IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRUCE WAPLES, Petitioner, v. RICK KEARNEY, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.	)	Civil Action No. 00-926-GMS

M E M O R A N D U M A N D O R D E R

After determining that Bruce Waples violated the terms of his probation, the Delaware Superior Court sentenced him to four and one-half years in prison. Waples is currently incarcerated at the Sussex Correctional Institution in Georgetown, Delaware. He has filed with the court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising due process challenges to the violation of probation ("VOP") proceedings. For the reasons set forth below, the court concludes that Waples' claims do not provide a basis for federal habeas relief, and will deny the petition.

I. BACKGROUND

In September 1996, Waples pleaded guilty in the Superior Court to criminal mischief, trespass, theft, and assault, and was sentenced to four years in prison, suspended for decreasing levels of supervision. *State v. Waples*, Cr. A. No. 9604004784 (Del. Super. Ct. Sept. 19, 1996). In October 1997, Waples pleaded guilty to possession of marijuana and trespass, and was

sentenced to eighteen months in prison suspended for probation. *State v. Waples*, Cr. A. No. 9706017979 (Del. Super. Ct. Dec. 11, 1997). On March 20, 1998, the Superior Court found that Waples had violated the terms of his probation, revoked it, and sentenced him to four years in prison suspended for thirty months. *State v. Waples*, Cr. A. No. 9604004784 (Del. Super. Ct. Mar. 20, 1998). The Superior Court again revoked Waples' probation on August 27, 1999, and sentenced him to four years in prison suspended after six months for decreasing levels of supervision. *State v. Waples*, Cr. A. No. 9604004784 (Del. Super. Ct. Aug. 27, 1999). Waples did not appeal to the Delaware Supreme Court from any of these orders.

On January 28, 2000, the Superior Court revoked Waples' probation a third time after finding that he had violated Operation Safe Streets.[1] The Superior Court sentenced Waples to four and one-half years in prison, suspended for a period of probation after successful completion of the Key Program and a substance abuse treatment program. *State v. Waples*, Cr. A. Nos. 9604004784, 9706017979 (Del. Super. Ct. Jan. 28, 2000). The Delaware Supreme Court affirmed. *Waples v. State*, No. 75, 2000, 2000 WL 1177697 (Del. Aug. 14, 2000).

Waples has now filed the current petition for federal habeas relief challenging the VOP proceedings on due process grounds.[2]

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[1] "Operation Safe Streets" is a statewide joint police and probation program that is designed to apprehend offenders who are not complying with the terms of their probation. *Harris v. State*, No. 550, 1999, 2000 WL 990921, **2 n.9 (Del. June 21, 2000).

[2] To the extent that Waples requests a default judgment pursuant to Federal Rule of Civil Procedure 55, (D.I. 8), this request will be denied. Whether a default judgment is even available in a habeas corpus proceeding is subject to debate. See Lemons v. O'Sullivan, 54 F.3d 357, 364-65 (7th Cir. 1995)("Default judgment is an extreme sanction that is disfavored in habeas corpus cases."); Gordon v. Duran, 895 F.2d 610, 612 (9th Cir.1990)("The failure to respond to claims raised in a petition for habeas corpus does not entitle the petitioner to a default judgment."); Aziz v. Leferve, 830 F.2d 184, 187 (11th Cir. 1987)("a default judgment is not

II. STANDARDS OF REVIEW

A federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> 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 –
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> > (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; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A federal court may issue a writ of habeas corpus under § 2254(d)(1) only if it finds that the state court decision on the merits of a claim either (1) was contrary to clearly established federal law, or (2) involved an unreasonable application of clearly established federal law.

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contemplated in habeas corpus cases"); Allen v. Perini, 424 F.2d 134, 138 (6th Cir. 1970) ("Rule55(a) has no application in habeas corpus cases").

Regardless, Waples is not entitled to a default judgment because the respondents have not "failed to plead or otherwise defend" in this action. Fed. R. Civ. P. 55(a). Counsel for the respondents received Waples' habeas petition on November 17, 2000. (D.I. 6.) Their answer was due forty-five days later on January 1, 2001. (D.I. 5, 6.) Because January 1 was a legal holiday, the period of time was automatically extended until January 2. *See* Fed. R. Civ. P. 6(a). On January 2, the respondents filed a motion to extend the due date until February 15, 2001, which the court granted. (D.I. 9.) The respondents then filed their answer in a timely manner on February 15. (D.I. 13.) Accordingly, the court will deny Waples' request for a default judgment.

Williams v. Taylor, 529 U.S. 362, 412 (2000).

Specifically, a federal court may grant the writ under the "contrary to" clause only "if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. The court "must first identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim." *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000)(citing *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999)), *cert. denied*, 532 U.S. 980 (2001). In order to satisfy the "contrary to" clause, the petitioner must demonstrate "that Supreme Court precedent **requires** the contrary outcome." *Matteo*, 171 F.3d at 888 (emphasis added).

If the petitioner fails to satisfy the "contrary to" clause, the court must determine whether the state court decision was based on an unreasonable application of Supreme Court precedent. *Id.* Under the "unreasonable application" clause, the court "may grant the writ if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. A federal court should not grant the petition under this clause "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*, 171 F.3d at 890. "A federal court may not grant a writ of habeas corpus merely because it concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002).

Respecting a state court's determinations of fact, this court must presume that they are correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.* The presumption of correctness applies to both explicit and implicit findings of fact. *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000), *cert. denied*, 531 U.S. 1084 (2001). When the state court did not specifically articulate its factual findings but denied a claim on the merits, federal courts on habeas review generally may "properly assume that the state trier of fact . . . found the facts against the petitioner." *Weeks v. Snyder*, 219 F.3d 245, 258 (3d Cir.), *cert. denied*, 531 U.S. 1003 (2000).

III. DISCUSSION

In his petition, Waples raises the following claims for relief respecting the VOP proceedings:

(1) He did not receive a preliminary hearing.

(2) He did not receive adequate notice of a VOP hearing or that he could be represented by counsel at the VOP hearing.

(3) He was denied the right to cross-examine witnesses at the VOP hearing.

(4) The evidence was insufficient to support the finding of a VOP.

(D.I. 2.) The respondents acknowledge that Waples exhausted his claims by raising them on direct appeal, and ask the court to deny the petition on the merits. (D.I. 13 at 3.) The court addresses each of Waples' claims in turn.

A. Preliminary Hearing

Waples' first claim is that he was not afforded a preliminary hearing "in violation of 32.1 Federal Procedure." (D.I. 2, ¶ 1.) Because Rule 32.1 of the Federal Rules of Criminal Procedure

does not apply to state VOP proceedings, it appears that Waples alleges a violation of Rule 32.1 of the Superior Court Rules of Criminal Procedure.[3] To the extent that Waples may be alleging a violation of Superior Court Rule 32.1, this claim is not cognizable in this federal habeas proceeding. A federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Claims based on errors of state law are not cognizable on federal habeas review. *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Riley v. Harris*, 277 F.3d 261, 310 n.8 (3d Cir. 2001). Because Rule 32.1 is a state rule, Waples' allegation that the Superior Court violated Rule 32.1 is not a cognizable claim in this proceeding.

Waples' allegation, however, implicates not only state law, but also his constitutional right to due process. As a matter of constitutional due process, a probationer such as Waples is entitled to a preliminary hearing at or near the time of arrest "to determine whether there is probable cause to believe that he has committed a violation" of the terms of probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)(citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)). A

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[3] Revocation of Partial Confinement or Probation. Whenever a person is taken into or held in custody on the grounds that the person has violated a condition of partial confinement or probation, the person shall be brought without unreasonable delay before a committing magistrate or a judge of Superior Court for the purpose of fixing bail and, if not released on bail, shall be afforded a prompt hearing before a judge of Superior Court on the charge of violation. The person shall be given:

(A) Written notice of the alleged violation;
(B) Disclosure of the evidence against the person;
(C) An opportunity to appear and to present evidence in the person's own behalf;
(D) The opportunity to question adverse witnesses; and
(E) Notice of the person's right to retain counsel and, in cases in which fundamental fairness requires, to the assignment of counsel if the person is unable to obtain counsel.

Super. Ct. R. Crim. P. 32.1(a).

finding of probable cause, following an informal hearing, is sufficient to detain the probationer pending a final revocation decision. *Morrissey*, 408 U.S. at 487.

Here, the Delaware Supreme Court ruled that Waples had been afforded a preliminary hearing as required by *Morrissey*. *See Waples*, 2000 WL 1177697 at **1 & n.3. According to the Delaware Supreme Court, Waples appeared in the Superior Court on January 18, 2000, on a warrant issued by his probation officer. At that hearing, the Superior Court advised Waples that he was accused of having violated "Safe Streets," and that a VOP hearing would be conducted on January 28, 2000. *Id.* at **1. The Delaware Supreme Court found this sufficient. *Id.*

While there is no question that Waples was afforded a preliminary hearing on January 18, 2000, the record does not establish whether the Superior Court expressly found probable cause to detain Waples pending a final VOP decision. Waples acknowledges, however, that the warrant which brought him to court on January 18, 2000, was supported by his sister's statements, as well as those of his probation officer. (D.I. 14, Appellant's Br., ¶ 3.) Based on the probation officer's warrant and the statements in support thereof, probable cause to believe that Waples had violated at least one of the conditions of his probation was easily established. Because probable cause is readily apparent, whether the Superior Court expressly found probable cause is not determinative as a matter of constitutional law. At bottom, the Superior Court conducted the requisite preliminary hearing and properly detained Waples pending a final VOP decision upon a showing of probable cause.

For these reasons, the court concludes that the Delaware Supreme Court's rejection of this claim is not contrary to, nor did it involve an unreasonable application of, clearly established federal law. Accordingly, the court will deny Waples' request for federal habeas relief as to this

claim.

B. Inadequate Notice

Waples' next claim is that the written notice of the VOP hearing was inadequate because he received it only four days in advance. He also asserts that the notice was inadequate because it failed to inform him that he could be represented by counsel at the VOP hearing.

Waples' assertion that the notice was inadequate because he received it only four days prior to the hearing does not give rise to a violation of his right to due process. Under *Morrissey*, due process requires nothing more than written notice. *Morrissey*, 408 U.S. at 489. Waples readily acknowledges that on January 24, he received a letter dated January 19 from the Superior Court, notifying him of the January 28 hearing. Without more, the court cannot conclude that a four-day notice in writing is insufficient to satisfy the minimum requirements of constitutional due process.[4]

Waples also alleges that the written notice was inadequate because it failed to advise him that he could be represented by counsel at the VOP hearing. Certainly, he is correct that the January 19, 2000 letter from the Superior Court did not mention that he could be represented by counsel. That, however, does not render the notice constitutionally infirm. While state law requires that a probationer be given notice that he may be represented by counsel at the VOP hearing, *see* Super. Ct. R. Crim. P. 32.1(a)(E), federal law does not. Neither *Morrissey* nor

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[4] An abbreviated period of time will often result where a probationer is denied bail and is incarcerated awaiting a final revocation hearing. In Delaware, a probationer "not released on bail, shall be afforded a prompt hearing before a judge of Superior Court on the charge of violation." Super. Ct. R. Crim. P. 32.1(a). Federal constitutional law mandates a final revocation hearing "within a reasonable time after the [probationer] is taken into custody." *Morrissey*, 408 U.S. at 488.

Gagnon specifically mandates such notice.

To the extent that Waples' claim suggests a denial of his right to counsel at the VOP hearing, this claim does not provide a basis for federal habeas relief. The Constitution does not impose upon states the duty to provide counsel for indigents in all probation or parole revocation cases. *Gagnon*, 411 U.S. at 787; *see Coverdale v. Snyder*, Civ. A. No. 98-718-GMS, 2000 WL 1897290, *5 (D. Del. Dec. 22, 2000). Rather, a probationer has a right to counsel upon request only (1) when he raises a colorable claim of innocence of the VOP, or (2) where revocation is inappropriate due to substantial, justifiable reasons that are complex or difficult to present. *See Coverdale*, 2000 WL 1897290 at *6 (citing *Gagnon*, 411 U.S. at 790).

Here, Waples makes no claim of innocence. Indeed, when questioned at the VOP hearing, Waples admitted that he had left his residence without telling his probation officer, and just "had to take what was coming." (D.I. 15, Ex. B at 2:21-3:15.) Moreover, this court's search of the record reveals no complex or difficult issues that would require appointment of counsel. As a probationer facing VOP proceedings for the third time, Waples was no doubt familiar with the process. A review of the record also confirms that Waples is articulate and quite capable of explaining to the Superior Court why he failed to report to his probation officer. The court thus concludes that appointment of counsel was not required as a matter of constitutional law.

In sum, Waples' claim that he received inadequate notice of the VOP hearing and of his right to counsel lacks merit. His request for federal habeas relief as to this claim will be denied.

C. Right to Cross-Examine Witnesses

Waples next alleges that his right to due process was violated when he was not permitted to cross-examine adverse witnesses. As the Delaware Supreme Court noted, there were no

witnesses at the VOP hearing. *Waples*, 2000 WL 1177697 at **2. A review of the transcript indicates that the Superior Court relied on the probation officer's reports and Waples' own statements to conclude that he changed residences and failed to report to his probation officer. At the hearing, Waples expressed no disagreement with anything in the reports, and even admitted that he had changed residences without reporting to his probation officer. To the extent that Waples now asserts that he did not "say what [he] meant" at the hearing, (D.I. 16 at 3), the court is unimpressed.

In short, the court concludes that this claim lacks merit. The Delaware Supreme Court's rejection of this claim comports with federal law and is entirely reasonable. Accordingly, Waples' request for federal habeas relief as to this claim will be denied.

D. Sufficiency of the Evidence

Waples' final claim is that the evidence is insufficient to support a finding of a violation of the terms of his probation. He asserts that the probation officer offered no competent evidence to support such a finding.

The court agrees with the Delaware Supreme Court that this claim "is without merit." *Waples*, 2000 WL 1177697 at **2. The probation officer reported that Waples was not at his residence as required by the terms of probation. Waples admitted as much. The court finds that the Delaware Supreme Court's rejection of this claim is reasonable and comports with federal law. Accordingly, Waples' claim for federal habeas relief as to this claim will be denied.

IV. CERTIFICATE OF APPEALABILITY

Finally, the court must determine whether a certificate of appealability should issue. *See* Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires the petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, the court has concluded that Waples' claims do not provide a basis for federal habeas relief. The court is persuaded that reasonable jurists would not find its conclusions debatable or wrong. Waples has, therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Bruce Waples' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2) is DENIED.

2. Waples' document captioned "Respondent Failure to Respond" (D.I. 8) is treated as a motion for a default judgment, and so treated, is DENIED.

3. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated: July 10 , 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE