IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

WILLIAM D. BURTON, III,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 97-359-JJF
	:	
DELAWARE STATE BOARD OF PAROLE and ATTORNEY GENERAL M. JANE BRADY,	:	
	:	
Respondents.	:	

William D. Burton. Pro Se Petitioner.

Loren C. Meyers, Esquire, Chief of Appeals Division, DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Respondents.

MEMORANDUM OPINION

March 15, 2002
Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Motion For Summary Judgment Rule 56 (D.I. 40) filed by Petitioner, William D. Burton, III. By his Motion, Petitioner requests the Court to grant his Petition Under 28 U.S.C. 2254 For The Writ Of Habeas Corpus By A Person In State Custody ("Section 2254 Petition"), which was previously denied by the Court for failure to exhaust state remedies. For the reasons set forth below, Petitioner's Motion For Summary Judgment will be denied. In addition, Petitioner's Section 2254 Petition will be dismissed and the Writ of Habeas Corpus will be denied.

BACKGROUND

In March 1977, Petitioner was arrested and indicted on charges of first degree kidnaping and two counts of first degree rape. Petitioner was tried before a jury in the Delaware Superior Court and convicted of first degree kidnaping and two counts of second degree rape, a lesser included offense. Thereafter, the Delaware Superior Court sentenced Petitioner to life imprisonment plus twenty years. Burton v. State, 426 A.2d 824 (Del. 1981).

In May 1991 Petitioner was paroled, but he was rearrested in February 1992 on drug charges. Petitioner failed to report this arrest to his parole officer and failed to meet with his parole officer. As a result, Petitioner was subsequently charged with

violating his parole. After a hearing before the Delaware Board of Parole ("the Parole Board"), Petitioner's parole was revoked and he was re-incarcerated.

In February 1995, Petitioner was paroled for a second time. Nearly a year and a half later, Petitioner was charged with a violation of parole for failing to report to his parole officer and failing to notify his parole officer of his change of address. After a hearing before the Parole Board, Petitioner's parole was again revoked, and he was ordered to serve the remainder of his sentence. Petitioner did not file an appeal in the state courts.

Thereafter, Petitioner filed the instant Petition for federal habeas relief. Because Petitioner had failed to exhaust his state remedies, the Court dismissed the Petition without prejudice with leave to refile upon the exhaustion of his state remedies. Burton v. Delaware State Board of Parole, Civ. Act. No. 97-359-JJF (D. Del. Oct. 8, 1998).

In January 1999, Petitioner filed a petition for writ of mandamus in the Delaware Superior Court seeking review of the Parole Board decision. The Delaware Superior Court summarily dismissed the petition as legally frivolous. Burton v. Lichtenstadter, C.A. No. 99M-01-084-CHT (Del. Super. Jan. 28, 1999).

Several months later, Petitioner moved the Court by letter

to reconsider his previously filed Petition. Respondents filed a response requesting the Court to deny Petitioner's request, because Petitioner's appeal of the superior court's decision was still pending in the Delaware Supreme Court. Thereafter, Petitioner filed a letter with this Court, informing the Court of the Delaware Supreme Court's decision affirming the superior court's denial of his mandamus petition and requesting the Court to reconsider his Petition. (D.I. 29).

Thereafter, Petitioner filed several motions, including a Motion To Expand The Record (D.I. 31) and a Motion For Referral To Non-Binding Arbitration (D.I. 32). The Court subsequently denied Petitioner's request for arbitration, but granted his request to expand the record and ordered Respondents to file a Supplemental Answer. Before Respondents filed their Supplemental Response, Petitioner filed the instant Motion For Summary Judgment. At this juncture, the Petition has been fully briefed and is ripe for the Court's review.

In seeking federal habeas relief, Petitioner contends that (1) the Parole Board failed to conduct a timely preliminary hearing violating his rights to a speedy trial under the Sixth and Fourteenth Amendments; (2) his counsel before the Parole Board was ineffective; (3) he was denied the right to present witnesses; and (4) he was denied the right to cross-examination. The Court will address each of Petitioner's claims in turn.

DISCUSSION

I. Petitioner's Claim That His Rights To A Speedy Trial Were Violated

In his first claim for relief, Petitioner contends that his rights to a speedy trial under the Sixth and Fourteenth Amendments were violated by the Parole Board's failure to conduct a timely preliminary hearing. Petitioner presented this claim to the Delaware Supreme Court, and therefore, his claim has been properly exhausted. Specifically, Petitioner contends that he was arrested on August 13, 1996, and his preliminary hearing was not held until September 18, 1996. Because the Parole Board is required to hold a preliminary hearing within ten working days after the hearing officer receives the violation report, Petitioner contends that his rights to a speedy trial were violated.

The purpose of the Sixth Amendment's Speedy Trial Clause is to prevent oppressive pre-trial incarceration, minimize the anxiety of the accused, and reduce the possibility of prejudice to the accused in preparing his defense. Hayes v. Muller, 1996 WL 583180, *5 (E.D. Pa. Oct. 10, 1996) (citations omitted). However, courts in this Circuit and others have repeatedly recognized that the Sixth Amendment right to a speedy trial does not apply to parole or probation revocation proceedings. Id. (collecting cases). Accordingly, the Court will dismiss Petitioner's claim that his Sixth Amendment rights were violated

by the Parole Board's delay in conducting a preliminary hearing.

With regard to Petitioner's Due Process claims, the United States Supreme Court has set forth certain minimum constitutionally mandated procedures for parole revocation proceedings. Morrissey v. Brewer, 408 U.S. 471, 485-488 (1972). Pursuant to these standards, preliminary hearings must be conducted "as promptly as convenient." Id. at 485; Person v. Pennsylvania Board of Probation and Parole, 1999 WL 973852, *7-8 (E.D. Pa. Oct. 20, 1999) (recognizing that Morrissey does not require a specified number of days between the parolee's arrest and the preliminary hearing).

In this case, Petitioner alleges that his hearing was approximately 26 days late. However, the Court cannot conclude that the timing of the hearing was so unreasonable as to violate Petitioner's due process rights. See e.g. Person, 1999 WL 973852 at *7 (holding that twenty-five day delay was no so unreasonable as to amount to due process violation); Hammie v. Castor, 1995 WL 61126, *3-4 (E.D. Pa. Feb. 10, 1995) (holding that delay of forty-nine days between detention on parole charges and preliminary hearing did not violate due process, particularly where parolee did not show prejudice). Moreover, Petitioner has not alleged that he was prejudiced by the Parole Board's failure to conduct a timely hearing. Person, 1999 WL 973852 at *7; Hammie, 1995 WL 61126 at *3-4. Cf. Ward v. Snyder, 838 F. Supp.

874, 879 (D. Del. 1993) (denying speedy trial claim where petitioner failed to show prejudice resulting from length of his pretrial incarceration). Accordingly, the Court will dismiss Petitioner's claim that the timing of his preliminary hearing violated his due process rights.

II. Petitioner's Ineffective Assistance Of Counsel Claim

Petitioner next contends that his counsel before the Parole Board was ineffective. Specifically, Petitioner contends that counsel failed to raise the preliminary hearing delay to the Parole Board. Although Petitioner did not present this claim to the Delaware Supreme Court, Respondents have waived compliance with the exhaustion requirement. (D.I. 43 at 3) (citing 28 U.S.C. § 2254(b)(3)). Accordingly, the Court will consider the merits of Petitioner's claim.

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984). The first prong of the Strickland test requires a defendant to show that his or her counsel's errors were so egregious as to fall below an "objective standard of reasonableness." Id. at 687-88. In determining whether counsel's representation was objectively reasonable, "the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance." Id. at 689. In turn, the defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound . . . strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Under the second prong of Strickland, the defendant must demonstrate that he or she was actually prejudiced by counsel's errors, meaning that there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different. Strickland, 466 U.S. at 692-94; Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954 (1993). To establish prejudice, the defendant must also show that counsel's errors rendered the proceeding fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

Having concluded that Petitioner's claim that his preliminary hearing was untimely lacks merit, the Court likewise concludes that counsel was not ineffective for failing to raise this issue before the Parole Board. Further, Plaintiff has failed to establish that the outcome of his proceedings would have been different had the timeliness of his hearing been raised. Because Petitioner cannot establish that his counsel was ineffective under Strickland, the Court will dismiss Petitioner's claim of ineffective assistance of counsel.

III. Petitioner's Claim That He Was Denied The Right To Present Witnesses

Petitioner next contends that he was denied the right to present witnesses at his Parole Board hearing. Specifically, Petitioner contends that he was denied the opportunity to rebut the allegation that he failed to report a change of address to his parole officer, because he was not permitted to present the testimony of his mother that he had not changed his address.

Pursuant to the Supreme Court's directives in Morrissey, a parolee is entitled to present witnesses and documentary evidence on his behalf. 408 U.S. at 489. An analogous right exists in the Sixth Amendment's right to compulsory process. However, the right of compulsory process is not absolute. United States v. Valenzuela-Bernal, 458 U.S. 858, 867-872 (1982). To establish a violation of the right to compulsory process, Petitioner must show that the evidence he sought to introduce was material and favorable to his defense. United States v. Cruz-Jiminez, 977 F.2d 95, 100 (3d Cir. 1992); see also Valenzuela-Bernal, 458 U.S. at 867-872. "Evidence is material only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." Cruz-Jiminez, 977 F.2d at 100; see Valenzuela-Bernal, 458 U.S. at 867.

In this case, Petitioner's mother wanted to testify that he never changed his residence, even though Petitioner's sister had told Petitioner's parole officer that he had moved when the officer visited the residence. Apparently, a supervisor in the

Probation/Parole Office offered to take the information from Petitioner's mother to save her the trip to Smyrna, Delaware for the hearing; however, the supervisor never relayed the information to the Parole Board. At the hearing, Petitioner testified that he was still living at the address he had given the Parole Officer. Petitioner has not established that his mother would have added anything beyond corroborating his statements, and Petitioner has not established that this additional, repetitive testimony would have affected the Parole Board's judgment or changed the outcome of his violation hearing. See e.g. Cruz v. Greiner, 1999 WL 1043961, *35 (S.D.N.Y. Nov. 17, 1999) (quoting Valenzuela-Bernal, 458 U.S. at 873 for proposition that evidence must not be "merely cumulative to the testimony of the available witnesses" and collecting cases). Indeed, Petitioner had been charged with failing to report to his parole officer, in addition to his failure to report a change of address.

Further, the record in this case reveals that the Bureau of Corrections investigated the incident surrounding the testimony of Petitioner's mother and informed the Parole Board about the incident and the evidence that would have been provided by Petitioner's mother. The Board considered this evidence, but concluded that it would have had no effect on their decision. (Letter dated 5/29/97 from Hawthorne to Walker; Letter dated

10/29/97 from Lichentstadter to Karr). Because Petitioner cannot establish that the evidence he sought to produce through his mother's testimony would have affected the Parole Board's decision, the Court concludes that Petitioner has not met the materiality requirement necessary to establish a violation of the right to compulsory process. Accordingly, the Court will dismiss Petitioner's claim that his right to present witnesses was violated.

IV. Whether Petitioner Was Denied The Right To Cross-Examination

Petitioner next contends that he was denied the right to cross-examination. Specifically, Petitioner contends that his parole officer referred to him as a "drug dealer," and that this characterization was passed on to the Parole Board by another parole officer who appeared at the hearing and was "filling-in" for Petitioner's parole officer. Petitioner contends that this testimony was heresay, and he was denied the right to confront and cross-examine his parole officer.

Under Morrissey, a parolee is permitted to cross-examine witnesses against him. 408 U.S. at 489. Violations of the confrontation clause are subject to the harmless error standard of review. See e.g. Delaware v. Van Arsdall, 475 U.S. 673 (1986). Under this standard, relief is only appropriate if the error "had substantial and injurious effect or influence in determining" the outcome of the proceeding. Brecht v.

Abrahamson, 507 U.S. 619, 623 (1993). Stated another way, the "court must find that the [Petitioner] was actually prejudiced by the error." Calderon v. Coleman, 119 S. Ct. 500, 503 (1998).

In this case, the Court cannot conclude that Petitioner's inability to cross-examine his parole officer was prejudicial. Petitioner pled guilty in September 1992 to possession of cocaine with intent to distribute, and thus, the Court cannot conclude that the officer's characterization of him as a drug-dealer would have had a substantial or injurious effect or influence on the Parole Board's decision. Moreover, Petitioner had numerous unexplained missed appointments with his parole officer which constituted the basis for his violation of parole. Given Petitioner's missed appointments, his previous parole revocation, and the nature and gravity of Petitioner's original conviction, the Court cannot conclude that the outcome of the proceedings would have been different if Petitioner had cross-examined his parole officer or the Parole Board had excluded the testimony at issue. See Williams v. Johnson, 171 F.3d 300, 307 (5th Cir. 1999) (concluding that error was harmless where parole officer did not testify despite petitioner's request that he appear, because parole board's decision would not have been substantially affected or influenced). Because the admission of this testimony and/or the inability of Petitioner to cross-examine his parole officer on this comment was no more than harmless error, the

Court will dismiss Petitioner's claim that he was denied the right of cross-examination.

CONCLUSION

For the reasons discussed, Petitioner's Motion For Summary Judgment will be denied. In addition, the Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody filed by Petitioner will be dismissed and the Writ of Habeas Corpus will be denied.

An appropriate Order will be entered.

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FOR THE DISTRICT OF DELAWARE

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	:	
Petitioner,	:	
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v.	:	Civil Action No. 97-359-JJF
	:	
DELAWARE STATE BOARD OF PAROLE and ATTORNEY GENERAL M. JANE BRADY,	:	
	:	
Respondents.	:	

O R D E R

At Wilmington, this 15 day of March 2002, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that:

1. Petitioner's Motion For Summary Judgment Rule 56 (D.I. 40) filed by Petitioner, William D. Burton, III is DENIED.

2. Petitioner's Motion Under 28 U.S.C. § 2255 To Vacate,

Set Aside, Or Correct Sentence By A Person In Federal Custody (D.I. 89) is DENIED.

3. Because the Court finds that Defendant has failed to make "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2), a certificate of appealability is DENIED. See Third Circuit Local Appellate Rule 22.2.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

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	:	
	:	
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AMENDED ORDER

WHEREAS, a Memorandum Opinion and Order was issued on March 15, 2002 in the above-captioned case;

NOW THEREFORE, this 20th day of March 2002, the Order accompanying that Memorandum Opinion is amended to read as follows:

1. Petitioner's Motion For Summary Judgment Rule 56 (D.I. 40) filed by Petitioner, William D. Burton, III is DENIED.

2. The Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (D.I. 2) filed by Petitioner William D. Burton, III is DISMISSED and the Writ of Habeas Corpus is DENIED.

3. Because the Court finds that Petitioner has failed to make "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2), a certificate of

appealability is DENIED. See Third Circuit Local Appellate Rule 22.2.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE