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

CARLOS M. FLECHA,	:	CIVIL ACTION
Petitioner,	:	NO. 04-4164
v.	:	
EDWARD KLEM, et al.,	:	
Respondents.	:	

MEMORANDUM

ROBERT F. KELLY, S.J. **MARCH 14, 2005**

Presently before this Court are the Objections to the Report and Recommendation of United States Magistrate Judge Charles B. Smith on the Petition for Writ of Habeas Corpus. While I join in the Report's conclusion on the merits, I review the petition *de novo* and conclude that Petitioner's claims are procedurally barred.

The Petitioner, Carlos M. Flecha, is an inmate incarcerated in the State Correctional Institution at Mahoney, Pennsylvania. Following a jury trial before the Honorable Marvin R. Halbert of the Philadelphia County Court of Common Pleas, Petitioner was convicted of burglary, robbery, and attempted rape on January 24, 1986. On June 16, 1985, Judge Halbert sentenced Petitioner to ten to twenty years incarceration on the robbery conviction, with a five year sentence on the attempted rape and burglary conviction to run consecutively to the robbery sentence. The combined sentences gave Petitioner a minimum release date of February 6, 2000, and a maximum release date of February 6, 2015.

Since the expiration of Petitioner's minimum sentence, the Pennsylvania Board of

Probation and Parole (the "Board") has reviewed Petitioner's applications for release four times, denying them all. On December 13, 1999, the Board concluded that "following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." (Ex. at 8.). The Board further noted that it would consider whether Petitioner received a favorable recommendation for parole from the Department of Corrections, whether he maintained a clear conduct record and whether he completed the Department of Corrections prescriptive programs at Petitioner's next review for parole.

On April 11, 2001 and again on September 26, 2002, the Board issued decisions denying Petitioner's parole applications. In both decisions the Board indicated that at subsequent reviews it would consider whether the Petitioner successfully completed the Department of Corrections' treatment program for sex offenders, whether the Petitioner received a favorable recommendation for parole from the Department of Corrections, and whether the Petitioner maintained a clear conduct record and completed the Department of Corrections' prescriptive programs. (Ex. at 6-7.).

Petitioner wrote a letter to Senator Greenleaf on November 17, 2002 stating, among other things, that he refused to admit guilt and was, therefore, not permitted to participate in the sex offenders treatment program. Senator Greenleaf forwarded Petitioner's letter to the Board, which replied that its function is not to retry Petitioner's case and that one of the qualifications for successfully completing a sex offender treatment program is admitting guilt. (Ex. at 24-25).

At Petitioner's most recent review by the Board, he was once against denied parole. The Board issued the following decision:

> Following an interview with you and a review of your file, and having considered all matters required pursuant to the Parole Act of 1941, as amended, 61 P.S. § 331.1 *et seq*., the Board of Probation and Parole, in the exercise of its discretion has determined at this time that: your best interests do not justify or require you being paroled/reparoled; and, the interests of the Commonwealth will be injured if you were paroled/reparoled. Therefore, you are refused parole/reparole at this time. The reasons for the Board's Decision include the following:
>
> The recommendation made by the Department of Corrections.
>
> Your need to participate in and complete additional institutional programs.
>
> Your interview with the hearing examiner and/or board member.

(Ex. at 4.). The Board indicated it would consider the same factors as it had in previous applications at the Petitioner's next review.

After his most recent denial, Petitioner alleges that he wrote to the Board requesting reconsideration and did not receive a response. On April 27, 2004, Petitioner filed a Petition for Review in the Nature of a Complaint in Mandamus in the Commonwealth Court. The Commonwealth Court treated the petition as directed to its original jurisdiction under 42 Pa. Cons. Stat. Ann § 761(a), citing Coady v. Vaughn, 564 Pa. 604, 770 A.2d 287 (2001), which requires the Commonwealth Court to consider the merits of a petition in mandamus alleging that the Board violated the *ex post facto* clause when it denied parole. The Commonwealth Court denied the petition on August 10, 2004.

Because Petitioner's mandamus petition was directed to the original jurisdiction of the Commonwealth Court, Petitioner had the right to appeal the Commonwealth Court's

decision to the Pennsylvania Supreme Court as a matter of right.[1] 42 Pa. Cons. Stat. Ann. § 723(a). Petitioner was not required to petition for allowance of appeal, and the Pennsylvania Supreme Court would have been required to hear the appeal on its merits. Id. However, Petitioner did not file an appeal.

Petitioner filed the present Petition for Writ of Habeas Corpus on October 4, 2004, alleging that the Board's application of the 1996 amendments to the Parole Act to his parole applications violates the *ex post facto* Clause of the United States Constitution.

A federal writ of habeas corpus may not be granted to a petitioner in the custody of a state unless the petitioner has exhausted all remedies in the state courts. 28 U.S.C. § 2254(b)(1)(A). As a result, the petitioner must invoke one complete round of the state's established review process, including recourse to the state's court of last resort, before he may assert the claim on federal habeas review. O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). Generally, federal courts should dismiss unexhausted claims without prejudice, so as not to deprive the state courts of the "opportunity to correct their own errors, if any." Toulson v. Beyer, 987 F.2d 984, 989 (3d Cir. 1993). However, if a petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims would find the claim to be procedurally barred, the federal courts are precluded from reviewing the petition as well. Coleman v. Taylor, 501 U.S. 722, 729, 735 n.1 (1991). As Petitioner did not present his *ex post facto* claim to the Pennsylvania Supreme Court, his failure to do so has created an independent

[1] The Magistrate Judge's conclusion that Petitioner was not required to present his claims to the Pennsylvania Supreme Court is in error as it rests on the faulty assumption that Petitioner's claim was presented to the Superior Court. Petitioner's mandamus action, however, was filed in the Commonwealth Court. As a result, the procedural order upon which the Magistrate Judge based his conclusion regarding exhaustion of state remedies does not apply.

state law ground for the denial of his claim. See id. at 729.

Petitioner argues that his failure to appeal to the Pennsylvania Supreme Court should be excused because the Pennsylvania Supreme Court has ruled that application of the 1996 amendments to the Parole Act does not violate the *ex post facto* clause, Finnegan v. Pa. Bd. of Probation & Parole, 576 Pa. 59, 838 A.2d 684 (2003), and the opposite argument to the Pennsylvania Supreme Court would be futile. Furthermore, although the Pennsylvania Supreme Court's position is directly contrary to that of the U.S. Court of Appeals for the Third Circuit ("Third Circuit") in Mickens-Thomas v. Vaughn, 35 F.3d 294 (3d Cir. 2004), upon which Petitioner principally relies here, the Pennsylvania Supreme Court has made clear that its position will not be altered by the Third Circuit. Hall v. Pa. Bd. of Probation & Parole, 578 Pa. 245, 255, 851 A.2d 859, 865 (2002) ("Within our federal system of governance, there is only one judicial body vested with the authority to overrule a decision that this Court reaches on a matter of federal law: the United States Supreme Court. Absent a contrary ruling from that tribunal, it is the law of this Commonwealth that application of the 1996 amendments to the Parole Act to persons sentenced prior to their adoption does not violate the *ex post facto* clause of the United States Constitution."). In light of such a statement, Petitioner urges the excusal of presenting such an obviously non-starter argument to the Pennsylvania Supreme Court. Unfortunately for the Petitioner, making such a presentation is a necessary element to his receiving any type of habeas corpus relief.

The United States Supreme Court has repeatedly held that a habeas petitioner is not excused from presenting his claim to the state courts merely because those courts are likely to reject it. In Engle v. Isaac, 456 U.S. 107 (1982), habeas petitioners forfeited their objection to a

jury instruction on self-defense when they failed to object to it at trial. Although they sought to excuse their failure on the ground that "any objection to Ohio's self-defense instruction would have been futile" under Ohio law, the argument was rejected. The Court noted

> at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.

Id. at 130. As a result, even though a petitioner believes that his arguments will fall upon deaf ears in the state courts, he is not excused from the requirement to present them there. Id.

The Pennsylvania Supreme Court has, in fact, clarified it's position on the *ex post facto* clause and the 1996 amendments to the Parole Act. In Cimaszewski v. Board of Probation and Parole, — Pa. —, 2005 WL 442157 (Feb. 24, 2005), the Court concluded that an inmate can, in fact, make an *ex post facto* challenge to a parole denial. However, the burden is on the inmate to show that the 1996 amendments, as applied to the inmate, create a significant risk of prolonging the inmate's incarceration. Id. at *9 (citing Garner v. Jones, 529 U.S. 244, 251 (2000)). Merely citing to Mickens-Thomas cannot satisfy that burden. Rather, the inmate must show that the Board relied solely on the inappropriate criteria in making its determination. Id.

As Petitioner has failed to exhaust his state remedies and no other grounds have been demonstrated to grant the writ, the petition will be dismissed.[2]

An appropriate Order follows.

---

[2] Petitioner's objections based upon the Fifth Amendment are not considered as they were not asserted in the Petition. The only argument properly submitted to the Court in the present petition was Petitioner's *ex post facto* claim.

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

CARLOS M. FLECHA,	:	CIVIL ACTION
Petitioner,	:	NO. 04-4164
v.	:	
EDWARD KLEM, et al.,	:	
Respondents.	:	

ORDER

AND NOW this 14th day of March, 2005, upon careful consideration of the Report and Recommendation filed by United States Magistrate Judge Charles B. Smith, the Objections filed by the Parties thereto, and upon independent review of the Petition for Writ of Habeas Corpus, it is hereby **ORDERED** that:

1. Petitioner's objections to the Report and Recommendation are **DENIED**;

2. Respondents' objections to the Report and Recommendation are **SUSTAINED**; and

3. the Petition is hereby **DISMISSED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY Sr. J.