

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

JEFFREY BORS : CIVIL ACTION
 :
 v. :
 :
 DONALD T. VAUGHN, et al. : NO. 98-0019

MEMORANDUM AND ORDER

HUTTON, J.

April 16, 1998

Presently before this Court are the Report and Recommendation of United States Magistrate Judge Diane M. Welsh and the Petitioner Jeffrey Bors's Objections to the Report and Recommendation. For the reasons set forth below, the Petition for Writ of Habeas Corpus is **DENIED**.

I. BACKGROUND

The petitioner, Jeffrey Bors, contends that the Pennsylvania Board of Probation and Parole (the "Parole Board") acted in an arbitrary and capricious manner in failing to grant the petitioner's request for parole.¹ Accordingly, the petitioner claims that he is entitled to a writ of habeas corpus, under 28 U.S.C. § 2241, on the grounds that the Parole Board violated his Eighth Amendment rights and his right to due process.

Magistrate Judge Welsh explained that the petitioner pled "his due process claim in a manner that is consistent with the case

1. The facts of the case are discussed at length in Magistrate Welsh's Report and Recommendation and need not be repeated here.

of Block v. Potter, 631 F.2d 233 (3d Cir. 1980)." Rep. and Recomm. at 1. In Block, the Third Circuit Court of Appeals stated that "[e]ven if a state statute does not give rise to a liberty interest in parole release under Greenholtz, once a state institutes a parole system all prisoners have a liberty interest flowing directly from the due process clause in not being denied parole for arbitrary or constitutionally impermissible reasons." Id. at 236.² Thus, the decisions of parole boards may still be reviewed in a limited capacity.³

After reviewing the Block standards, Magistrate Welsh found that, "[w]ithout intimating any view concerning the merits of the petitioner's due process claim, [the petitioner] . . . pled a cognizable claim." Report and Recommendation at 2. However, Magistrate Welsh concluded that because the petitioner failed to exhaust his state court remedies as required by Burkett v. Love, 89 F.3d 135 (3d Cir. 1996), his petition should be dismissed. Rep. and Recomm. at 2-3.

2. In Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 7 (1979), the Supreme Court stated that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." The Court, however, did recognize that a State parole statute may give rise to an "expectancy of release . . . entitled to some measure of constitutional protection." Id. at 12.

3. For example, the court in Block stated that "the role of judicial review on application for a writ of habeas corpus 'is to insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible considerations.'" Id. at 236 (quoting Zannino v. Arnold, 531 F.2d 687, 690 (3d Cir. 1976)).

II. DISCUSSION

In Burkett, a state prisoner alleged "that he was denied parole in retaliation for the successful pursuit of relief in various federal habeas corpus proceedings." Burkett, 89 F.3d at 136. Relying on its decision in Block, the Third Circuit restated its earlier position that a state inmate may successfully challenge a state parole board's decision to deny parole based on arbitrary or constitutionally impermissible reasons. Id. at 139-41. Moreover, the Third Circuit found that, under the Pennsylvania Supreme Court's decision in Bronson v. Pennsylvania Bd. of Probation and Parole, 421 A.2d 1021 (1980), cert. denied, 450 U.S. 1050 (1981), a petitioner asserting such a claim could seek judicial review in state court. Burkett, 89 F.3d at 140-41. Thus, the Third Circuit held that a petitioner asserting such a claim must exhaust his state court remedies prior to filing a federal habeas corpus petition. Id. at 142.

The petitioner, however, relies on Weaver v. Pennsylvania Bd. of Probation and Parole, 688 A.2d 766, 771-72 (Pa. Commw. Ct. 1997), wherein the Commonwealth Court of Pennsylvania disagreed with the Third Circuit's decision in Burkett. The Commonwealth Court stated that the Third Circuit misapplied the Pennsylvania Supreme Court's ruling in Bronson, and instead held that a petitioner seeking habeas corpus relief for the denial of parole has no remedies available to him under the Pennsylvania state court

system. Id. at 771-72; see also Pennsylvania v. Stark, 698 A.2d 1327, 1333 (Pa. Super. Ct. 1997) (following Weaver and rejecting Burkett). Thus, the Weaver court found that a habeas corpus petitioner cannot be required to exhaust his state court remedies prior to proceeding with his habeas corpus petition in federal court. Id. at 771.

This Court is now faced with conflicting rules of law between the United States Court of Appeals for the Third Circuit and the Superior and Commonwealth Courts of Pennsylvania. As Magistrate Judge Welsh stated, this Court is bound by the Third Circuit's interpretation of Bronson, until the Supreme Court of Pennsylvania makes a determination on this issue. Accordingly, the petitioner is required to first exhaust his state court remedies, and, because he has failed to do so, his petition is dismissed.

An appropriate Order follows.

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O R D E R

AND NOW, this 16th day of April, 1998, upon careful and independent consideration of the petition for a writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Diane M. Welsh and the Petitioner's Objections thereto, IT IS HEREBY ORDERED that:

- (1) The Report and Recommendation is **APPROVED** and **ADOPTED**; and
- (2) The Petition for a Writ of Habeas Corpus is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.