IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALFRED T. BARTLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. A. No. 01-196-KAJ
	)	
ROBERT SNYDER, Warden,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Alfred T. Bartley, *pro se* Petitioner.

Loren C. Meyers, Chief of Appeals Division, Delaware Department of Justice, Wilmington, Delaware. Attorney for Respondent.

March 18, 2004
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

Following a revocation of Petitioner Alfred T. Bartley's parole, his previously earned good time was forfeited and he was ordered to serve the balance of his sentence. He is presently incarcerated in the Delaware Correctional Center ("DCC") in Smyrna, Delaware. Bartley has filed with the Court a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. (D.I. 2.) For the reasons set forth below, the Court will dismiss Bartley's petition. (D.I. 2.)

II. PROCEDURAL AND FACTUAL BACKGROUND

Bartley was sentenced in 1989 on four separate charges: Second Degree Burglary, First Degree Criminal Trespass, Third Degree Burglary, and Delivery of a Schedule II Narcotic.[1] Bartley's sentence for the Second Degree Burglary conviction was 10 years at Level V, to be suspended after 5 years. Then he was to serve 2 years at Level III and 3 years at Level II. Bartley's sentence for the Criminal Trespass conviction was 1 year at Level V. Bartley's sentence for the Third Degree Burglary was 2 years at Level V. Finally, Bartley was sentenced to 5 years mandatory

[1]The sentences for Second Degree Burglary and Criminal Trespass were imposed on January 27, 1989. Bartley was sentenced for Third Degree Burglary and Narcotic Delivery on January 31, 1989. (D.I. 25.)

incarceration at Level V for his Narcotic Delivery conviction. All of these sentences were to run consecutively. (D.I. 25.)

On December 11, 1996, Bartley was released on parole.[2] (D.I. 15, Supp. Viol. R.; D.I. 16, Ex. A.) In April 1997, Bartley was arrested on drug charges, and in July 1997, Bartley was arrested on burglary charges. Parole officers filed a violation report with the Parole Board on August 11, 1997, alleging that Bartley had violated three terms of his parole: 1) his two arrests violated the condition prohibiting the commission of new criminal offenses; 2) his drug charges violated the condition prohibiting possession of controlled substances; and 3) he failed to obtain full-time employment. (D.I. 15, Supp. Viol. R. Ex. B.) On August 27, 1997, the Parole Board issued an arrest warrant, and Bartley was apprehended and placed in prison on September 10, 1997.

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[2]The Truth-in-Sentencing Act of 1990 ("TIS") eliminated parole. *See* 11 DEL. C. ANN. § 4205(f),(j) (Repl. 2001). However, Bartley was convicted prior to the enactment of TIS when parole was still utilized. Although the Supplemental Violation Report regarding Bartley's violation of parole labels his status as "conditional release," as explained *infra*, for all intents and purposes, conditional release and parole are the same. *See* 11 Del. C. §§ 4302(5)(11), 4348 (Repl. 1995); *see also* Del. Op. Atty Gen. 95-IB14, 1995 WL 794546 (Del. A.G. Mar. 27, 1995); *Jackson v. Multi-Purpose Criminal Justice Facility*, 700 A.2d 1203, 1206 (Del. 1997)(parole and conditional release are similar forms of early release because they are both "conditioned upon the inmate's compliance with all of the conditions of supervision associated with his early release of confinement"). To reduce the amount of confusion regarding the use of these terms, I will refer to Bartley's early release as "parole" rather than "conditional release."

Bartley pled guilty to the charges stemming from his April 1997 and July 1997 arrests, and the Delaware Superior Court sentenced him on November 14, 1997. (D.I. 16, Ex. B; D.I. 23.) The Parole Board was notified of his plea in a supplemental violation report dated January 15, 1998. (D.I. 15, Supp. Viol. R.) In January 1998, the Board of Parole notified Bartley that a revocation hearing was scheduled for April 7, 1998. The April hearing never took place because Bartley was not transported to the facility where the Board was meeting. The Board notified Bartley that the hearing was rescheduled for May 26, 1998. However, the May hearing was deferred at Bartley's request, as was a hearing set for August 25, 1998. Nothing more happened until March 1999, when Bartley filed a petition for the writ of mandamus complaining about the delayed revocation proceedings. He also charged that the Board did not provide counsel for him. The Board moved to dismiss the petition. On June 22, 1999, the Superior Court granted the Board's motion to dismiss. (D.I. 15, Super. Ct. Dkt. for *Bartley v. Lichtenstadter*.) Bartley did not appeal this decision.

In June 1999, the Board notified Bartley that the revocation hearing was scheduled for August 31, 1999. The hearing took place as scheduled, and the Board revoked Bartley's parole, forfeited his previously earned good time credits, and ordered Bartley to serve the balance of his original sentence.

On July 26, 1999, before his revocation hearing was held, Bartley filed a petition for the federal writ of habeas corpus. However, at Bartley's request, the petition was dismissed without prejudice. *Bartley v. Snyder*, Civ. Act. No. 99-474-RRM (D. Del. June 28, 2000).

Currently before the Court is Bartley's new petition for the federal writ of habeas corpus, filed on March 14, 2001.

III. EXHAUSTION AND PROCEDURAL DEFAULT

A federal district 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). When seeking habeas relief from a federal court, a state petitioner must first exhaust remedies available in the state courts. According 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 unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is grounded on principles of comity in order to ensure that state courts have

the initial opportunity to review federal constitutional challenges to state convictions. *Werts v. Vaughn,* 228 F.3d 178, 192 (3d Cir. 2000). However, a state can expressly waive the exhaustion requirement. *See* 28 U.S.C. § 2254(b)(3).

To satisfy the exhaustion requirement, a petitioner must demonstrate that the claim was fairly presented to the state's highest court, either on direct appeal or in a post-conviction proceeding. *See Lambert v. Blackwell,* 134 F.3d 506, 513 (3d Cir. 1997)(citations omitted); *Coverdale v. Snyder,* 2000 WL 1897290, at *2 (D.Del. Dec. 22, 2000). However, if the petitioner raised the issue on direct appeal in the correct procedural manner, then the petitioner does not need to raise the same issue again in a state post-conviction proceeding. *Lambert v. Blackwell,* 134 F.3d 506, 513 (3d Cir. 1996); *Evans v. Court of Common Pleas, Delaware County, Pennsylvania*, 959 F.2d 1227, 1230 (3d Cir. 1992)(citations omitted).

A petitioner's failure to exhaust state remedies will be excused if state procedural rules preclude him from seeking further relief in state courts. *Lines,* 208 F.3d at 160; *Wenger v. Frank,* 266 F.3d 218, 223 (3d Cir. 2001); *see Teague v. Lane,* 489 U.S. 288, 297-98 (1989). Although deemed exhausted, such claims are still considered to be procedurally defaulted. *Lines,* 208 F.3d at 160. Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates

either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claim. *McCandless v. Vaughn,* 172 F.3d 255, 260 (3d Cir. 1999); *Coleman v. Thompson,* 501 U.S. 722, 750-51 (1999); *Caswell v. Ryan,* 953 F.2d 853, 861-62 (3d Cir. 1992).

To demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986). A petitioner can demonstrate actual prejudice by showing "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. *Edwards v. Carpenter,* 529 U.S. 446, 451 (2000); *Wenger v. Frank,* 266 F.3d 218, 224 (3d Cir. 2001). In order to demonstrate a miscarriage of justice, the petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray,* 477 U.S. at 496. Actual innocence means factual innocence, not legal insufficiency

of proof of guilt. *Bousley v. United States*, 523 U.S. 614, 623 (1998). A petitioner establishes actual innocence by proving that no reasonable juror would have voted to find him guilty beyond a reasonable doubt. *Sweger v. Chesney,* 294 F.3d 506, 522-24 (3d Cir. 2002).

IV. DISCUSSION

Bartley filed his original habeas petition on March 27, 2001. (D.I. 2.) On January 3, 2002, he filed an untitled document which appears to be both a memorandum in support of his original petition and a reply to Respondent's answer.[3] (D.I. 16.) Because that reply merely provides additional facts in support of Bartley's original claims, I will consider it, as well as the habeas petition itself, in the following review.

Bartley asserts six claims in his habeas documents: (1) the Board of Parole's failure to grant him a preliminary hearing within ten days of his arrest for violation of parole violated his Fourteenth Amendment right to due process and the Board of Parole's own rules and procedures (D.I. 2; D.I. 16 at pp. 5-6, ¶¶ 1, 5.); (2) he was denied the right to representation by counsel at the revocation hearing (D.I. 2; D.I. 16 at p. 6, ¶ 3.); (3) he

[3]Bartley's traverse requests the Court to grant "compensatory damages . . . to be reimbursed for all money lost to bail" as well as injunctive relief. (D.I. 16.) Such relief is not available in a federal habeas proceeding. To the extent he is attempting to allege a civil rights claim, the proper vehicle is 21 U.S.C. § 1983.

did not receive a prompt revocation hearing, thereby violating his Fourteenth Amendment right to due process (D.I. 2; D.I. 16 at p. 5, ¶ 1.); (4) he was denied due process because he was not allowed to cross-examine a witness regarding a statement that he was dismissed from a job after only six days because of theft charges (D.I. 2; D.I. 16 at p.6, ¶ 6.); (5) he was not given advance written notice of the time and place of the preliminary hearing, which should have occurred within ten days of his arrest (D.I. 2; D.I. 16 at p.6, ¶9; and (6) the Board of Parole or its department "violated the ex post facto clause by later imposing enhance[d] (T.I.S.) probation stipulations on the back of a sentic [sic] mandatory release sentence." (D.I. 16 at p. 7, ¶ 10; D.I. 2.)

In its answer, the State contends that Bartley failed to exhaust state remedies, but explicitly waives the exhaustion requirement with respect to Claims Four and Six. The State asks the Court to dismiss Bartley's habeas petition because he fails to allege cause and prejudice for procedurally defaulting Claims One, Two, Three, and Five. The State asks the Court to dismiss Claims Four and Six because they are without merit.

Bartley in reply asserts that the Delaware Superior Court does not have statutory authority to review Board of Parole findings, thereby excusing him from the exhaustion requirement.

He claims that any attempt to exhaust state remedies "would be futile." (D.I. 16 at p. 6 ¶7.) Moreover, he contends that his failure to appeal the Superior Court's denial of his petition for writ of mandamus was due to inadequate access to the prison law library, untrained inmate paralegals, his lack of a legal education, and "serious medical problems [that were] neglected by the medical and prison officials." (*Id.* at ¶8.)

After initially reviewing the submissions by both parties, I concluded that I could not review Bartley's ex post facto claim (Claim 6) without a copy of his original sentencing orders. At my request, the State filed those orders as well as a supplemental memorandum addressing the ex post facto claim.[4] Bartley's habeas petition is now ripe for review.

A. Claims 1,2,3, and 5 are procedurally barred from federal habeas review.

A state prisoner challenging the revocation of his parole must satisfy the exhaustion requirement in 28 U.S.C. § 2254(b)(1). *See Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)(exhaustion is required for challenges to the actions of a

[4]The Court also asked the State to provide any additional arguments for dismissing this petition. The State contends that the petition is time-barred, and the Court concurs. However, the State did not raise this affirmative defense until 2 years after Bartley filed his reply memorandum. It is therefore unclear as to whether the State raised this affirmative defense at the "earliest practicable moment." *Robinson v. Johnson*, 313 F.3d 128 (3d Cir. 2002). Thus, the Court will not dismiss the petition on this ground.

state administrative body); *Carter v. Williams*, 2002 WL 531231, at *2-*3 (D. Del. Apr. 2, 2002). In Delaware, Board of Parole decisions may be challenged through a petition for a writ of mandamus in the Delaware Superior Court or through a petition for a writ of certiorari in the Delaware Supreme Court. *Carter*, 2002 WL 531231, at *2; *Wilson v. Carper,* 2002 WL 169248, at *2-3 (D. Del. Jan. 31, 2002). As such, when a petitioner challenges his revocation of parole by way of a writ of mandamus, he must still appeal the Superior Court's decision in order to exhaust state remedies. *See Lambert v. Blackwell,* 134 F.3d 506, 513 (3d Cir. 1997)(citations omitted); *Coverdale v. Snyder,* 2000 WL 1897290, at *2 (D.Del. Dec. 22, 2000).

Here, Bartley filed a petition for the writ of mandamus in the Delaware Superior Court, asking the Chairperson of the Board of Parole to appoint counsel for his parole revocation hearing. Bartley also asked to have his revocation hearing dismissed for numerous alleged procedural due process violations. (D.I. 15, Pet. for Writ of Mandamus.) The Delaware Superior Court dismissed Bartley's petition for the writ of mandamus, and he never appealed. Thus, because he never presented these claims to the Delaware Supreme Court, Bartley has failed to exhaust state remedies. *See Bailey v. Snyder*, 855 F.Supp. 1392, 1399 (D. Del. 1993), *aff'd*, 68 F.3d 736 (3d Cir. 1995).

Bartley's failure to exhaust state remedies is excused, however, because state procedural rules prevent him from pursuing further state court relief. *See Coleman*, 501 U.S. at 750; *Lines*, 208 F.3d at 160. First, any attempt now to appeal the dismissal of the writ of mandamus would be untimely under state law. Del. Supr. Ct. R. 6(a)(criminal appeals must be filed within thirty days after a sentence is imposed, and post-conviction appeals must be filed within thirty days after entry of a judgment or order in a proceeding for post-conviction relief). Moreover, Delaware Superior Court Criminal Rule 61(i)(3) bars Bartley from asserting these claims in a new Rule 61 motion for post-conviction relief because he did not file a direct appeal, and he cannot demonstrate cause and prejudice for his failure. *See Moore v. State*, 798 A.2d 1042, at **1 n.2 (Del. 2002).

Although Bartley's failure to exhaust is excused, the unexhausted claims are still procedurally defaulted. As a result, federal habeas review of the claims is foreclosed unless he demonstrates cause and prejudice, or a miscarriage of justice. *See Coleman*, 501 U.S. at 750-51; *Lines*, 208 F.3d at 160.

To establish cause for his procedural default, Bartley must demonstrate that an external impediment prevented him from appealing the denial of his mandamus action. *See Murray*, 477 U.S. at 492. Bartley alleges inadequate access to the law library and untrained paralegals as cause for his procedural

default. This argument fails, however, because inmates do not have an unrestricted right to a law library or legal assistance. *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Rather, inmates are only entitled to a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* Here, Bartley's conclusory allegations fail to demonstrate that the alleged "shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Id*.

Further, Bartley's allegation that his substantial medical problems provide cause for the procedural default is also without merit. Bartley has failed to provide any authority for his contention that a dental problem or other medical problem can constitute cause for a procedural default. However, even if a medical problem could constitute cause, Bartley has failed to show that his problems were, in fact, the cause of his procedural default.

Specifically, Bartley has failed to establish that he was incapacitated during the time period for filing an appeal. The Superior Court dismissed Bartley's writ for mandamus on June 22, 1999. (D.I. 15, Del. Super. Ct. Docket for *Bartley v. Lichtenstader*, 99M-03-056, Items 9, 10.) As such, he had to file an appeal by July 22, 1999. *See* Del. Supr. Ct. R. 6(a). Bartley contends that he broke or sprained his fingers on July

25, 1999, thereby constituting cause for his procedural default. (D.I. 16, Ex. X(3).) The Court rejects this excuse, because the break or sprain on July 25, 1999 did not prevent Bartley from filing his appeal by July 22, 1999.

Moreover, Bartley's year long dental problems from August 1998 through August 1999 do not constitute cause for his procedural default. (D.I. 16, Ex. W(1)-(5)). Bartley has failed to explain how the dental problems prevented him from filing an appeal between June 22, 1999 and July 22, 1999 but did not prevent him from filing numerous medical grievances between August 1998 and August 1999. In short, the Court concludes that Bartley's medical problems and alleged inadequate legal access do not provide cause his procedural default.

Even if, arguendo, Bartley could establish cause, he has failed to demonstrate any actual prejudice that would excuse his procedural default. Bartley's first assertion is that his constitutional right to due process was violated because he was not given a preliminary hearing within ten days of his arrest. Bartley relies upon *Morrissey v. Brewer*, 408 U.S. 471 (1972) and the Rules of the Delaware Board of Parole.

As an initial matter, Bartley's belief that he had an absolute right to a preliminary hearing within ten days of his arrest for the parole violation is erroneous. Rule 19 of the Delaware Board of Parole's Rules specifically states that "a

preliminary hearing *should* be held within approximately ten (10) working days." (emphasis added). The 10 day period for holding a preliminary hearing is only suggested; it is not mandatory.

Moreover, although *Morrissey* established a parole offender's right to a preliminary hearing for a parole violation, this right is not always automatic. The purpose of a preliminary hearing is to establish probable cause that the parolee has violated a condition of his parole. *Id.* Yet, when a parolee is convicted of a new crime, a preliminary hearing for the parole revocation is not required because the new conviction establishes the requisite probable cause. *Moody v. Daggett*, 429 U.S. 78, 86 n.7 (1976).

Here, Bartley was arrested on September 10, 1997 for his parole violation, and he was sentenced for the new burglary and drug charges on November 14, 1997.[5] (D.I. 16 at 5.) Thus, there was no need for a preliminary hearing after November 14, 1997. *See Moody*, 429 U.S. at 86. Similarly, if, as the State contends, Bartley pled guilty to these charges on September 15, 1997, then

[5]According to Bartley, he posted bail after his arrests for the burglary and drug charges. Thus, when he was arrested on September 10, 1997, it was for his violation of parole. Bartley further contends that he pled guilty to these charges on November 14, 1997, the same day he was sentenced. The State, however, contends that Bartley pled guilty to the new burglary and drug charges on September 15, 1997, and that he was only sentenced on November 14, 1997. Unfortunately, the record does not clearly indicate which version is correct.

his guilty plea provides the requisite probable cause and obviates the need for a preliminary hearing. *Id.*

Even if Bartley had not pled guilty on September 15, 1997, the failure to provide him with a preliminary hearing can only constitute a ground for federal habeas relief if he demonstrates that the delay was unreasonable and he was prejudiced by such delay. *See Vargas v. United Sates Parole Comm'n*, 865 F.2d 191, 194 (9th Cir. 1988)("[A] preliminary hearing delay of 40 days without any evidence of prejudice is not unreasonable"); *Heath v. United States Parole Comm'n*, 788 F.2d 85, 90 (2d Cir. 1986); *Maslaukas v. United States Bd. Of Parole*, 639 F.2d 935, 938 (3d Cir. 1980). "Once a final parole revocation hearing has been held, a parole violator's concerns about due process violations committed during the preliminary hearing are mooted unless those violations caused the violator prejudice at the final hearing." *Reilly v. Morton*, 1999 WL 737916, at *6 (E.D.N.Y. Sept. 16, 1999).

Here, Bartley has failed to establish that the lack of a preliminary hearing caused prejudice during his revocation hearing. *See Gibbs v. Brewington-Carr*, 2000 WL 1728360, at *4 (D.Del. Jan. 11, 2000). For example, he does not identify any potentially exculpatory evidence that was unavailable to him because of the delay. As such, the failure to provide Bartley with a preliminary hearing did not "infect his [revocation

hearing] with error of constitutional dimensions," and therefore, it does not excuse his procedural default. *See Murray*, 477 U.S. at 494.

Bartley's second assertion is that he had a conflict with the public defender's office, thereby requiring the appointment of counsel by the Board of Parole. However, there is no constitutional right to counsel in a state post-conviction proceeding or in a parole revocation proceeding. *Coleman*, 501 U.S. at 752; *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973). Indeed, assuming that the Board of Parole has authority to appoint counsel, it also has "considerable discretion" in deciding whether to appoint counsel. *See Gagnon*, 411 U.S. at 790. Although the facts and circumstances of each situation dictate whether counsel is appointed, counsel should be provided for parole revocation hearings where a petitioner presents "a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and the reasons are complex or otherwise difficult to develop or present." *Id.*

Here, the facts and circumstances of Bartley's situation did not warrant the appointment of counsel. First, Bartley's

November 1997 convictions clearly established his violation of the parole conditions. Second, a public defender was assigned to represent Bartley, but Bartley refused such representation because of an unidentified conflict of interest with the public defender's office. It appears that Bartley never substantiated the alleged conflict of interest, he never provided "substantial reasons" justifying or mitigating his violation, and he never explained how his case was so complex as to require the appointment of counsel. *See Gagnon*, 411 U.S. at 790. Accordingly, the appointment of counsel was not required, and the Board's decision to not appoint counsel besides the public defender does not excuse Bartley's default.

Bartley's due process claims regarding the delay in receiving notice of the revocation hearing and in the delay of the hearing itself are also without merit. Bartley was sentenced on November 14, 1997 to 7 years incarceration for the Burglary Second Degree charge.[6] (D.I. 16, Ex. B.) The Board of Parole did not receive the supplemental violation report containing the new information regarding Bartley's pleas and convictions until January 21, 1998. Bartley received the first notice of the revocation hearing on January 26, 1998, a mere 5 days after the

[6]Unfortunately, the record does not indicate Bartley's sentence on the drug charges.

parole violation was definitely established.[7] This 5 day "delay" was not unreasonable, nor has Bartley demonstrated how the "delay" prejudiced his final revocation hearing.

Similarly, the delay in holding the revocation hearing did not violate Bartley's due process rights because much of the delay was attributable to Bartley's failure to act.[8] *See Barker v. Wingo*, 407 U.S. 514, 530 (1972)(explaining that, in determining whether a delay denies a defendant the right to a speedy trial, a factor to be considered is the cause of the

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[7]Moreover, the notice properly informed Bartley of the alleged parole violations, the time and place of the hearing, and of his right to counsel. Bartley has not shown how any notice delay prejudiced his final revocation hearing.

[8]The scheduling of the first revocation hearing for April 7, 1998 was not unreasonable because his incarceration from November 14, 1997 through April 7, 1998 was due to his new conviction; he was not incarcerated because of his parole violation. *See Moody*, 429 U.S. at 86-7. The April 7, 1998 hearing was re-scheduled to May 26, 1998 because Bartley was not transported to the hearing. While unfortunate, Bartley has not demonstrated how the one month delay from April to May prejudiced him. From this point on, however, the hearings were deferred at Bartley's request. Bartley requested a deferral of the May 26 and August 25, 1998 hearings, apparently because he did not want to be represented by a public defender. On October 26, 1998, Bartley wrote a letter to the Board of Parole asking that the parole violation charges be dropped. (D.I. 15.) In a letter dated November 9, 1998, the Board of Parole responded and specifically told Bartley that the charges could only be dropped at a revocation hearing, and that Bartley needed to decide if he was going to retain an attorney, agree to be represented by a public defender, or appear without an attorney. (D.I. 15.) However, Bartley did nothing further until he filed his writ of mandamus on March 11, 1999 asking for the appointment of counsel. As such, the hearing delay was due to Bartley's failure to determine the counsel issue, not due to the Board's inaction.

delay). In short, neither the alleged delay in providing notice of the hearing nor the delay in holding the hearing excuse Bartley's procedural default.

The only other way to excuse Bartley's procedural default is if Bartley establishes that a refusal to review the claim would result in a miscarriage of justice. To satisfy this exception, Bartley would have to demonstrate that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray,* 477 U.S. at 496. Bartley has never asserted his actual innocence with respect to the 1997 convictions. Accordingly, federal habeas review of Claims 1, 2, 3, and 5 is procedurally barred.

B. Claim 4 is meritless.

Bartley's Claim 4 is that he was denied due process at the revocation hearing because he was not allowed to cross-examine adverse witnesses. The State expressly waives the exhaustion requirement with respect to this claim.[9] (D.I. 13 at 6, n.3.)

A parolee at a parole revocation hearing does not have an absolute right to confront and examine adverse witnesses. *See Morissey v. Brewer,* 408 U.S. 471, 489 (1972)(holding that a parole revocation hearing can be performed under more flexible

[9]A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement. 28 U.S.C. § 2254(b)(3).

procedures than a criminal prosecution); *Country v. Bartee*, 808 F.2d 686, 687 (8th Cir. 1987). Thus, to succeed on a denial of confrontation claim, a petitioner "must show that the denial of the right [to confront witnesses] actually prejudiced him." *Bartee*, 808 F.2d at 688; *see Ball v. U.S. Parole Com'n*, 849 F.Supp. 328, 331 (M.D. Pa. 1994). The requisite prejudice is established by showing that a different result would have occurred if he had been able to confront adverse witnesses. *Bartee*, 808 F.2d at 688; *see Ball*, 849 F.Supp. at 331).

Here, Bartley fails to identify the witnesses he wished to question, the nature of the questions he sought to ask, and how the result would have been different had he confronted the witnesses. In short, Bartley has failed to demonstrate any prejudice resulting from the denial to confront adverse witnesses. Accordingly, his Claim 4 is without merit and will be dismissed.

C. Claim 6

Bartley's final claim is that the State "violated [his] constitutional rights under the ex post facto clause [by] attach[ing] (T.I.S.) probation provision's to the back of a (sentic sentence)." (D.I. 2.) Once again, the State expressly waives the exhaustion requirement with respect to this claim. (D.I. 13, at 7 n.4.)

The State initially argued that Bartley failed to provide sufficient information to enable either this court or the State to identify the alleged constitutional errors. *Murray v. Redman*, C.A. Nos. 90-617-SLR and 90-728-SLR, Mem. Op. at 6-7 (D. Del. June 26, 1991). However, Bartley's reply memorandum expands upon his claim:

> Petitioner contends that (T.I.S.) probation provisions level[s] 3 and 4 [are] an enhancement of punishment that was formed out of the truth in sentencing act of 1989, with the provisions of this act taking effect with respect to crimes committed as of June 30, 1990, and cannot prescribed [sic] to the lower law at the time of offense (sent[a]c level 1) unless applied retroactively. This fact also applies to parole and conditional release.

(D.I. 16 at p.9 ¶ I.)

It is difficult to decipher the true meaning of Bartley's claim. However, Bartley's expanded claim refers to TIS probation Levels III and IV, and the only document in the record that refers to both levels of supervision is his November 14, 1997 Sentence Order for Burglary Second. I therefore interpret Bartley's argument to be two-fold. First, he appears to argue that the November 14, 1997 sentence for his Burglary conviction, imposed after the enactment of TIS, was actually imposed as punishment for his violation of parole under his original non-TIS sentence for Burglary in 1989. Second, he argues that the Board of Parole increased the level of supervision upon his parole, or, as he states it, imposed TIS provisions upon his SENTAC

sentence.[10] This latter argument appears to be based on the use of the terms "conditional release" and "level 3 supervision" in Bartley's Supplemental Violation Report, and the numerous letters from the Board of Parole referring to his revocation hearing as a "revocation of mandatory release hearing."

Before discussing Bartley's argument, I reiterate the fact that Bartley was sentenced in 1989 on his Burglary Second conviction to 10 years at Level V supervision, to be suspended after 5 years for 2 years at Level III and 3 years at Level II. According to the State, the Level III and Level II supervision referred to probation, not parole. Thus, when Bartley was released in 1996, he was released on parole. As such, he had to serve his parole until the maximum expiration of his prison term, and consequently, his 5 years of probation at Levels III and II were not to begin until July 27, 2001. D.I. 15, Supp. Viol. R.; *see also Hall v. Carr*, 692 A.2d 888, 892 (Del. 1997).

This distinction is important with respect to Bartley's first argument because a "person who violates a condition of parole is imprisoned for the remainder of the original sentence from which he was granted parole," whereas "a violation of probation often results in a new sentence." *State v. Clyne*, 2002 WL 1652149, at *2 (Del. Super. Ct. July 22, 2002). Only the

[10]Although Bartley uses the terms SENTAC and TIS, it appears that he is really arguing about the distinction between TIS and non-TIS sentencing procedures.

Board of Parole can revoke parole, and only a judge can revoke probation.

Here, the 1997 Burglary Second sentence, which included provisions for Level IV and Level III supervision, was not imposed for his violation of parole. Rather, it was a new sentence for a new crime. The punishment for Bartley's violation of parole was the revocation of his parole and his re-incarceration for the remainder of his original sentence. That result was proper. *See Hall v. Carr*, 692 A.2d 888, 890 (Del. 1997); *State v. Clyne*, 2002 WL 1652149, at *2 (Del. Super. Ct. July 22, 2002). Thus, because Bartley's original punishment was not retroactively increased, there was no ex post facto violation. *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997)(the ex post facto clause is not violated unless a retroactively applied provision or law increases a punishment previously imposed).

Bartley's second argument also fails. Bartley appears to believe that the terms "conditional release" and "level 3" included in his Supplemental Violation Report demonstrate that the Board of Parole somehow enhanced his original SENTAC "mandatory release sentence" with TIS provisions. (D.I. 16 at p. 1(A) ¶ 10; D.I. 15, Supp. Viol. R. - Level 3.) In other words, he believes his "conditional release" or "level 3" supervision increased the intensity of supervision that was originally set in his 1989 sentence.

Bartley makes a distinction between TIS and non-TIS sentences. However, as the State points out, TIS has nothing to do with the level of supervision Bartley was on during his parole.[11] (D.I. 23.) Moreover, parole and conditional release are similar forms of early release because they are both "conditioned upon the inmate's compliance with all of the conditions of supervision associated with his early release of confinement."[12] *Jackson v. Multi-Purpose Criminal Justice*

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[11]The distinction between TIS and non-TIS sentencing provisions is summarized in *Andrews v. Snyder*, 1996 WL 659470, at *1 (Del. Super Ct. Oct. 16, 1996), *rev'd on other grounds*, 708 A.2d 237 (Del. 1998)(internal citations omitted), as follows:

> The underlying crimes for which . . . [the defendant] was sentenced were committed prior to June 30, 1990. That was the date on which various new sentencing provisions, with a few exceptions, became law for all crimes committed on or after that date. Those provisions are collectively known as TIS. As a shorthand distinction, the Court, attorneys and the Department often refer to TIS and non-TIS sentences. Offenses committed prior to June 30, 1990, with exceptions not germane to this controversy, were sentenced and calculated under non-TIS statutes.
>
> * * *
>
> TIS provides that where a defendant received a TIS jail sentence while serving a non-TIS jail sentence, the non-TIS sentence is interrupted to serve the TIS sentence. Once the TIS sentence has been served, the non-TIS sentence resumes . . . Prisoners serving jail time under either sentencing system are statutorily entitled to earn time off their sentences. It is generally known as "good time" for good behavior. TIS provides for one method of calculation, and non-TIS provides for another . . . Under non-TIS provisions, however, good time is earned at a far more generous rate.

[12]Indeed, the definition for "conditional release" was not altered by TIS. *Compare* 11 Del. C. Ann. § 4302(4)(1988) *with* 11 Del. C. Ann. § 4302(4)(2003).

Facility, 700 A.2d 1203, 1206 (Del. 1997). Thus, to the extent the parole officer merely used these terms interchangeably, there was no ex post facto increase in punishment.

Finally, to the extent Bartley believes that the Board of Parole imposed Level III supervision on his parole, Level III supervision was always part of his original sentence. There was no ex post facto increase in punishment. Thus, Bartley's Claim 6 must be dismissed as meritless.

D. Motion for the Appointment of Counsel

Bartley asks the Court to appoint counsel because he is indigent, he has no legal training, the issues involved are complex, and is a "super maximum security inmate" without any access to a law library, photocopying, or legal support. (D.I. 5.)

It is well settled that Bartley does not have a Sixth Amendment right to counsel in this habeas proceeding. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *United States v. Roberson*, 194 F.3d 408, 415 n. 5 (3d Cir. 1999). However, a district court may appoint counsel to represent an indigent habeas petitioner "if the interest of justice so requires." Rule 8(c), 28 U.S.C. *foll*. § 2254. As explained above, the Court is dismissing Petitioner's § 2254 petition. In these circumstances, the "interests of justice" do not require the appointment of

counsel, *see* 18 U.S.C. § 3006A(a)(2)(B), and Bartley's motion for the appointment of counsel is denied as moot.

E. Certificate of Appealability

Finally, this Court must decide whether to issue a certificate of appealabilty. *See* Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner establishes a "substantial showing" by demonstrating "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).

Additionally, when a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find the following debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

The Court concludes that Bartley's claims are either procedurally barred or without merit. Reasonable jurists would not find these conclusions debatable or wrong. Consequently, Bartley has failed to make a substantial showing of the denial of a constitutional right, and I decline to issue a certificate of appealability.

V. CONCLUSION

For the foregoing reasons, Bartley's § 2254 petition will be denied, and no certificate of appealabilty will issue. An appropriate order shall follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALFRED T. BARTLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. A. No. 01-196-KAJ
	)	
ROBERT SNYDER, Warden,	)	
	)	
Respondent.	)	

ORDER

For the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that:

1. Alfred T. Bartley's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2.) is DENIED.

2. Alfred T. Bartley's motion for the appointment of counsel is DENIED as moot. (D.I. 5.)

3. The Court declines to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: March 18, 2004

Kent A. Jordan
UNITED STATES DISTRICT JUDGE