

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

GENNARO RAUSO : CIVIL ACTION
 :
 v. :
 :
 DONALD VAUGHN, et al. : NO. 98-CV-6312

M E M O R A N D U M

Ludwig, J.

March 1, 1999

On December 4, 1998 pro se petitioner Gennaro Rauso filed this petition for a writ of habeas corpus. 28 U.S.C. § 2254.¹ The Magistrate Judge's Report and Recommendation recommended that the petition be dismissed for failure to exhaust state remedies. No objections were filed. Following de novo review, the petition will be dismissed based on the merits, as well as failure to exhaust.

The petition sets forth that petitioner, an inmate at SCI-Graterford, was deprived of substantive due process rights in a disciplinary hearing. Pet. ¶ 12. The subsequent denial of his parole application is also alleged to have been unconstitutional.² Id. ¶ 4. There is no averment that these claims were presented to a Pennsylvania court.

In a decision handed down just before the Report and Recommendation was filed, the Pennsylvania Supreme Court held that "Parole Board determinations, since they do not constitute an

¹Although the petition was filed under 28 U.S.C. § 2241, section 2254 appears to be the appropriate provision. See Burkett v. Love, 89 F.3d 135 (3d Cir. 1996) (treating state prisoner's habeas challenge to denial of parole under § 2254).

²The petition and supporting complaint do not state the specific constitutional basis for this claim.

adjudication by an agency, are not reviewable." Rogers v. Pa. Bd. of Probation and Parole, ___ Pa. ___, ___, ___ A.2d ___, ___ (Jan 22, 1999). Accordingly, exhaustion is inapplicable to a Pennsylvania denial of parole.

Nevertheless, petitioner's claim that the parole rejection was unconstitutional will be denied on the merits.³ The denial of parole cannot constitute a procedural due process violation. There is no constitutional liberty interest in parole. See Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 7-10, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Furthermore, parole is not a protected liberty interest in Pennsylvania. See Rogers, ___ A.2d at ___; Burkett, 89 F.3d at 139.

Our Court of Appeals has held that denial of parole may give rise to a substantive due process violation even though there is no liberty interest in parole. See Block v. Potter, 631 F.2d 233, 236 (3d Cir. 1980). Although the vitality of Block is questionable, it must be followed until overturned. See Jubilee v. Horn, No. 97-1755, slip op. at 1 (3d Cir. Mar. 26, 1998) (unpublished per curiam decision) ("[N]ot only do courts of appeals in other circuits disagree with Block, but more recent decisions by this Court suggest that Block may be obsolete."). The petition does not assert any conduct by defendants that might give rise to

³"An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2).

a cognizable substantive due process violation under Block – e.g., deprivations implicating “race, religion, political beliefs, or on frivolous criteria with no rational relationship to the purpose of parole such as the color of one’s eyes, the school one attended, or the style of one’s clothing.” Block, 631 F.2d at 236 n.2.

Accordingly, petitioner’s parole claim is denied on the merits. In all other respects, the Report and Recommendation is adopted.

Edmund V. Ludwig, J.

