

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

FRANK NELLOM

V.

DONALD T. VAUGHN

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CIVIL ACTION

NO.00-CV-3697

ORDER

AND NOW, this 12th day of April, 2001, upon consideration of the Report and Recommendation written by Magistrate Judge Faith Angell and the petitioner's and government's responses thereto as well as the petitioner's subsequent submission of a "memorandum of law with newly discovered evidence", it is hereby **ORDERED** and DECREED that Frank Nellom's habeas petition is DISMISSED WITHOUT **PREJUDICE**, because the claims raised by petitioner are all unexhausted as set forth below.

Judge Angell issued her Report and Recommendation on October 2, 2000. On October 13, 2000, Nellom submitted objections to the report, and the government responded to these objections on October 23, 2000. On October 26, 2000, petitioner Frank Nellom submitted "questions for this court in matter not decided in response to defendant's response." Thereafter, on November 14, 2001, the petitioner submitted a

"memorandum of law with newly discovered evidence", to which **the** government responded **on** November 29, 2000. Nellom submitted his reply to the government's **response** on December 8, 2000. The petitioner's submission of the "memorandum of law with newly discovered evidence" has significantly altered the scope of his **habeas** petition. The Court therefore cannot adopt **Judge Angell's** Report and Recommendation, which was drafted prior to the Court's receipt of the November 14 **memorandum** of law. Nonetheless, the Court has relied on the Report in its analysis of the issues **where possible**.

The petitioner's initial habeas petition, **filed** on July 9, 2000, challenged an October 21, 1998 decision by the Parole Board to recommit Nellom to custody on a parole violation as well as the Board's May 3, 2000 decision **not** to reparole Nellorn. Because Nellom **is** challenging the decisions of a parole board rather than a state court, his petition should have been raised under 28 U.S.C. §2241, **rather** than under 28 U.S.C. 82254. The Court will consider the petition **as** though it had been raised under Section 82241.

Nellom's July 9 habeas petition raised the following issues:

- (1) "Evidence was insufficient to **support** the board's finding of owning or possessing firearms. No evidence **was** presented to establish parolee's willful behavior or his knowledge of weapons being placed in his home indicated in (Paragraphs No. **9-25**)."
- (2) "Ineffective assistance of private counsel in failing to file **a** petition for review and abandonment without any notice. (Paragraphs 26-28, pages 101-102)."

- (3) **"Violation of** due process by the Board of Probation and Parole in failing to retrieve and address the petitioner's appeal letter in a timely manner as indicated in (Paragraphs 28-30, 36A-E, page 117)."
- (4) "Ineffectiveness of Court appointed counsel in filing issues with knowledge of issues having been already decided by the U.S. Supreme Court. (Paragraph 38)."
- (5) "Ineffective assistance of Court appointed counsel for failure to present issues parolee had indicated in his initial petition for review. (Paragraph 38)."
- (6) "In effective assistance of court appointed counsel for failure to appeal the Commonwealth Court's decision with knowledge of the Court's two prior rulings denying the Board's claim of untimeliness. (Paragraph 39, pages 103-123)."
- (7) 'Ineffective assistance of counsel in abandoning Petitioner without notice, and violating his constitutional right to appeal. (Paragraph 38-40)."
- (8) "The Board's orders are vague and fail due process requirements according to administrative law and common sense, where it does not identify the problem and **basic** findings of fact are not discernible to enable this court to pass upon a question of law. Furthermore failure to identify a specific problem relating to risk to the safety of the public frustrates the rehabilitation process for which this system was established to achieve. If there are **facts which support** such conclusion they must be present , absent such facts, would appear that such order is arbitrary and capricious. (Paragraphs 42-43)."
- (9) 'Board member Barbara Descher erred in making a **clinic** determination for treatment. Such is also error in light of current evaluation by the director of specific program. Other past and current trained, licensed, and professional evaluations/determinations of record indicating no such treatment need. (Paragraphs 43-45)."

As Judge Angell stated in her Report and Recommendation, petitioner has failed to exhaust state remedies on the above claims. Under **Pennsylvania** law, the constitutionality of a

Parole Board decision may **only** be challenged through a writ of mandamus. Rogers v. Pa. Bd. of Probation and Parole, 724 A.2d 319 (Pa. 1999). See also Cody v. Vaughn, J-87-00, No, 212 M.D. 1999 (Pa., March 22, 2001). Petitioner did file a petition for writ of mandamus with the Pennsylvania Commonwealth Court on May 26, 1999, but this petition did not raise any of the issues raised **in** Nellom's federal habeas petition. Therefore none of Nellom's original July 9 claims regarding the unconstitutionality of the Parole Board action have been exhausted.

Nellom also raised several **ineffective** assistance of counsel **claims in** his July 9 petition. To the **extent** that Nellom **may** be arguing that he is **entitled to** habeas relief because his Sixth Amendment right to counsel was violated by parole counsel's ineffectiveness, there is **no** absolute constitutional right to counsel in parole revocation proceedings. Thus, any such claim is not cognizable in this federal habeas forum. See Person v. Pa. Bd. Of Probation and Parole, 1999 WL 973852 at *12 (E.D.Pa. October 20, 1999). In his traverse to the Respondent's Answer, **the** petitioner argued that the **ineffective** assistance **claims were** raised to explain why state remedies were not exhausted. **As** such, these claims should first have been raised in a mandamus action challenging the **parole** proceedings, as a **possible** excuse for the untimeliness of any action, before being **raised** as

part of a federal habeas petition.

On November 14, 2000, petitioner submitted a "memorandum of law with newly discovered evidence." In this memorandum, the petitioner raised several new claims concerning the constitutionality of the Parole Board's decisions under both the Due Process Clause and the Ex Post Facto Clause of the Constitution:

- (1) Nellom claims that his parole agent used false information in completing the Parole Decision Making Guidelines, which were then used by the Board to determine whether Nellom should be reparaoled.
- (2) Nellom claims that his parole agent completed the Parole Decision Making Guidelines without consulting Nellom or giving him a chance to refute the incorrect information.
- (3) Nellom claims that his parole agent and the Parole Board applied new parole guidelines to him in deciding whether to reparaole him after their May 3, 2000 meeting, thereby violating the **ex post facto** clause of the constitution.

These claims are also unexhausted. For a claim **to have** been exhausted, a "substantially equivalent" claim must have been heard by the appropriate state courts. "Both the legal theory and the facts on which a federal claim rests must have been presented to the state courts." Gibson v. Scheidmantel, 805 F.2d 135, 138 (3d Cir. 1986). As petitioner concedes, he has not presented the claims raised in his November 14 petition to any state courts, in part because he was not aware of the evidence underlying these claims prior to the filing of his federal habeas

petition.

All of petitioner's claims - those presented in the July 9, 1999 habeas petition and in the November 14, 2000 "memorandum of newly discovered evidence" are therefore unexhausted. It is possible that some or all of these claims are also procedurally defaulted, given the Pennsylvania statute of limitations.

Fleming v. Rockwell, 500 A.2d 517 (Pa.Cmwlth.Ct. 1985); 42 Pa.C.S. §5522. The Court declines to decide whether the claims are procedurally defaulted, however, because this determination is better left to the state courts. As the Third Circuit stated in Toulson v. Bever, "we believe the better practice allows a [state court] - not a federal court - the first opportunity to address the question of procedural default under [state] law." Toulson v. Bever, 987 F.2d 984, 988 n.7 (3d Cir. 1993). It is not the role of a this Court to 'presume how the state courts would rule on [Nellom's] claims." Id. at 989. For this reason, the Court declines to decide whether Nellom's claims are procedurally defaulted at this time.

Finally, the Court notes that, if the state courts determine that Nellom's claims are procedurally defaulted, Nellom will not

be barred from refiling a federal habeas petition, because a habeas petition under 42 U.S.C. §2241 is not subject to the one-year time limit included in 42 U.S.C. §2254.

For the above reasons, Frank Nellom's habeas petition is dismissed without prejudice in its entirety, and the petitioner is directed to exhaust all state remedies. If the state courts determine that there are no available state remedies for Nellom's claim at this time, Nellom can then refile his federal habeas petition.

ed 4/12/01 to:
Katherine Rebellard, Esq.

ed 4/12/01 to:
Frank Nellom

BY THE COURT:

Ma. A. McLaughlin
Ma. A. McLaughlin, J.