IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LARRY M. JENSEN, Petitioner, v. STATE OF DELAWARE DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.	)	Civil Action No. 99-116-GMS

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

Following a jury trial in the Delaware Superior Court, Larry M. Jensen was convicted of rape, robbery, conspiracy, and possession of a deadly weapon during the commission of a felony. Jensen was sentenced to a term of life plus eight years imprisonment. He is currently on parole. Jensen has filed with the court[1] a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, apparently challenging the terms and conditions of his parole. For the following reasons, the court concludes that Jensen has failed to exhaust available state court remedies, and will dismiss the petition without prejudice for failure to exhaust.

[1] This matter was originally assigned to the Honorable Joseph J. Longobardi, but was reassigned to this court on August 18, 1999.

I. BACKGROUND

On July 16, 1982, a jury in the Delaware Superior Court found Jensen guilty of rape, robbery, conspiracy, and possession of a deadly weapon during the commission of a felony. The events leading to Jensen's convictions occurred on October 29, 1981. The Superior Court sentenced Jensen to consecutive sentences of life in prison for rape, three years for robbery, and five years on the weapons offense. On direct appeal, the Delaware Supreme Court affirmed. *Jensen v. State*, 482 A.2d 105 (Del. 1984).

Since then, Jensen has challenged his conviction and sentence in state court by filing at least four motions for postconviction relief. Each was either denied, dismissed, or withdrawn.[2] Jensen was released on parole in 1995.[3]

Jensen has now filed the current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, Jensen does not challenge his conviction or sentence. Rather, as explained below, he challenges the terms and conditions of his parole. The respondents assert that Jensen has never presented his current claims to the state courts, and ask the court to dismiss his petition for failure

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[2] *See Jensen v. State*, No. 236, 1986, 1987 WL 36204 (Del. Jan. 22, 1987)(affirming denial of first motion for postconviction relief); *State v. Jensen*, 1989 WL 124929 (Del. Super. Ct. Sept. 11, 1989)(denying second motion for postconviction relief); *Jensen v. State*, No. 29, 1990, 1990 WL 38266 (Del. Mar. 6, 1990)(dismissing as untimely appeal from the denial of second motion for postconviction relief); *State v. Jensen*, 1997 WL 817587 (Del. Super. Ct. Oct. 7, 1997)(acknowledging withdrawal of third motion for postconviction relief and dismissing as time-barred fourth motion for postconviction relief); *Jensen v. State*, No. 451, 1997, 1998 WL 188546 (Del. Apr. 2, 1998)(affirming dismissal of fourth motion for postconviction relief).

[3] The record currently before the court does not indicate the precise date of Jensen's release on parole, nor does it contain any statement of the terms and conditions of his parole. It is sufficient for purposes of the current petition that the parties agree that Jensen was released on parole in 1995.

to exhaust state court remedies.

II. EXHAUSTION AND PROCEDURAL DEFAULT

Pursuant to the federal habeas statute:

> 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 –
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> (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). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). Although a state prisoner is not required to "invoke extraordinary remedies," he must fairly present each of his claims to the state courts. *Boerckel*, 526 U.S. at 845, 848. Generally, federal courts will dismiss without prejudice claims that have not been properly presented to the state courts, thus allowing petitioners to exhaust their claims. *Lines v. Larkins*, 208 F.3d 153, 159-60 (3d Cir. 2000).

While a federal court is prohibited from *granting* habeas relief on an unexhausted claim, a federal court is authorized to *deny* habeas relief on the merits of an unexhausted claim. *See* 28 U.S.C.

§ 2254(b)(2). A petition containing an unexhausted claim, however, should not be denied on the merits unless "it is perfectly clear that the applicant does not raise even a colorable federal claim." *Lambert v. Blackwell*, 134 F.3d 506, 515 (3d Cir. 1998)(quoting *Granberry v. Greer*, 481 U.S. 129, 135 (1987)). "If a question exists as to whether the petitioner has stated a colorable federal claim, the district court may not consider the merits of the claim if the petitioner has failed to exhaust state remedies." *Lambert*, 134 F.3d at 515.

If a claim has not been fairly presented to the state courts, but state procedural rules preclude a petitioner from seeking further relief in the state courts, the exhaustion requirement is considered satisfied. *Lines*, 208 F.3d at 160. Such claims are deemed procedurally defaulted, not unexhausted, because further state court review is unavailable. *Id.* Federal courts should refrain from finding claims procedurally barred unless state law clearly forecloses review of claims which have not previously been presented to a state court. *Id.* at 163. In questionable cases or those involving an intricate analysis of state procedural law, "it is better that the state courts make the determination of whether a claim is procedurally barred." *Banks v. Horn*, 126 F.3d 206, 213 (3d Cir. 1997).

III. DISCUSSION

In his habeas petition, Jensen alleges that the state is violating his constitutional rights by imposing guidelines, laws, and rules respecting his parole that were not in effect when he was sentenced. He alleges that pursuant to the Truth-in-Sentencing ("TIS") laws that were not in effect when he was sentenced, he has been required to pay monthly supervision fees, has been transferred arbitrarily from one level of supervision to another, and has been forced to submit to polygraph and

medical examinations. He contends that he should either be exempt from the TIS requirements, or that his sentence should be modified to incorporate these requirements.[4]

The respondents argue that Jensen has never presented any of these claims to the state courts, and that his habeas petition must be dismissed for failure to exhaust state court remedies. In his petition, Jensen acknowledges that he has not previously presented his current claims to any court. (D.I. 1, ¶ 13.) Because the parties agree that Jensen has not presented his current claims to the state courts, the only remaining question is whether any state court remedies are available to Jensen. If so, the court must dismiss Jensen's petition without prejudice for failure to exhaust. If, on the other hand, state law clearly forecloses review of Jensen's current claims, his claims are procedurally barred.

According to the respondents, Jensen may raise his current claims to the state courts by means of a petition for a writ of mandamus. For this proposition they cite *Bradley v. Delaware Parole Board*, 460 A.2d 532 (Del. 1983). In *Bradley*, the Delaware Parole Board conducted a hearing to determine if James Bradley was eligible for parole. *Id.* at 533. At the time of the hearing, Bradley was in custody in a federal penitentiary in Pennsylvania and did not receive notice of the hearing. *Id.* In the Bradley's absence, the Parole Board denied his request for parole. *Id.* Bradley challenged the Parole Board's decision by filing in the Superior Court a petition for a writ of mandamus, arguing that the Parole Board failed to follow its statute and regulations. *Id.* at 534. The Superior Court denied

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[4] Although Jensen does not elaborate, it appears that the TIS requirements of which he complains are a part of the Truth-in-Sentencing Act of 1989, which applies to sentences imposed for crimes committed after June 29, 1990. Del. Code Ann. tit. 11, § 4354; *Snyder v. Andrews*, 708 A.2d 237, 238 (Del. 1998). Among other things, it eliminated parole and significantly reduced the amount of good time credits available to an inmate. *Snyder*, 708 A.2d at 238.

Bradley's petition, and the Delaware Supreme Court affirmed. *Id.* at 534-35.

Certainly *Bradley* stands for the proposition that the Superior Court will entertain a petition for a writ of mandamus challenging a decision of Delaware Parole Board to deny parole. It is not clear from Jensen's habeas petition, however, that he raises such a challenge, or that he even challenges any specific decision of the Parole Board. Rather, a fair reading of his petition reveals that he challenges the terms and conditions of his parole. In particular, his petition suggests an *ex post facto* challenge to the imposition of terms of parole based on the TIS, which was not in effect when he was sentenced. Because Jensen's claims are dissimilar to those presented in *Bradley*, the court cannot conclude that *Bradley* supports the respondents' argument.

Nonetheless, the court agrees that state law *may* permit Jensen to present his claims to the Superior Court in a petition for a writ of mandamus. The court's conclusion is based on *Snyder v. Andrews*, 708 A.2d 237 (Del. 1998). In *Snyder*, an inmate raised an *ex post facto* challenge to the allocation of good time credits under the TIS by filing a petition for a writ of mandamus with the Superior Court. *Id.* at 240. Although the Delaware Supreme Court rejected the inmate's *ex post facto* challenge, *id.* at 248, nothing in *Snyder* suggests that a petition for a writ of mandamus is an impermissible procedural mechanism for raising such a challenge. Much like the inmate in *Snyder*, Jensen seeks to challenge on *ex post facto* grounds the application of the TIS to the terms and conditions of his parole. Based on *Snyder*, the court concludes that Jensen may present his current claims to the Superior Court in a petition for a writ of mandamus.

In sum, the court finds that Jensen has failed to exhaust available state court remedies. For this reason, his habeas petition will be dismissed without prejudice.

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 Jensen's habeas petition must be dismissed for failure to exhaust state court remedies. The court is persuaded that reasonable jurists would not find its assessment debatable or wrong. Jensen 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. Jensen's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED WITHOUT PREJUDICE for failure to exhaust state court remedies.
2. 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: January 25, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE