

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WILLIE PERSON	:	
	:	CIVIL NO.
	:	98-2149
v.	:	
	:	CIVIL NO.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE	:	98-6508
	:	

MEMORANDUM

Broderick, J.

October , 1999

Petitioner Willie Person ("Person") is presently incarcerated at the State Correctional Institution at Graterford, Pennsylvania. Person filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 23, 1998. Person alleges that his constitutional rights were violated by actions taken by the Pennsylvania Board of Probation and Parole ("the Parole Board") in revoking his parole in 1995. This petition was referred to United States Magistrate Judge M. Faith Angell for a report and recommendation pursuant to Local Civil Rule 72.1 and 28 U.S.C. § 636(b)(1)(B). Before Magistrate Judge Angell issued a report and recommendation, Person filed a second habeas petition on December 15, 1998 which also challenged actions of the Parole Board. This petition was also referred to Magistrate Judge Angell for a report and recommendation. Magistrate Judge Angell ordered the two petitions consolidated and issued a joint report and recommendation suggesting that the consolidated actions be dismissed without prejudice for failure to exhaust state remedies. Person filed timely objections thereto. The

Parole Board did not file a response to Person's objections. After filing his objections, Person also filed a motion for appointment of counsel as well as a motion entitled "Motion for Permission to Submit Sub-Amended In Support of Petitioner Objections to Report and Recommendation" and a motion entitled "Motion to Grant and Order." The Parole Board has not responded to these filings.

Because Person has filed timely objections to the Magistrate's Report and Recommendation, the Court has made a de novo review of the entire record. 28 U.S.C. § 636(b)(1). In doing so, the Court has considered all of Person's submissions to the Court, including the arguments made in his "Motion for Permission to Submit Sub-Amended in Support of Petitioner Objections to Report and Recommendation" and in a letter sent to the Court. After having made this review, the Court has determined, for the reasons stated below, that Person's petitions can be dismissed on the merits. "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). Therefore, the Court will not adopt the Magistrate Judge's Report and Recommendation. Person's petitions for a writ of habeas corpus will be denied. Person's motion for appointment of counsel will be dismissed as moot because no further proceedings are necessary to decide the merits of this action. Person's motion for leave to submit an additional response in support of his objections to the report and recommendation will also be dismissed as moot, in that the Court has considered the arguments raised therein in reaching its decision on the merits of Person's claims. Finally, Person's motion "to Grant" will be dismissed as moot in that the only relief it seeks is a ruling on the pending habeas petitions.

I. BACKGROUND

Person was originally sentenced on August 15, 1972 to a term of five to 15 years imprisonment, effective May 16, 1971, for forcible rape, aggravated robbery and burglary. Answer of Parole Board (Doc. No. 5 in 98-2149) ("Ans.") at Ex. A. His original maximum date for his sentence was May 16, 1986. Id. Person escaped on February 17, 1974 and was apprehended on October 26, 1982. Id. On January 26, 1983, Person was sentenced to serve a term of three months to twenty-three months as a result of the escape and his new maximum sentence date was computed to be January 25, 1995. Id.

Person was granted parole on April 1, 1985 and was released on parole on June 5, 1985. Ans. at Ex. B. Person was arrested in Marion County, Indiana on July 10, 1987 and charged with attempted rape of a seventeen year old girl and confinement. Ans. at Ex. C. Person was found guilty of confinement on January 21, 1988 and was sentenced on February 17, 1988 to a term of four years imprisonment in Marion County Court. Ans. at Ex. C. As a result of the Indiana conviction, Person was ordered returned to custody in Pennsylvania as a convicted parole violator on April 17, 1989. Ans. at Ex. D. On October 5, 1989, the Parole Board ordered Person recommitted to the state correctional institution as a convicted parole violator to serve twelve months backtime. Ans. at Ex. D. His parole violation maximum date was recomputed to be February 27, 1999. Ans. at Ex. D.

Person was granted reparole on April 5, 1990 and was released on parole on May 6, 1991. Ans. at Ex. E. Person was declared delinquent by the Parole Board on December 22, 1994, effective December 2, 1994. Ans. at Ex. F. On October 21, 1995, Person was arrested in Dayton, Ohio on a parole violation warrant. Ans. at Ex. G. A warrant to arrest and detain Person

was issued by the Parole Board on October 23, 1995. Ans. at Ex. H. On November 27, 1995, the Parole Board issued a warrant to commit and detain Person. Ans. at Ex. H. Also on November 27, 1995, the Parole Board issued a notice of charges and hearing informing Person that he was being charged with three enumerated technical parole violations and setting a preliminary hearing for December 4, 1995. Ans. at Ex. H. Person acknowledged receipt of this notice on December 1, 1995. Ans. at Ex. H.

A preliminary hearing was held on December 4, 1995 and the hearing examiner found that probable cause was not established as to any of the three enumerated technical parole violations with which Person was charged. Ans. at Ex. I. Person was not released from custody after the preliminary hearing. Person's supplemental Memorandum of Law (Doc. No. 3 in 98-2149) ("Supp.") at 3. Instead, a new warrant to commit and detain was issued by the Parole Board on December 12, 1995. Supp. at Ex. F. The Parole Board also issued a notice of charges and hearing on December 12, 1995 which charged Person with the same three technical parole violations contained in the notice of November 27, 1995 as well as a new charge. Ans. at Ex. J. This notice set a preliminary hearing date of December 19, 1995. Id. Person did not acknowledge receipt of this notice. Id. In fact, Person alleges that he never received this notice. See Person's Traverse to Board's Answer (Doc. No. 6 in 98-2149) ("Traverse") at 3; Person's Memorandum of Law in Support of second habeas petition (Doc. No. 1 in 98-6508) ("Second Pet. Mem.") at 5. Rather, Person alleges that he was told on December 20, 1995, after filing a DC-135A form, that "Your parole agent refiled the charges against you. Your hearing will be 12/22/95." Second Pet. Mem. at Ex. G.

A preliminary hearing on the second set of charges was held on December 22, 1995.

Ans. at Ex. K. Person objected to proceeding on the grounds that he was being recharged with the same violations which were dismissed on December 4, 1995. Person v. Pennsylvania Bd. of Probation & Parole, 701 A.2d 1381, 1382 (Pa. Commw. 1997). The hearing examiner denied Person's objections. Id. The hearing examiner found probable cause existed on three of the four charged violations. Ans. at Ex. K. On February 28, 1996, the Parole Board issued a notice that a parole revocation hearing would be held on March 21, 1996. Ans. at Ex. L. The hearing was held on the three violations as to which the hearing officer found probable cause on December 22, 1995: that Person was in the state of Ohio without written permission of his parole officer (Condition #1), that Person changed his approved residence without written permission of his parole officer (Condition #2), and that Person did not go to J. J. Peters Institute for evaluation of his need for Sex Offender Treatment (Special Condition - Condition #7). Ans. at Ex. L.

A violation hearing was held on March 21, 1996. Person v. Pennsylvania Bd. of Probation & Parole, 701 A.2d 1381, 1382 (Pa. Commw. 1997). Person was represented by counsel at this hearing. Id. at 1382. At the hearing, Person's counsel objected to the proceedings on the ground that the preliminary hearing was not held in a timely fashion, in violation of the Parole Board's regulations. Id. The hearing officer overruled Person's objections and found Person violated his parole. Id.

On August 11, 1996, the Parole Board ordered Person recommitted to a state correctional institution as a technical parole violator and sentenced him to serve eighteen months backtime. Ans. at Ex. N. On September 4, 1996, Person's new maximum date was calculated to be January 18, 2000. Sec. Pet. Mem. at Ex. B. The Parole Board determined that Person had ten months and twenty-one days of delinquent time as well as four years, one month and twenty-eight days of

backtime. Id. Person was given backtime credit of twenty-seven days for the time he spent in custody between the issuance of the arrest warrant and the issuance of the Parole Board's warrant to commit and detain. Id.

Person sought administrative review of the Parole Board's decision, which was denied on January 10, 1997. Person v. Pennsylvania Bd. of Probation & Parole, 701 A.2d 1381, 1382 (Pa. Commw. 1997). Person then, through counsel, appealed to the Pennsylvania Commonwealth Court. Id. On appeal to the Commonwealth Court, Person challenged the Parole Board's decision to hold him in custody after probable cause was not found to exist at his first preliminary hearing and to recharge him with the same violations. Id. at 1382. Person also challenged the timeliness of his second preliminary hearing. Id. at 1383. The Commonwealth Court rejected both of Person's contentions. Id. at 1383. Person's Petition for Allowance of Appeal from the Commonwealth Court was denied by the Supreme Court of Pennsylvania on February 27, 1998. Ans. at Ex. O.

On June 5, 1998, Person was denied parole and ordered to serve the remainder of his unexpired maximum sentence until January 18, 2000. Sec. Pet. Mem. at Ex. I. Person then sought review of the Board's decision, which was denied by the Commonwealth Court on November 25, 1998 on the ground that Person sought to challenge his parole maximum date rather than the denial of parole and, thus, had not employed the proper method of review. Sec. Pet. Mem. at Ex. A.

II. DISCUSSION

In ruling on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, a Federal

Court may only consider claims that the petitioner is being held in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Where the merits of the petitioner's claim have already been adjudicated in a State court proceeding, an application for a writ of habeas corpus may not be granted "unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved in unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" 28 U.S.C. § 2254(d). "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Generally, a state prisoner is required to exhaust all avenues of state review of his claims before filing a petition for Federal habeas review. 28 U.S.C. § 2254(b)(1).

Construing Person's pro se petitions liberally pursuant to Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court finds that Person's two habeas petitions, taken together, raise the following claims: First, Person alleges that he is being held in custody in excess of his maximum sentence date, in violation of his Fourteenth Amendment due process rights and Eighth Amendment right to be free of cruel and unusual punishment, because the Parole Board wrongfully recomputed his maximum sentence date. Second, Person alleges that the Parole Board violated his Fourteenth Amendment due process rights in failing to provide him with a timely preliminary hearing on the December 12, 1995 parole violation charges. Third, Person alleges that the Parole Board violated his Fourteenth Amendment due process rights in failing to give him proper notice of the technical parole violation charges brought against him on December 12, 1995. Fourth, Person alleges that the Parole Board improperly recharged him with the same technical parole violations

after probable cause was found not to exist as to those violations at the December 4, 1995 preliminary hearing. Fifth, Person alleges that the Parole Board improperly detained him for more than forty-eight hours after the hearing examiner determined on December 4, 1995 that probable cause did not exist as to any of the alleged technical parole violations. Finally, Person alleges that the counsel who represented him in connection with his parole revocation was ineffective and that this led to the denial of his appeal of his parole revocation by the Commonwealth Court and also led to his being held in custody in excess of his proper maximum sentence date.

Magistrate Judge Angell recommended dismissing Person's consolidated habeas petitions without prejudice for failure to exhaust state remedies. Report and Recommendation (Doc. No. 8 in 98-2149) ("R&R") at 11. Magistrate Angell found that only the second, third, fifth, and sixth claims enumerated above implicate federal constitutional issues which could be raised in a federal habeas action. R&R at 8, n.7. Magistrate Angell further found that only the second claim, that is Person's claim that he was not provided with a timely preliminary hearing on the December 12, 1995 parole violation charges in violation of his due process rights, was presented to the state courts. R&R at 8, n.7. Person, in his objections to Magistrate Judge Angell's Report and Recommendation, does not dispute that some of the claims raised in his consolidated habeas petitions have not been exhausted. Rather, Person argues both that he should be permitted to proceed on the exhausted claims contained in his first habeas petition and also that he has shown that exhaustion would be futile and extraordinary circumstances exist such that this Court should waive exhaustion as to the remaining claims. This Court, however, need not determine whether or not Person's failure to exhaust certain claims may be excused because the Court has

determined that, notwithstanding the exhaustion requirement, Person's applications for "a writ of habeas corpus may be denied on the merits." 28 U.S.C. § 2254(b)(2); see also Burkett v. Love, 89 F.3d 135, 138 (3d Cir. 1996). Thus, the Court will address each of Person's asserted grounds for relief in turn

A. Eighth Amendment Cruel and Unusual Punishment

Person alleges that his Fourteenth Amendment due process rights and Eighth Amendment right to be free of cruel and unusual punishment were violated by the Parole Board. Person does not elaborate on how these violations occurred in his first petition. His supplemental filings and his second habeas petition make clear, however, that Person is challenging the recomputation of his maximum parole violation date. Person alleges that he is being held in excess of his maximum sentence date in violation of the Eighth Amendment.

Person makes two separate arguments as to why his maximum sentence date, currently set at January 18, 2000, is wrong. First, Person argues that his maximum sentence should not have been recomputed after he was recommitted as a technical parole violator. Person challenges the Parole Board's determination that he was delinquent for ten months and twenty-one days. Person argues that at the preliminary hearings held on December 4, 1995 and December 22, 1995, the hearing officer found that there was no probable cause to support a finding that he failed to maintain contact with the parole supervision staff as directed. Person argues that, since he was never found delinquent, under the Parole Board's regulations, his maximum date should not have been recomputed as a result of his other technical parole violations. Person concludes that his maximum sentence date was properly February 27, 1999, the date set by the Parole Board prior to his 1996 parole revocation. Therefore, Person believes that he has been held since February 27,

1999 in excess of his maximum sentence date and in violation of his right to be free of cruel and unusual punishment under the Eighth Amendment.

As further support for his contention that February 27, 1999 is his proper maximum sentence date, Person argues that the Commonwealth Court found that his maximum date was February 27, 1999. Generally, a fact determined by the State court is presumed correct unless the petitioner demonstrates otherwise by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Person has not challenged the Commonwealth Court's determination of the facts as set forth in its opinion and the Court therefore presumes those facts are correct. A review of the Commonwealth Court's opinion, however, demonstrates that the Commonwealth Court merely stated that after Person was recommitted as a convicted parole violator in 1989, his maximum sentence date was increased to February 27, 1999. Person v. Pennsylvania Bd. of Probation & Parole, 701 A.3d 1381, 1382 (Pa. Commw. 1997). Nowhere does the Commonwealth Court address what effect the revocation of Person's parole in 1996 had on his maximum sentence date nor suggest that the recomputation of that date as a result of his 1996 parole revocation would be improper. Thus, the Court does not presume that the Commonwealth Court determined that February 27, 1999 was Person's proper maximum sentence date after his 1996 parole revocation.

Person also argues that even if his sentence date was properly recomputed to include delinquent time, his maximum date still should not be January 18, 2000. Instead, Person asserts that his maximum date should be December 19, 1999 because he should be given credit for the thirty-seven days he was in custody between his arrest in Ohio on October 21, 1995 and the issuance of the Parole Board detainer on November 27, 1995.

Person cannot obtain habeas relief on either of these two grounds. The United States

Court of Appeals for the Third Circuit has held that holding a prisoner under an expired sentence may constitute cruel and unusual punishment in violation of the Eighth Amendment. Sample v. Diecks, 885 F.2d 1099, 1108 (3d Cir. 1989). However, federal habeas relief may only be granted on the basis that the prisoner is being held in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a); see Estelle v. McGuire, 502 U.S. 62, 68 (1991). "[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution -- not to correct errors of fact." Herrera v. Collins, 506 U.S. 390, 400 (1993). The Pennsylvania statute which governs technical parole violations provides that a parolee shall be given credit for time spent on parole in good standing, but does not allow credit for delinquent time. 61 P.S. § 331.21a(b). However, there is no federal constitutional right to receive credit for time spent on parole in the calculation of a parolee's maximum sentence. Morrissey v. Brewer, 408 U.S. 471, 480 (1972). Thus, even if Person is correct that the Parole Board did not properly follow the dictates of 61 P.S. § 331.21a(b) in calculating the amount of credit he receives for time spent on parole, this allegation does not amount to a constitutional violation cognizable in a federal habeas action. See Hayes v. Muller, No. Civ. A. 96-3420, 1996 WL 583180 at *7 n.5 (E.D.Pa. Oct. 10, 1996) (holding that there is "no due process right in having the [Parole] Board adhere to its own requirements"); Lewis v. District of Columbia Bd. of Parole, 788 F. Supp. 14, 15 (D.D.C. 1992) (stating that "a state does not violate an individual's federal constitutional right to procedural due process merely by deviating from its own established procedures") (citations omitted).

The Court has reviewed the records provided by Person and by the government and has determined that Person is not being held in violation of his maximum sentence. According to the Court's calculations, on January 18, 2000, when Person's current sentence is set to expire under

the Parole Board's calculations, Person will have served slightly more than twelve and a half years in custody of his fifteen year original maximum sentence. Thus, January 18, 2000 is clearly not in excess of the maximum sentence which the state could have constitutionally required Person to serve. See Snyder v. Riggs, No. Civ. A. 96-1569, 1996 WL 103820 at *3 (E.D.Pa. Mar. 8, 1996) (holding that a prisoner has no constitutional right to be set free until he served his maximum aggregate sentence). The Court has also reviewed the Board's calculations in light of the governing state statute, 61 P.S. § 331.21a(b), and the Court notes, without deciding that, even if failure to comply with the dictates of this section could form the basis of federal habeas relief, Person would likely not be entitled to relief because, based on the records provided to this Court by the parties, it appears his maximum sentence was properly calculated in accordance with State law. Thus, the Court cannot say that Person's continued detention up to January 18, 2000 constitutes cruel and unusual punishment in violation of the Eighth Amendment and Person's request for habeas relief on this basis will be denied.

B. Lack of a Timely Preliminary Hearing

Person argues that the Parole Board violated his Fourteenth Amendment due process rights by failing to provide him with a preliminary hearing within fourteen days of bringing parole violation charges against him as required by 37 Pa. Code § 71.2(3). Person argues that the fourteen day period under the statute begins to run when the Parole Board warrant to commit and detain issued on November 27, 1995 and therefore the second preliminary hearing on December 22, 1995 was in violation of 37 Pa. Code § 71.2(3) and thus a violation of constitutional due process rights.

Person's due process argument concerning the timeliness of his preliminary hearing on

December 22, 1995 must fail. In Morrissey v. Brewer, 408 U.S. 471 (1972), the United States Supreme Court set forth the minimum constitutionally-mandated procedures required for parole revocation proceedings. As explained by the Supreme Court, due process requires that after a parolee is taken into custody on parole violation charges a preliminary hearing, for the purpose of determining whether or not probable cause exists as to the alleged violations, be held by a neutral decision maker, that the parolee be given notice of this hearing and of the charges against him, that the parolee be permitted to appear at the hearing and present evidence, and that the decision maker make a summary of the proceedings and state the reasons for his decision if he determines that probable cause exists. Morrissey, 408 U.S. at 485-487. If probable cause is found to exist at the preliminary hearing then a revocation hearing must be held before parole is revoked and the parolee must be given specified procedural protections at that hearing. Morrissey, 408 U.S. at 487-488. Morrissey does not require that the preliminary hearing be held within any specified number of days after a parolee is taken into custody on a parole violation warrant. Morrissey merely requires that a preliminary hearing be held "as promptly as convenient after arrest while information is fresh and sources are available." 408 U.S. at 485. Therefore, a hearing within fourteen days is not constitutionally required. Mere noncompliance with Pennsylvania state law is not a constitutional violation cognizable in a Federal habeas petition. Estelle v. McGuire, 502 U.S. 62, 68 (1991).

The Parole Board originally issued a warrant to commit and detain Person on November 27, 1995 on technical parole violation charges. Ans. at Ex. H. A hearing was held on those charges on December 4, 1995 and probable cause was not found. Ans. at Ex. I. Person does not complain about the timeliness of that hearing. Thereafter, a second warrant to commit and detain

Person was issued by the Parole Board on December 12, 1995 as a result of four parole violation charges being brought against him. Ans. at Ex. J; Supp. at Ex. F. A hearing was held on these charges, which formed the basis of the Parole Board's December 12, 1995 detainer, on December 22, 1995. Ans. at Ex. K. This preliminary hearing was originally scheduled for December 19, 1995, but was postponed due to weather. Person v. Pennsylvania Bd. of Probation & Parole, 701 A.2d 1381, 1382 (Pa. Commw. 1997). Thus a hearing on the second set of charges was held ten days after the entry of the detainer which ordered Person held on those charges.

The Commonwealth Court found that the Parole Board's actions did not violate the applicable Pennsylvania statute. Person v. Pennsylvania Bd. of Probation & Parole, 701 A.2d 1381, 1383 (Pa. Commw. 1997). The Commonwealth Court found that, under 37 Pa. Code § 71.2(3), the time in which a hearing must be held begins to run from the date of the Parole Board's warrant to commit and detain. Id. Thus, Person received a hearing ten days after the charges were brought against him, well within the time provided for by Pennsylvania law. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

The Court finds that a preliminary hearing ten days after the charges were brought against Person and he was ordered detained on those charges is not unreasonable and is therefore not a violation Person's due process rights. Furthermore, the Court cannot say that, even if the time were calculated from the time that Person was originally detained on a separate set of charges, a period of twenty-five days between the Parole Board's warrant and the holding of the hearing is

so unreasonable as to be a violation of Person's due process rights under the Fourteenth Amendment. See Hammie v. Castor, No. Civ. At. 93-5304, 1995 WL 61126 at * 3-4 (E.D.Pa. Feb. 10, 1995) (holding that delay of forty-nine days between detention on parole violation charges and preliminary hearing did not violate due process where parolee did not show that he was prejudiced by the delay). Therefore, the Court finds that Person is not entitled to relief on his claim that he was denied due process as a result of an untimely preliminary hearing.

C. Inadequate Notice of the Charges

Person argues that the Parole Board violated his Fourteenth Amendment due process rights by not providing him with adequate notice of the charges brought against him on December 12, 1995. Person alleges that he was never provided with a copy of the Notice of Charges and Hearing which was issued by the Parole Board on December 12, 1995. Rather, Person alleges that he did not find out until December 20, 1995 that he was being held in custody because parole violation charges had been refiled against him. Person further alleges that he only received notice that charges had been brought against him on December 20, 1995 when he filed an administrative form requesting information on why he was being held in custody. Finally, Person alleges that the information he received on December 20, 1995 did not specify the charges that were being brought against him and, therefore, he did not have an adequate period of time to prepare to defend these charges prior to his preliminary hearing on December 22, 1995.

Person's argument must fail. As set forth above, the United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471 (1972), set forth the minimum due process requirements for parole revocation procedures. Morrissey merely requires that the parolee be given notice of the charges against him and does not say when that notice must be given. 408 U.S. at 487-489; see

also Parson v. Edwards, 709 F. Supp. 548, 551 (M.D.Pa. 1988). Courts since Morrissey have stated that notice must simply be given prior to or at the time of the preliminary hearing. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973) (stating that notice of the alleged violations must be given at the preliminary hearing); Parson v. Edwards, 709 F. Supp. 548, 551 (M.D.Pa. 1988) (holding that "due process and logic" require that the parolee be given notice of the claimed violations at or before the hearing).

Person does not dispute that the Notice of Charges and Hearing was issued by the Parole Board on December 12, 1995. Rather, Person alleges that the notice was never provided to him personally. However, Person was represented by counsel at his parole revocation proceedings and Person has not alleged that his counsel was not provided with a copy of the Notice in a timely fashion. At the time of the preliminary hearing on December 22, 1995, Person's counsel objected to proceeding because of his contention that the charges were improperly refiled against him. Person v. Pennsylvania Bd. of Probation & Parole, 701 A.2d 1381, 1382 (Pa. Commw. 1997). Person did not, however, object to proceeding on the charges on the basis that he had received inadequate notice of the charges. Nor has Person alleged any prejudice that he suffered as a result of the allegedly short notice that he received. See Parson v. Edwards, 709 F. Supp. 548, 552 (M.D.Pa. 1988) (holding that habeas relief is only available for due process delays where the petitioner can demonstrate that the delay was "both unreasonable and prejudicial"). Finally, the Court notes that Person received three days notice of the first preliminary hearing and did not object to this notice as inadequate, presumably because he was able to succeed on these charges. Person makes no argument as to why three days notice is constitutionally sufficient but two days notice is constitutionally deficient, particularly when the majority of the charges he

faced at the two hearings were the same.

The record demonstrates that Person received notice of the charges against him prior to his preliminary hearing. Sec. Pet. Mem. at Ex. G. Person was represented by counsel at the preliminary hearing and raised defenses to the charges against him. Based upon the record before the Court, this Court finds that the notice provided to Person was not constitutionally deficient and the Court will, therefore, deny Person relief on this claim.

D. Recharging With the Same Alleged Violations

Person argues that recharging him with violating the same conditions of parole after probable cause was found not to exist violates "res judicata." Person does not allege that his Federal constitutional rights have been violated by this action. This Court may only grant habeas relief for the deprivation of rights secured by the Constitution or laws of the United States. See, e.g., Estelle v. McGuire, 502 U.S. 62, 68 (1991). The Court will, however, presume that Person intended to allege a due process violation and will address Person's claims, nonetheless.

Person was charged with violating conditions #1, 2, and 3A of his terms of parole on November 27, 1995. Ans. at Ex. H. A preliminary hearing was held on December 4, 1995 and probable cause was not found as to any of these alleged violations. Ans. at Ex. I. Thereafter, Person was charged with violating conditions #1, 2, 3A, and 7 of his term of parole on December 12, 1995. Ans. at Ex. J. A preliminary hearing was held on December 22, 1995 and probable cause was found as to conditions #1, 2, and 7. Ans. at Ex. K. At this preliminary hearing, Person's counsel objected to proceeding on the charges, contending that they had been improperly refiled against him. Person v. Pennsylvania Bd. of Probation & Parole, 701 A.2d 1381, 1382 (Pa. Commw. 1997). The hearing examiner denied Person's motion, finding that

there had been no violation of law. Id. Person also raised this issue in his appeal to the Pennsylvania Commonwealth Court. Id. The Commonwealth Court rejected Person's claims, noting that Person was charged with one new violation and that, even if the charges had been identical, a criminal defendant who prevails at a preliminary hearing may be arrested and recharged with the same charges. Id. at 1383. Since parolees are not entitled to the same due process rights as citizens who have not been convicted of crimes, as the United States Supreme Court held in Morrissey v. Brewer, 408 U.S. 471, 480 (1972), the Commonwealth Court refused to hold that a parolee's rights are violated by being recharged with the same violations for which probable cause was not found at a prior hearing. Person, 701 A.2d at 1383. This Court agrees with the reasoning of the Commonwealth Court.

Person's entire argument rests on the mistaken notion that res judicata bars recharging him with the same violations which were previously resolved in his favor. For this contention, Person relies primarily on the case of Knox v. Pennsylvania Bd. of Probation & Parole, 588 A.2d 79 (Pa. Commw. 1991), where the Commonwealth Court held that res judicata barred the Parole Board from holding a revocation hearing on technical parole violations stemming from alleged acts of retail theft when the Parole Board had previously held a parole revocation hearing and found that the parolee was not a convicted parole violator based on the same acts. Even if the Knox case were analogous to the case at bar it would not be determinative of Person's claims because the Commonwealth Court in Knox did not hold or even suggest that the Parole Board's actions were a violation of Knox's Federal constitutional rights. The Court need not decide, however, whether or not a violation of res judicata principles could be a violation of Federal due process rights because res judicata principles do not apply to Person's situation. As Knox

recognized, res judicata only applies when the first proceeding concludes with a final judgment on the merits. Knox, 588 A.2d at 81. Here, the hearing officer's determination at the December 4, 1995 preliminary hearing that probable cause did not exist as to the three technical violations alleged against Person was not a final judgment on the merits. Rather, Person's situation is more analogous to a criminal defendant where probable cause is not found at a preliminary hearing but he is recharged and probable cause is found at a second preliminary hearing. A criminal defendant would not suffer a deprivation of his constitutional rights in that situation. See, e.g., Commonwealth v. Genovese, 425 A.2d 367, 369 n.7 (Pa. 1981). Person has not suffered a constitutional deprivation either. Therefore, the Court will deny Person's request for habeas relief on this basis.

E. Improper Detention After a Finding of No Probable Cause

Person next alleges that he was improperly detained for a period of eight days between when the first set of charges against him were dropped on December 4, 1995 and when the second set of charges were brought against him on December 12, 1995. Person alleges that holding him for eight days without probable cause was a violation of Gerstein v. Pugh, 420 U.S. 103 (1975).

Person's claim must fail. The United States Supreme Court in Gerstein held that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended pretrial detention after a warrantless arrest. 420 U.S. at 126. Following Gerstein, the Supreme Court determined that, in the context of detention after a warrantless arrest, "prompt" means within forty-eight hours of arrest. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). However, the United States Court of Appeals for the Third Circuit held that "[n]either

we nor the Supreme Court has indicated that the Fourth Amendment should be expanded to include postconviction incarceration." Torres v. McLaughlin, 163 F.3d 169, 174 (3d Cir. 1998). Thus, the forty-eight hour rule established by Gerstein and County of Riverside does not apply to the detention of an alleged parole violator.

To the extent that Person also argues that his detention violated his due process rights, this claim must fail as well. The United States Supreme Court in Morrissey v. Brewer was concerned that parole violators not be held for an unreasonable period of time without a finding by a neutral decision maker that probable cause as to a parole violation exists. 408 U.S. at 485-488. Morrissey does not, however, specify how long an alleged parole violator may be held before a probable cause determination, as discussed above, nor does it address the situation at bar. The Pennsylvania statute which governs parole revocation proceedings states merely that the parolee should be released "as soon as practicable " after a preliminary hearing at which the hearing officer determines that no probable cause exists. 37 Pa. Code § 71.2(8).

Under all the circumstances of this case, the Court cannot say that holding Person for eight days before he was recharged as a technical parole violator violated his due process rights. Therefore, the Court will deny Person habeas relief on this basis.

F. Ineffective Assistance of Counsel

Finally, Person argues that the counsel who represented him during the parole revocation proceedings and his appeal before the Commonwealth Court was ineffective. Person argues that this counsel was ineffective in not bringing certain legal arguments before the Parole Board and before the Commonwealth Court on his appeal and, thus, his failure to exhaust these issues should be excused. The Court need not address whether or not counsel's alleged failure to raise

certain issues presents extraordinary circumstances which would warrant a waiver of the exhaustion requirement because the Court has addressed each of Person's grounds for habeas relief on the merits and determined that he is not entitled to relief.

To the extent that Person is also arguing that he is entitled to federal habeas relief because his Sixth Amendment right to counsel was violated by counsel's ineffectiveness, this argument must also fail. There is no absolute constitutional right to counsel in parole revocation proceedings. Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973). Similarly, "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman v. Thompson, 501 U.S. 722, 752 (1991) (internal citations omitted). Since there is no constitutional right to counsel in parole revocation proceedings, just as in state post-conviction proceedings, there can be no cognizable claim of constitutionally ineffective assistance of counsel in such proceedings. Therefore, Person is not entitled to habeas relief on this basis.

III. CONCLUSION

Having addressed each of Person's claims on its merits and having found that Person is not entitled to habeas relief on any of his claims, the Court will deny both of Person's petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court will also deny Person a certificate of appealability. Under 28 U.S.C. § 2253(c)(1)(A), to appeal a final order in a habeas corpus proceeding where the petitioner is being held in state custody, the petitioner must first obtain a certificate of appealability. This certificate of appealability may be issued by a district court judge. See United States v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997). The certificate may

issue "only if the applicant has made a substantial showing of the denial of a constitutional right."
28 U.S.C. § 2253(c)(2). This Court has determined that Person has failed to demonstrate that any constitutional right was denied by the action of the Parole Board. Therefore, Person will not be granted leave to appeal this decision.

For the foregoing reasons, the Court will not adopt Magistrate Judge Angell's Report and Recommendation that the consolidated petition be dismissed for failure to exhaust state remedies. Rather, the Court will deny both applications for a writ of habeas corpus on the merits. The Court will deny a certificate of appealability. The Court will dismiss Person's other pending motions as moot.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WILLIE PERSON	:	
	:	CIVIL NO.
	:	98-2149
v.	:	
	:	CIVIL NO.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE	:	98-6508
	:	

ORDER

AND NOW, this day of October, 1999; Petitioner Willie Person ("Person") having filed two pro se motions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254; these motions having been referred to United States Magistrate Judge M. Faith Angell for a report and recommendation; Magistrate Judge Angell having filed a joint report and recommendation suggesting that Person's petitions for a writ of habeas corpus be dismissed without prejudice for failure to exhaust state remedies; Person having filed objections thereto; Person, after filing his objections to Magistrate Judge Angell's report and recommendation, also having filed a motion for appointment of counsel; Person also having filed a motion entitled "Motion for Permission to Submit Sub-Amended In Support of Petitioner Objections to Report and Recommendation" as well as one entitled "Motion to Grant and Order;" for the reasons stated in this Court's Memorandum of this same date, the Court having determined, after a de novo review of the entire record, including all of Person's submissions to the Court, that Person's petitions for a writ of habeas corpus should be denied on the merits without holding an evidentiary hearing;

IT IS ORDERED that the Report and Recommendation of United States Magistrate Judge M. Faith Angell (Doc. No. 8 in 98-2149) is not approved and adopted;

IT IS FURTHER ORDERED that Person's Petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 1 in 98-2149 and Doc. No. 1 in 98-6508) are **DENIED**;

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**;

IT IS FURTHER ORDERED that Person's motion for appointment of counsel (Doc. No. 10 in 98-2149) is **DISMISSED AS MOOT**;

IT IS FURTHER ORDERED that Person's motion for permission to file an additional response in further support of his objections (Doc. No. 11 in 98-2149) is **DISMISSED AS MOOT** .

IT IS FURTHER ORDERED that Person's motion seeking a ruling on the instant habeas petitions (Doc. No. 13 in 98-2149) is **DISMISSED AS MOOT**.

RAYMOND J. BRODERICK, J.