

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

H. BEATTY CHADWICK : CIVIL ACTION
 :
 v. :
 :
 R.D. ANDREWS, et al. : NO. 97-4680

MEMORANDUM and ORDER

Norma L. Shapiro, J.

April 30, 1998

Petitioner H. Beatty Chadwick ("Mr. Chadwick") has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. Respondents, the Warden of Delaware County Prison, the District Attorney of Delaware County, the Attorney General of Pennsylvania, and intervenor Barbara Jean Crowther Chadwick ("Ms. Chadwick"), object to Mr. Chadwick's petition. For the reasons stated below, Mr. Chadwick's petition will be dismissed for failure to exhaust available state remedies.

BACKGROUND

Ms. Chadwick filed a divorce action pending in the Delaware County Court of Common Pleas in November, 1992. During an equitable distribution conference in the state court in February, 1993, Mr. Chadwick informed the court and Ms. Chadwick he had transferred \$2,502,000 of the marital estate to satisfy an alleged debt to Maison Blanche, Ltd. ("Maison Blanche"), a Gibraltar partnership. See Chadwick v. Chadwick, No. 1555 Philadelphia 1995 at 2 (Pa. Super. Aug. 22, 1996) ["Chadwick I"]. Ms. Chadwick had no knowledge of any debt owed by Mr. Chadwick to

Mason Blanche.

After hiring a private investigator and further discovery, Ms. Chadwick determined: one of the principals of Maison Blanche returned \$869,106 from Gibraltar to an American account in Mr. Chadwick's name, with which Mr. Chadwick purchased three annuity contracts; \$995,726.41 had been transferred to a Union Bank account in Switzerland in Mr. Chadwick's name; and \$550,000 in stock certificates Mr. Chadwick claimed he had transferred to an unknown barrister in England to forward to Maison Blanche were never received. Id. at 3; Chadwick v. Hill, No. 2192 Philadelphia 1996 at 2 n.1 (Pa. Super. Apr. 23, 1997) ["Chadwick II"]. The state court entered a freeze order on the marital assets on April 29, 1994.

In May, 1994, Mr. Chadwick redeemed the annuity contracts and deposited the funds in a Panamanian bank. See Chadwick II at 2 n.1. On July 22, 1994, the state court held a hearing at which Mr. Chadwick and his counsel were present. After hearing testimony regarding the disposition of the \$2,502,000 sent to Gibraltar, the court determined Mr. Chadwick's transfer of the money was an attempt to defraud Ms. Chadwick and the court. The court ordered Mr. Chadwick to return the \$2,502,000 to an account under the jurisdiction of the court, pay \$75,000 for Ms. Chadwick's attorney's fees and costs, surrender his passport and remain within the jurisdiction. See id. at 3.

Mr. Chadwick refused to comply with the July, 1994 order; Ms. Chadwick filed a petition for contempt. The state court held contempt hearings on August 29, 1994; October 18, 1994; and October 31, 1994. Mr. Chadwick failed to appear at any of the hearings, but his attorney was present. See id. The state court found Mr. Chadwick in contempt of the July, 1994 order and issued a bench warrant for his arrest.

Upon learning a bench warrant was issued, Mr. Chadwick fled the jurisdiction. After an altercation with law enforcement officers in Delaware, Mr. Chadwick was arrested and detained on April 5, 1995. The state court determined Mr. Chadwick has the present ability to comply with the terms of the July, 1994 Order and set bail at \$3,000,000. See Chadwick I at 4. Mr. Chadwick could have been released from custody at any time if he posted bail or purged his contempt by complying with the July, 1994 order to deposit \$2,502,000 in the court's account; to date, he has done neither.

On April 7, 1995, Mr. Chadwick filed an emergency motion for release from the Delaware County Prison and to quash the state court bench warrant on the ground that the contempt finding was improper under state law. This court declined to intervene in a pending state court proceeding under Younger v. Harris, 401 U.S. 37 (1971) and progeny. See Chadwick v. Delaware County Court of Common Pleas, No. 95-0103, 1995 WL 232500, at *2 (E.D. Pa. Apr.

19, 1995).

Mr. Chadwick has filed six petitions for state habeas relief; the trial court denied all petitions. In the midst of appealing his state habeas petitions, Mr. Chadwick filed a second federal habeas petition; this court dismissed the second federal habeas petition for failure to exhaust available state remedies. See Chadwick v. Hill, No. 95-0103, 1995 WL 541794, at *1 (E.D. Pa. Sept. 8, 1995).

Several appeals of the state trial court's denials of Mr. Chadwick's state habeas petitions and its denial of his motion to vacate court orders were consolidated on appeal. The Pennsylvania Superior Court affirmed the lower court decisions. See Chadwick I. Mr. Chadwick's petition for allowance of appeal to the Supreme Court of Pennsylvania was denied on April 8, 1997.

Mr. Chadwick's sixth petition for state habeas relief, arguing his continued confinement deprived him of due process because it had become punitive rather than coercive, was denied by the trial court on June 21, 1996. While appealing that determination, Mr. Chadwick filed a third federal habeas petition on September 23, 1996. By Memorandum and Order dated January 16, 1997, this court dismissed Mr. Chadwick's third federal habeas petition for failure to exhaust available state remedies and abstained because of the pending appeal to the Pennsylvania Superior Court. See Chadwick v. Hill, No. 96-6426, 1997 WL

22406, at *2 (E.D. Pa. Jan. 16, 1997).

The Pennsylvania Superior Court affirmed the trial court's denial of Mr. Chadwick's sixth state habeas petition by Opinion dated April 23, 1997. See Chadwick II. The court encouraged the Supreme Court¹ to review its decision to clarify the point at which a coercive penalty for civil contempt becomes a criminal sanction requiring due process under federal and state law. See id. at 6 (It "is for our high court to make such a determination.").

Mr. Chadwick instead sought reconsideration of this court's January 16, 1997 decision dismissing his federal habeas petition for lack of exhaustion. This court, finding the Superior Court specifically "invited" the Supreme Court to review its decision and Mr. Chadwick must seek review in the Supreme Court, denied Mr. Chadwick's motion for reconsideration on May 23, 1997. This court held that "the question of when civil contempt becomes impermissibly punitive is one which a federal court should abstain from considering before the state supreme court has had the opportunity." May 23, 1997 Order at ¶ 10.

Mr. Chadwick declined to seek review of the Superior Court's April 23, 1997 decision. Instead, Mr. Chadwick filed the present federal petition for writ of habeas corpus on July 18, 1997. He

¹ All references to the Supreme Court refer to the Supreme Court of Pennsylvania.

argues, as he did in his sixth state habeas petition, that his continued detention in the Delaware County Prison (twenty-seven months at the time of filing) serves only a punitive purpose; he is no longer imprisoned for civil contempt, and must be afforded the protections and procedures available before criminal sanctions are imposed.²

Mr. Chadwick's current petition was referred to United States Magistrate Judge Arnold C. Rapoport ("Judge Rapoport") for a Report and Recommendation. Judge Rapoport recommended Mr. Chadwick's petition for federal writ of habeas corpus be dismissed for failure to exhaust state remedies. Mr. Chadwick has objected to Judge Rapoport's recommendation on the ground that review of the Superior Court's April, 1997 decision in the Supreme Court would have been futile and was not a prerequisite to the present federal habeas petition.

DISCUSSION

"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-- (A) the person has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1). A petitioner has not exhausted his

² Mr. Chadwick unsuccessfully sought release on bail pending determination of his federal habeas petition. See Chadwick v. Andrews, No. 97-4680, 1997 WL 792884, at *3 (E.D. Pa. Dec. 23, 1997).

available state remedies as long as "he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). The court is required to dismiss a habeas petition containing an unexhausted claim, see Rose v. Lundy, 455 U.S. 509, 522 (1982), and the burden rests with the petitioner to establish exhaustion of all available state remedies. See Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993); Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

The constitutional claim must have been fairly presented to the state's highest court for review. See Evans v. Court of Common Pleas, 959 F.2d 1227, 1231 (3d Cir. 1992), cert. dismissed, 506 U.S. 1089 (1993); Swanqer v. Zimmerman, 750 F.2d 291, 295-96 (3d Cir. 1984); Belle v. Stepanik, No. 95-2547, 1996 WL 663872, at *4 (E.D. Pa. Nov. 14, 1996). The state supreme court need not have addressed the claim on the merits, as long as it was given the opportunity to do so. See Mayberry v. Petsock, 821 F.2d 179, 184 n. 2 (3d Cir.), cert. denied, 484 U.S. 946 (1987); Chaussard v. Fulcomer, 816 F.2d 925, 928 (3d Cir.), cert. denied, 484 U.S. 845 (1987).

The requirement of complete exhaustion of all state remedies, while not a jurisdictional requirement for a federal habeas petition, serves important federalism and comity principles by allowing the state courts "a meaningful opportunity to consider allegations of legal error without interference from

the federal judiciary." Toulson, 987 F.2d at 986; see Rose, 455 U.S. at 518.

Mr. Chadwick sought discretionary review in the Supreme Court of the denial of his state habeas petitions, based on his confinement as of the summer of 1995; the Supreme Court denied allocatur on April 8, 1997. Mr. Chadwick chose not to seek review of the denial of his sixth state habeas petition, based on his continued confinement as of May, 1996. Mr. Chadwick argues it was unnecessary to seek review in the Supreme Court because he had already asked that court to review the denial of his earlier state habeas petitions, so a second petition for allowance of appeal would have been fruitless.

A petitioner need only seek state court review of a federal claim once, either on direct review or in a state habeas proceeding; repeated review is not necessary to satisfy the exhaustion requirement. See Duckworth v. Serrano, 454 U.S. 1, 4 n.1 (1981) ("repetitious applications to state courts" not required); Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (same); Codispoti v. Howard, 589 F.2d 135, 142 (3d Cir. 1978) (same). Therefore, if the due process claim in Mr. Chadwick's sixth state habeas petition was the same as that of his prior petitions, he had no obligation to seek repetitious review in the Supreme Court.

Mr. Chadwick's claim is based on a contention that his

detention for civil contempt is no longer coercive but punitive, and therefore he is now being deprived of due process by his continued detention. Unlike a typical habeas claim based on an alleged error that occurred at or prior to trial, i.e., a static claim that does not change with the passage of time, Mr. Chadwick's claim changes with the passing of each day. The Supreme Court declined to entertain Mr. Chadwick's claim that his detention from April, 1995 until the summer of 1995 violated due process when it denied his petition for allowance of appeal on April 8, 1997. Mr. Chadwick's sixth state habeas petition was based on his detention from April, 1995 until May, 1996, the date of its filing. That petition was premised on a detention lasting in excess of one year. It is by no means clear that the Supreme Court would have denied Mr. Chadwick's petition for allowance of appeal of his sixth state habeas petition, premised on very different facts than those presented in the prior state habeas petitions.

The court can only excuse Mr. Chadwick's failure to exhaust available state remedies if "there is an absence of available State corrective process," or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). The proper inquiry is whether requiring exhaustion in state court would be "futile." See Lambert v. Blackwell, 134 F.3d 506, 516 (3d Cir. 1998); Christy

v. Horn, 115 F.3d 201, 207 (3d Cir. 1997). The court must be able to "say with certainty" that Mr. Chadwick would not be able to obtain further state review of his claim in state court. See Lambert, 134 F.3d at 516; Hammock v. Vaughn, No. 96-3463, 1998 WL 163194 (E.D. Pa. Apr. 7, 1998).

The court should dismiss a federal habeas petition whenever there is a possibility of state court review of a non-exhausted claim, "even if it is not likely that the state court will consider petitioner's claim on the merits." Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997) (even though unclear whether the Supreme Court would reach the merits of claims in a capital case after statutory amendments, dismissal proper); see Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996) (even though state court review of claim statutorily barred, dismissal proper because state court might opt to reach merits anyhow).

The Pennsylvania habeas corpus statute provides: "Any judge of a court of record may issue the writ of habeas corpus to inquire into the cause of detention of any person or for any other lawful purpose." 42 Pa. Cons. Stat. Ann. § 6502(a). State habeas corpus review is available for anyone "restrained of his liberty" other than "by virtue of sentence after conviction for a criminal offense." 42 Pa. Cons. Stat. Ann. § 6503.³ Mr.

³ Because Mr. Chadwick has never been convicted of a crime, the remedy and limitations proscribed by the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541,

Chadwick's previous six state collateral petitions have been filed under Pennsylvania's habeas corpus statute, which offers relief for individuals improperly confined for contempt. See DiGiacomo v. Heston, 140 A. 533, 534 (Pa. 1928); Roth v. Kozakiewicz, 485 A.2d 843, 845-46 (Pa. Commw. Ct. 1984).

Although Mr. Chadwick has forfeited his right to seek Supreme Court review of the Superior Court's April 23, 1997 denial of his sixth state habeas petition, see Pa. R. App. P. 1113(a) (petition for allowance of appeal must be filed within 30 days of order), he would not be barred from filing a seventh state habeas petition based on his present confinement of approximately thirty-seven months. Under Pennsylvania law, Mr. Chadwick can file a seventh state habeas petition in the Court of Common Pleas and exhaust his appellate remedies, see 42 Pa. Cons. Stat. Ann. § 931, or petition directly in the Supreme Court, which has original, but not exclusive, jurisdiction over habeas corpus proceedings. See 42 Pa. Cons. Stat. Ann. § 721(1). But unless the issues presented in the federal habeas petition have all been first presented to the Supreme Court, the district court may not exercise jurisdiction. See Lambert, 134 F.3d at 515 (requiring "complete exhaustion"); Swanger, 750 F.2d at 295 (raising claim before Supreme Court in petition for allowance of

et seq., do not apply. See 42 Pa. Cons. Stat. Ann. § 9542 (PCRA provides remedy for "persons convicted of crimes" and replaces all other remedies "for the same purpose.").

appeal satisfies exhaustion requirement).⁴

Because Mr. Chadwick failed to seek review in the Supreme Court from the denial of his sixth state habeas petition, he has not fully exhausted his available state remedies and this court cannot yet entertain his petition for federal habeas corpus. Mr. Chadwick has a potential collateral remedy available in state court; the court cannot be certain that remedy would be "futile." See Lambert, 134 F.3d at 516-18 (uncertainty whether state courts would excuse petitioner's waiver of state remedies due to miscarriage of justice compelled dismissal of federal habeas petition for lack of exhaustion).

When civil contempt becomes impermissibly punitive should not be considered by this court until the Supreme Court has had the opportunity, especially where the state's intermediate appellate court specifically requested the Supreme Court to determine when confinement for civil contempt becomes punitive and requires due process protections. Mr. Chadwick's federal

⁴ Perhaps Mr. Chadwick could petition the Supreme Court to assume plenary jurisdiction and enter an immediate final order once he returns to state court. Under 42 Pa. Cons. Stat. Ann. § 726:

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

habeas petition will be dismissed without prejudice for failure to exhaust available state remedies.

An appropriate Order follows.

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

H. BEATTY CHADWICK : CIVIL ACTION
 :
 v. :
 :
 R.D. ANDREWS, et al. : NO. 97-4680

ORDER

AND NOW, this 30th day of April, 1998, upon de novo review of the record, the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport ("Judge Rapoport"), petitioner H. Beatty Chadwick's ("Chadwick") objections thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The Recommendation submitted by Judge Rapoport is **APPROVED**; Chadwick's objections thereto are **OVERRULED**.

2. Chadwick's amended petition for federal habeas corpus relief under 28 U.S.C. § 2254 is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust available state remedies.

3. There is no cause to issue a certificate of appealability.

Norma L. Shapiro, J.