard of Review**

"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 the applicant has exhausted the remedies available in the courts of the State . . . ." 28 U.S.C.A. § 2254(b)(1)(A) (West 1994 & Supp. 2001). See also Duckworth v. Serrano, 454 U.S. 1, 3 (1981); Roberts v. LaVallee, 389 U.S. 40, 42 (1967); Codispoti v. Howard, 589 F.2d 135, 140 (3d Cir. 1978). The exhaustion requirement is not met if the petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C.A. § 2254(c) (West 1994 & Supp. 2001). The exhaustion requirement has been met when the petitioner has presented his claims to the highest state court; there is no requirement that the state courts consider or discuss the claims. See Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, requires a federal court considering a habeas petition to afford state court determinations great deference. Habeas petitions filed since the enactment of AEDPA require a two-step analysis. See Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 891 (3d Cir. 1999) (en banc), cert. denied, Matteo v. Brennan, 528 U.S. 824 (1999). First, the federal court must determine whether the state court's decision was contrary to Supreme Court precedent. Id. Second, if the state court's

decision was not contrary to Supreme Court precedent, the court must determine whether the state court decision represents an unreasonable application of Supreme Court precedent. Id.

B. **Exhaustion**

Magistrate Judge Scuderi found that petitioner had exhausted his claims in state court. Respondents do not context this finding, and it will be approved.

C. **Constitutional Claims**

1. Due Process

Judge Scuderi interpreted Williams' due process claim as alleging it was unconstitutional to re-sentence Williams on revocation of probation to a term greater than that comprehended by his original plea agreement. R&R, at 15. Williams, objecting to the R&R, argues that his real claim is that he had a "due process right for [the State Trial Judge] to conform to the [plea agreement] when probation was revoked." Pet. Rply. at 4. There is no functional difference between Williams' allegations and the argument rejected by the R&R. In any event, it does not violate due process to impose additional prison time following revocation of probation based on additional criminal activity, so long as the new sentence does not exceed the maximum permitted for the original offense. See, e.g., Skipworth v. United States, 508 F.2d 598, 602 (3d Cir. 1975). Here, Williams' probation was revoked because he assaulted a prison guard. This assault broke

the plea agreement: re-sentencing did not need to conform to its terms. See United States v. Gerace, 997 F.2d 1293 (9th Cir. 1993) (unless the terms of the plea agreement specifically apply beyond initial sentencing, the agreement does not bind a prosecutor's actions at a probation revocation proceeding).

2. Double Jeopardy

Judge Scuderi interpreted petitioner's double jeopardy claim as alleging that re-sentencing to a term of imprisonment longer than contemplated by the terms of the plea agreement was illegal. Williams contends that the real issue is whether "when revoking probation if the Judge gives more than the agreement does this violate Double Jeopardy." Pet. Rply. at 6. It does, he argues, "because a Defendant who pleads guilty ... has a legitimate expectation of that sentence." Id. (citing to U.S. v. Boyd, 961 F.2d 434 (3d Cir. 1992).

Petitioner neglects to analyze his claims under AEDPA. The state courts held that resentencing does not violate double jeopardy after probation has been revoked. This holding was not contrary to "clearly established Supreme Court precedent," and did not unreasonably interpret such authority. See Garret v. United States, 471 U.S. 773, 780 (1985) (double jeopardy only prevents the sentencing court from prescribing greater punishment than the legislature intended). Revocation does not implicate double jeopardy because probation or parole is merely the

continuation of an already imposed sentence. See United States v. DiFrancesco, 449 U.S. 117, 137 (1980) (citing authorities). To the extent that the sentence for probation violation did not (when added to the first) incarcerate defendant for a term greater than the legislature prescribed (which it did not),[1] there was no double jeopardy violation. See Jones v. Thomas, 491 U.S. 376, 381-82 (1989) (double jeopardy only prevents multiple sentencing that cumulatively exceeds the statutory maximum sentence).

## III. **Conclusion**

Petitioner has exhausted his claims, but the state court decision to revoke petitioner's probation and resentence him to a term of imprisonment longer than provided for in his plea agreement did not violate petitioner's federal constitutional rights; it was neither contrary to Supreme Court precedent or an unreasonable application thereof. Petitioner's Objections to the R&R will be overruled; his petition for habeas corpus will be denied.

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[1]The statutory maximum for aggravated assault in Pennsylvania is ten (10) years. 18 Pa. C.S.A. §§ 2702, 106. Following his probation revocation and re-sentencing, petitioner's total maximum sentence was eight (8) years and eleven (11) months.

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**ORDER**

AND NOW this 17th day of January, 2002, after careful and independent consideration of the petition for a writ of habeas corpus filed under 28 U.S.C. § 2254, review of the Report and Recommendation of Magistrate Judge Scuderi and petitioner's objections thereto, in accordance with the attached memorandum,

It is **ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation of Magistrate Judge Scuderi (#23) are **OVERRULED.**

2. The Report and Recommendation of Magistrate Judge Scuderi (#21) is **APPROVED** and **ADOPTED**.

3. The petition filed pursuant to 28 U.S.C. § 2254 is **DISMISSED and DENIED without an evidentiary hearing**.

4. Petitioner's Motion to Add a Party (#36) is **DENIED AS MOOT.**

5. There is no basis for issuing a certificate of appealability.

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Norma L. Shapiro, S.J.