

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

EDWARD GIBBS, :  
 :  
 Petitioner, :  
 :  
 v. : Civil Action No. 00-352-JJF  
 :  
 STATE OF DELAWARE, :  
 and M. JANE BRADY, Attorney :  
 General of the State of :  
 Delaware, :  
 :  
 Respondents. :

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Edward Gibbs, Pro Se Petitioner.

Loren C. Meyers, Esquire of THE STATE OF DELAWARE DEPARTMENT OF  
JUSTICE, Wilmington, Delaware.  
Attorney for Respondents.

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**MEMORANDUM OPINION**

January 8, 2001

Wilmington, Delaware

**Farnan, District Judge.**

Pending before the Court is a Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (the "Petition") (D.I. 2) filed by Petitioner, Edward Gibbs. In addition, Petitioner has filed a Motion For Expansion Of The Record (D.I. 14). For the reasons set forth below, the Petition will be dismissed as moot and the Writ of Habeas Corpus will be denied. In addition, Petitioner's Motion For Expansion Of The Record will be granted, and the claims raised by the Motion will be dismissed without prejudice for failure to exhaust state remedies.

**BACKGROUND**

On December 12, 1988, Petitioner pled guilty to unlawful sexual intercourse in the third degree. (A3, docket item no. 32).<sup>1</sup> The same day, the Delaware Superior Court sentenced Petitioner to fifteen years imprisonment, with credit for time served. (A4, docket item no. 33). In addition, the superior court ordered the balance of Petitioner's sentence suspended for Level II probation, after Petitioner served five years pursuant to 11 Del. C. § 4204(k).

Seven years later, in December 1995, the Delaware Superior Court found Petitioner guilty of a probation violation. The

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<sup>1</sup> The designation "A" refers to the appendix filed by Petitioner in Gibbs v. State, No. 263, 1999 (Del. Aug. 28, 2000).

Delaware Superior Court revoked Petitioner's probation and sentenced him to ten years at Level V, with credit for time served. The superior court further ordered that after serving six months at Level V, the balance of Petitioner's sentence would be suspended for three months at Level IV Work Release, followed by four years at level II probation. (A8-9, docket item no. 71).

In November 1997 and again in February 1998, the Delaware Superior Court found Petitioner guilty of probation violations. On May 19, 1999, Petitioner's probation officer cited him with a fourth probation violation. Specifically, Petitioner had been arrested and indicted on charges of second degree rape. In addition, the probation officer alleged that Petitioner failed to timely report a change in residence and violated his curfew.

On May 27, 1999, following a jury trial, Petitioner was acquitted of the second degree rape charge. Immediately upon the conclusion of the trial, Petitioner was arrested on a new charge of second degree rape without consent involving a different victim.

Several days later, in June 1999, the Delaware Superior Court held a violation of probation hearing. Petitioner appeared at the hearing without counsel. At the hearing, the Department of Probation and Parole acknowledged that Petitioner was acquitted of the first charge of second degree rape, but requested that the superior court amend the original violation of probation report to reflect the second charge.

Without ruling on the request for amendment and without hearing any evidence, the superior court found Petitioner guilty of a probation violation by a preponderance of the evidence. In making this finding, the superior court relied on the evidence that had been presented during Petitioner's May 27 trial. The Delaware Superior Court revoked Petitioner's probation and sentenced him to seven years and nine months imprisonment at Level V, with credit for time served. The superior court further ordered that after serving six years, the balance of Petitioner's sentence would be suspended for Level IV Home Confinement, which could be reduced to a lower level of supervision within the discretion of Petitioner's probation officer. Subsequently, Petitioner's sentencing order was amended to reflect that Petitioner was assigned to Sex Offender Tier Level III.

With the assistance of counsel, Petitioner appealed the superior court's June 1999 order. Specifically, Petitioner raised two arguments: (1) the superior court should have appointed counsel to represent Petitioner at the hearing, and (2) the superior court abused its discretion by relying on a criminal charge for which Petitioner had been acquitted to find a probation violation. On appeal, the Delaware Supreme Court reversed the superior court's judgment on the ground that the superior court should have appointed counsel for Petitioner. A new violation of probation hearing was scheduled for November 20, 2000.

Prior to the November 20, 2000 hearing, Petitioner filed the instant Petition seeking federal habeas relief. Specifically, Petitioner contends that he was not represented by counsel, was not informed of the evidence against him, was not allowed to testify, was not allowed to question witnesses, and was not in violation of his probation. (D.I. 2). The State has filed an Answer to the Petition, and therefore, the Petition is ripe for the Court's review.

### DISCUSSION

#### **I. The Exhaustion Requirement As Applied To The Claims Raised In the Petition**

Before turning to the merits of the Petition, the Court must determine, as a threshold matter, whether the Petitioner may seek federal habeas review. In order for a state petitioner to avail himself or herself of federal habeas review, he or she must have exhausted all available state remedies. 28 U.S.C. § 2254(b). Exhaustion is satisfied if a petitioner shows that he or she "fairly presented" each of his or her claims to the Delaware Supreme Court. Bailey v. Snyder, 855 F. Supp. 1392, 1399 (D. Del. 1993), aff'd, 68 F.3d 736 (3d Cir. 1995). If a petitioner has failed to exhaust state remedies, but state remedies are no longer available, the exhaustion requirement is excused. Teague v. Lane, 489 U.S. 288, 298 (1989).

In this case, Petitioner presented his claim regarding the superior court's failure to appoint counsel at the June 1999

hearing and his claim of innocence with regard to the violation of probation charge to the Delaware Supreme Court, and therefore, Petitioner has exhausted his remedies with respect to those claims. Petitioner did not present the remainder of his claims to the Delaware Supreme Court; however, pursuant to 28 U.S.C. § 2254(b)(3), the State has expressly waived the exhaustion requirement. Accordingly, the Court will proceed to a review of Petitioner's claims. See United States ex rel. Kelly v. Maroney, 414 F.2d 1228, 1230-31 (3d Cir. 1969).

## **II. Petitioner's Claims That The June 1999 Probation Hearing Was Constitutionally Infirm**

The claims presented by Petitioner relate to his June 1999 probation hearing. As the state court record indicates, the superior court's revocation of Petitioner's probation was reversed by the Delaware Supreme Court on appeal. Given these circumstances, the claims raised by Petitioner have been rendered moot. See Cumbo v. Eyman, 409 F.2d 400, 400 (9th Cir. 1969) (holding that reversal of conviction by state court during pendency of federal habeas petition mooted claims raised in petition). Accordingly, the Court will dismiss the Petition as moot and deny the relief requested.

## **III. Petitioner's Motion For Expansion Of The Record**

As for Petitioner's Motion For Expansion Of The Record, Petitioner requests to "amend his complaint" to "appeal . . . the rehearing of 11-20-2000 in the District Court." (D.I. 14). It

is well-established that the burden of proving exhaustion of state remedies rests on the habeas petitioner. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). In this case, Petitioner does not assert that he has exhausted his state remedies with respect to his claims concerning the November 20, 2000 hearing, and it appears from Petitioner's Motion that he is seeking a direct appeal of the superior court's November 20, 2000 decision in this Court.<sup>2</sup> (D.I. 14). Where, as here, a petitioner has certain state remedies available to him, judicial comity compels dismissal pending exhaustion of state remedies. See e.g. Boyd v. Vaughn, 1999 WL 1111021, \*1 (E.D. Pa. Dec. 6, 1999) (dismissing petition where petitioner failed to assert that he exhausted state remedies); Thomas v. Zimmerman, 1985 WL 3357 (E.D. Pa. Oct. 29, 1985) (dismissing petition for failure to exhaust available state remedies). Accordingly, to the extent that Petitioner challenges his November 20, 2000 hearing by his Motion For Expansion Of The Record, the Court will dismiss Petitioner's claims without prejudice for failure to exhaust state remedies.

#### **CONCLUSION**

For the reasons discussed, the Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody

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<sup>2</sup> The Court observes that the State's waiver of the exhaustion requirement was in response to the claims raised in the original Petition (D.I. 2). The State has not filed a response to Petitioner's Motion For Expansion Of The Record (D.I. 14), and therefore, the State has not waived the exhaustion requirement with respect to the claims raised by the Motion.

(the "Petition") (D.I. 2) filed by Petitioner, Edward Gibbs, will be dismissed as moot, and the Writ of Habeas Corpus will be denied. In addition, Petitioner's Motion For Expansion Of The Record will be granted, and the claims raised by the Motion will be dismissed without prejudice for failure to exhaust state remedies.

An appropriate Order will be entered.