

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

ROBERT SMITH : CIVIL ACTION  
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v. : :  
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DAVID H. LARKINS, ET AL. : NO. 99-1258

**MEMORANDUM**

**Padova, J.**

October , 1999

Petitioner, Robert Smith, a state prisoner at the State Correctional Institution in Dallas, Pennsylvania, filed a Petition for a Writ of Habeas Corpus (“Petition) pursuant to 28 U.S.C. § 2254 (West 1994). In accordance with 28 U.S.C.A. § 636(b)(1)(B) (West 1993) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Peter B. Scuderi for a Report and Recommendation (“Report”). Magistrate Judge Scuderi recommended that the Court dismiss the Petition, and Petitioner filed objections. For the following reasons, I will overrule Petitioner's objections, adopt Magistrate Judge Scuderi’s Report in part, and dismiss the Petition for a Writ of Habeas Corpus.

**I. FACTUAL BACKGROUND**

On February 24, 1987, Petitioner pled guilty to third degree murder in the Court of Common Pleas of Delaware County. Thereafter, he was sentenced to seven years and six months to fifteen years’ imprisonment. At the expiration of his minimum sentence in April, 1994, he was released on parole. However, he was recommitted to prison as a technical parole violator due to “assaultive behavior” in February, 1996. (Report at 3). At that time, he was sentenced to

serve nine months' "backtime."<sup>1</sup> Subsequently, the Pennsylvania Board of Probation and Parole (PBPP) denied Petitioner reparole on five occasions.

Petitioner filed the instant petition on March 11, 1999. The petition contains three claims:

(1) Smith claims that he is being subjected to "excessive punishment without due process . . . [and] without any available state court remedy." (Petition at 7-a).

(2) Smith claims that the PBPP changed "its rules pertaining to parole eligibility," lengthening his incarceration in violation of the Ex Post Facto Clause of the Constitution. (Petition at 7-a).

(3) Smith claims that he has been denied "equal protection of law" because he has been denied the benefits of Duncan v. Pennsylvania Board of Probation and Parole, 687 A.2d 1179 (Pa. Commw. Ct. 1996). (Petition at 7-a).

Magistrate Judge Scuderi issued a Report and Recommendation on July 16, 1999. The Magistrate Judge recommends dismissing Petitioner's claims. Petitioner objects to these recommendations.

## **II. STANDARD OF REVIEW**

"[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in

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<sup>1</sup>"Backtime" is the term given to prisoners who are ordered to serve some of the time they spent on parole back in prison. Therefore, backtime is not counted against the remaining time left on a sentence. After backtime is served, however, prisoners begin to serve time against their sentence again.

custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214, made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. §§ 2241-2255, the chapter governing federal habeas petitions. Section 2254(d)(1), as amended by AEDPA, provides:

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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-  
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States....

28 U.S.C.A. § 2254(d)(1) (West 1996). A habeas writ should not be granted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Matteo v. Superintendent Scialbion, 171 F.3d 877, 890 (3d Cir. 1999).

### **III. DISCUSSION**

Petitioner's due process claim has two facets. First, he asserts that by retrospectively applying a change in "parole-release rules" to his application for parole, the Board is punishing

him excessively, and this deprivation of liberty infringes his due process rights. (Petition at 7-b). This assertion of a change in rules also forms the essence of his ex post facto claim, discussed below. Second, Petitioner contends that the Board assessed him backtime penalties in excess of the presumptive range for such penalties,<sup>2</sup> and this also constitutes an “excessive and therefore unconstitutional” punishment, ostensibly also infringing his Fourteenth Amendment due process rights. (Petition at 7-c). The Court will first address the backtime argument, as this claim is spurious and thus may be dismissed without analyzing the merits of this claim, or whether Petitioner has exhausted state remedies.

A. Backtime

This Court recently considered a similar habeas claim of excessive backtime penalties. Hargrove v. Pennsylvania Board of Probation and Parole, No. 99-1910, 1999 WL 817722 (E.D.Pa.). In Hargrove, the Petitioner was assessed a ten-month backtime penalty at a parole revocation hearing. After his backtime had expired, Petitioner was reviewed for parole. The Board denied parole, and stated that Petitioner would be reviewed again for parole in twelve months. Petitioner characterized this decision as the imposition of an additional twelve months’ backtime, in excess of the presumptive range for a single parole violation. However, as the Court explained, the Board did not assess additional backtime after the expiration of the ten-month penalty. Rather, it merely denied reparole, a decision clearly within its discretion. Nothing in the Board’s decision indicated that this denial had anything to do with backtime. Thus the Court found Petitioner’s backtime argument “a fiction,” and that he had failed to “state any sufficient

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<sup>2</sup>Presumptive ranges for imposition of backtime penalties when the Board recommitts a parole violator are set by the Pennsylvania Administrative Code. 37 Pa. Code § 75.4.

ground for relief” based on this claim. Id.

The instant case presents an almost identical scenario. When Petitioner was recommitted to prison, he was assessed a backtime penalty of nine months, which Petitioner does not dispute is within the presumptive range for his parole violation. Subsequently the Board denied reparole on five separate occasions. While Petitioner characterized these denials as the imposition of additional, excessive backtime, in fact they were simply what the Board said they were: denials of reparole, with nothing to do with backtime. Thus, like the Petitioner in Hargrove, in the instant case Petitioner Smith’s backtime claim is a fiction, and the Court need not consider it further.

B. Exhaustion of State Remedies: Mandamus

In turning to the second facet of Petitioner’s due process claim and then to his remaining claims, the Court must first consider whether these claims were exhausted at the state level. Generally, a court will dismiss a petition containing a mixture of exhausted and unexhausted claims without prejudice. Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205 (1982). Magistrate Judge Scuderi concluded, however, that “to the extent that petitioner challenges the Board’s decision to deny parole, exhaustion is futile because there are no remedies in the Pennsylvania state courts for petitioner to exhaust.” (Report at 5). In Hargrove, the Court reviewed the state of Pennsylvania law regarding avenues of relief available to prisoners claiming violations of their constitutional rights based on denial of parole. State habeas corpus and direct appeal are foreclosed to such prisoners. Carter v. Muller, 45 F.Supp.2d 453, 454 (E.D.Pa. 1999). Relief through an action in mandamus against the Parole Board may be available in certain cases, although courts offer differing interpretations of when the theoretical availability of mandamus

may also be a practical reality. Compare Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766, 776-77 (Pa. Commw. Ct. 1997) (opining that “mandamus cannot be used to say that an agency considered improper factors, that its findings of fact were wrong, or the reasons set forth in its decision are a pretense”) with Carter, 45 F.Supp.2d at 455 (concluding Pennsylvania courts provide a mandamus action as a single avenue of relief to prisoners claiming an unconstitutional denial of parole). Given this uncertainty about the applicability of mandamus, the Magistrate Judge may be correct in his conclusion that such an “extraordinary remedy” would not be available in the instant case. (Report at 4). However, even assuming mandamus is available and Petitioner therefore has not exhausted state remedies, this Court, pursuant to powers granted in 28 U.S.C.A. § 2254(b)(2), will deny Petitioner’s claims on the merits.

C. Due Process

As the Court discussed in Hargrove, an individual has no constitutionally protected liberty interest in a claim to parole cognizable under procedural due process. Hargrove, 1999 WL 817722. Substantive due process, however, forbids arbitrary parole decisions by the Board, notwithstanding the legislative grant of discretion to the Board. Burkett v. Love, 89 F.3d 135, 139 (3d Cir. 1996). If the Board bases its decision on factors that bear no rational relationship to rehabilitation or the interests of the Commonwealth, it “transgresses the legitimate bounds of its discretion.” Block v. Potter, 631 F.2d 233, 237 (3d Cir. 1980).

In claiming that the Board’s denial of reparole infringes his due process rights, Petitioner provides no proof of arbitrary behavior by the Board that would rise to the level of a constitutional violation. He fails to support his bald assertion that the evidence relied on by the

Board was “false” and “unsubstantiated.” (Objections at 1-2).<sup>3</sup> In fact, the Board relied on testimony of the parole agent, on testimony of a female acquaintance of Petitioner, and on a letter from another female acquaintance. Petitioner testified himself, and he was represented by counsel. The proceeding, then, met the due process standard for a parole revocation hearing set by the Supreme Court. Morrissey v. Brewer, 408 U.S. 471, 488-89, 92 S.Ct. 2593, 2603-04 (1972). The Board decided based on the evidence presented that Smith presented “a danger to the safety of the public,” and “his parole would not be in the best interest of administrative justice.” (Report at 15). Thus the Board’s decision was not arbitrary, and the Board enunciated a rationale -- the safety of the public -- bearing a demonstrable, rational relationship to the best interests of the Commonwealth. For these reasons, the Court agrees with Magistrate Judge Scuderi that Petitioner’s due process claim fails on the merits.

D. Ex Post Facto Clause

The Ex Post Facto Clause prohibits states from passing “any . . . ex post facto Law.” U.S. Const. art. I, § 10, cl. 1. An ex post facto law “makes more burdensome the punishment for a crime, after its commission.” Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 2298 (1977) (quoting Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S.Ct. 68 (1925)). While the Constitution specifically prohibits ex post facto “laws,” Magistrate Judge Scuderi points out that laws in this context includes not only statutes but also validly promulgated administrative regulations. (Report at 8, citing Jubilee v. Horn, 959 F. Supp. 276, 282 (E.D.Pa. 1997)). Petitioner, however,

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<sup>3</sup>Petitioner further objects that he was not allowed an evidentiary hearing where he could prove that “the alleged assaults [sic] never occurred.” (Objections at 2). To the extent that this objection may be construed as a request for such a hearing, Petitioner has not met the statutory standard for an Evidentiary Hearing. 28 U.S.C.A. § 2254(e)(2).

cites neither a specific statute nor an administrative ruling that has lengthened his incarceration. Rather, he refers to a change in Board policy without providing proof of such a policy change. Moreover, he does not show that the putative policy change is applied by the Board in the rigid and mechanical fashion that might implicate the ex post facto clause. Crowell v. United States Parole Com'n., 724 F.2d 1406, 1408 (3d Cir. 1984). Thus the Court agrees with Magistrate Judge Scuderi that Petitioner's claim based on the ex post facto clause fails.

E. Equal Protection

Petitioner claims that he was denied "equal protection of law" because he has not been afforded the benefits of Duncan v. Pennsylvania Board of Probation and Parole, 687 A.2d 1179 (Pa. Commw. 1997). Duncan, however, was about the Board's imposition of backtime in excess of the presumptive range. 687 A.2d at 1180-81. As discussed above, despite Petitioner's assertion to the contrary, he did not receive a backtime penalty outside the presumptive range. While the Duncan court remanded the case to the Board to reverse the excessive backtime penalty, this "benefit" could not possibly be afforded to the Petitioner in the instant case, because he did not receive excessive backtime. Thus the Petitioner has failed to state a claim for violation of the Equal Protection Clause, and the Court therefore dismisses this claim.

For the foregoing reasons, the Court adopts Magistrate Judge Scuderi's Report and Recommendation in part, and denies the instant Petition for Writ of Habeas Corpus.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT SMITH

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CIVIL ACTION

v.

DAVID H. LARKINS, ET AL.

NO. 99-1258

**ORDER**

**AND NOW**, this            day of October, 1999, upon consideration of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi that the Petition for Writ of Habeas Corpus be Dismissed (Doc. No. 8) and Petitioner’s Objections (Doc. No. 9) thereto, **IT IS HEREBY ORDERED THAT:**

- 1. Petitioner’s Objections to the Report and Recommendation of Magistrate Judge Peter B. Scuderi are **OVERRULED**;
- 2. The Report and Recommendation is **APPROVED** and **ADOPTED IN PART**;
- 3. The Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED**;

and

- 4. Because Petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability under 28 U.S.C. § 2253(c)(2).

BY THE COURT:

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John R. Padova, J.