

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

LEROY J. MENARD, :  
Petitioner, :  
 :  
v. : C.A. No. 13-659L  
 :  
A.T. WALL, Director of Rhode Island :  
Department of Corrections; and :  
KENNETH WALKER, Rhode Island :  
Parole Board. :  
Respondents. :

**REPORT AND RECOMMENDATION**

Patricia A. Sullivan, United States Magistrate Judge

Before the Court is Petitioner Leroy J. Menard’s motion for leave to proceed *in forma pauperis* (ECF No. 2) and motion for appointment of counsel (ECF No. 3) in connection with his Petition for Writ of Habeas Corpus, which challenges the addition of the time he was out on parole to his state court sentence after he was recommitted to prison for parole violations. Because I conclude that the motion for leave to proceed *in forma pauperis* should be denied, these motions are addressed by report and recommendation. See Lister v. Dep’t of Treasury, 408 F.3d 1309, 1312 (10th Cir. 2005) (because denial of motion to proceed *in forma pauperis* is functional equivalent of involuntary dismissal, magistrate judge should issue report and recommendation for final decision by district court).

**I. Motion for Leave to Proceed *In Forma Pauperis***

Petitioner’s application to proceed *in forma pauperis* (ECF No. 2) should be denied. The filing fee for this habeas corpus case is only \$5. 28 U.S.C. § 1914(a). While Petitioner has complied with the technical requirements of an *in forma pauperis* motion by filing an affidavit and a certified inmate account statement, see 28 U.S.C. § 1915, Petitioner’s submission reveals

that he currently has \$230.26 in available funds and his average monthly prisoner account balance for the last six months is \$164.12. He can afford to pay the \$5 filing fee. Accordingly, I recommend that Petitioner be ordered to pay the fee within thirty days of the District Court's adoption of this Report and Recommendation; if he fails to do so, the Petition should be dismissed without prejudice.

## **II. Motion for Appointment of Counsel**

Petitioner asks this Court to appoint counsel to represent him because:

- 1) He is unable to afford counsel;
- 2) His imprisonment will limit his ability to litigate, the issues in the case are complex, he has limited knowledge of the law and he has limited access to the prison law library; and
- 3) When the case proceeds to trial, each side will offer conflicting testimony and counsel would better enable him to present evidence and cross examine witnesses.

There is no constitutional right to counsel in habeas corpus proceedings. Bido v. Wall, No. CA 08-399 ML, 2008 WL 4960197, at \*1 (D.R.I. Nov. 18, 2008); see Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Ellis v. United States, 313 F.3d 636, 652 (1st Cir. 2002). Federal law provides for the appointment of counsel in a § 2254 action “[w]henever the United States magistrate judge or the court determines that the interests of justice so require . . . .” 18 U.S.C. § 3006A(a)(2). In making this discretionary determination whether to appoint counsel, “a court must examine the total situation, focusing, *inter alia*, on the merits of the case, the complexity of the legal issues, and the litigant’s ability to represent himself.” Manisy v. Maloney, 283 F. Supp. 2d 307, 317 (D. Mass. 2003) (quoting DesRosiers v. Moran, 949 F.2d 15, 24 (1st Cir. 1991)).

The Petition attacks the validity of R.I. Gen. Laws § 13-8-19(b), which states that “the time between the release of the prisoner under the [parole] permit and the prisoner’s return to

[prison for a parole violation] shall not be considered as any part of the prisoner's original sentence." Here, Petitioner was originally sentenced by the Rhode Island Superior Court to fifty years for first-degree robbery, with twenty-five years to serve and a twenty-five year suspended sentence. ECF No. 1 at 1. Five times prior to the completion of the full twenty-five year incarceration portion of his sentence, he was paroled, returning to prison after each parole for parole violations. Each time he was paroled, he signed a parole permit by which he explicitly acknowledged that he was aware that by operation of R.I. Gen. Laws § 13-8-19(b), the period of release would push out the end date of his original sentence in the event of a parole violation: "the time between my release upon said permit and my return to the place of my original confinement shall not be considered as any part of the term of my original sentence." ECF No. 1-1 at 7; ECF No. 1-2 at 8-12. In all, Petitioner has been released on parole for a combined total of 1,436 days. Pursuant to R.I. Gen. Laws § 13-8-19(b), Respondents have automatically added this time to push out the end date of his original sentence.

The Petition contends that the parole board should have provided him a hearing before tacking on the time while he was released and that Respondents cannot automatically recalculate his criminal sentence. Accordingly, Petitioner claims, he is being held in violation of the United States Constitution on nine grounds: procedural due process, separation of powers, unconstitutional permit/contract, equal protection, double jeopardy, cruel and unusual punishment, abuse of discretionary power, substantive due process and because R.I. Gen. Laws § 13-8-19(b) is unconstitutional as applied to him. He asks this Court to order Respondents to credit his sentence for the 1,436 days he was released on parole, conduct a hearing to determine the recalculation, and declare R.I. Gen. Laws § 13-8-19(b) unconstitutional. ECF No. 1 at 25.

The first factor to be considered in assessing whether the interests of justice require the appointment of counsel is the merit of Petitioner's claim – this factor tips against the appointment of counsel.

First, the Petition lacks merit because the Rhode Island Supreme Court has examined R.I. Gen. Laws § 13-8-19(b), albeit not on all of the grounds raised by Petitioner, and held that it “precludes a prisoner from receiving credit towards his or her full sentence for time spent on parole.” Curtis v. State, 996 A.2d 601, 605 (R.I. 2010); see also Lee v. Gough, 133 A.2d 779, 782-83 (R.I. 1957) (parole board correctly determined without a hearing that parolee is subject to terms of his original sentence and cannot receive credit for time he is out on parole). The attachments filed with the Petition confirm that Petitioner had a hearing on each parole violation. Therefore, his Petition makes only the tepid claim that he suffered a constitutional deprivation as a result of the lack of a second hearing before the automatic recalculation of the end date of his sentence as statutorily required by R.I. Gen. Laws 13-8-19(b) after the parole board had already held a hearing to determine that he had committed a parole violation.

The Petition also lacks merit because a habeas petitioner must ordinarily exhaust his available state court remedies before filing the petition in federal court. See Dutil v. Murphy, 550 F.3d 154, 158 (1st Cir. 2008). The exhaustion rule requires a petitioner to present and exhaust his claims first in the state courts, including presentment to the state's highest court if it offers automatic or discretionary review. See Josselyn v. Dennehy, 475 F.3d 1, 3 (1st Cir. 2007); Barresi v. Maloney, 296 F.3d 48, 51 (1st Cir. 2002). In this case, the proper way to exhaust state court remedies is to file a post-conviction review action challenging the parole decision. See R.I. Gen. Laws § 10-9.1-1; State v. Ouimette, 367 A.2d 704, 706 (1976). While Petitioner has filed for post-conviction review and cursorily alleges that he does not need to exhaust because the

state court is refusing to act on it, the attachments to the Petition indicate that the Rhode Island Superior Court is currently considering the State's motion to dismiss, to which Petitioner has had ample opportunity to object and has indeed objected. ECF No. 1-4 at 8. Petitioner has also filed a habeas petition with the Rhode Island Supreme Court on July 9, 2013, which he says has been ignored, a hollow plaint where it appears the court has not yet acted because it is not in session in July and August.

The second factor to be examined – the complexity of the legal issues – is similarly insufficient to justify appointment of counsel. While the motion states that the claim involves complex issues that will require significant research and investigation, and the Petition contains several causes of action, all of Petitioner's legal theories focus on a core issue: whether Respondents can extend his sentence for the time he was released on parole without a hearing after he is recommitted for a parole violation. The complexity of this legal issue does not weigh in favor of appointing counsel.

The third factor – Petitioner's ability to represent himself – does not alter the analysis or suggest that this is a circumstance where the interests of justice require appointment of counsel. The filings Petitioner has made demonstrate that he has the ability to file motions and communicate in writing in an understandable manner based on the quality of his briefing in the state court proceedings that he attached to the Petition as exhibits. I conclude that Petitioner's ability to manage self-representation is more than adequate.

After considering the totality of these circumstances, the Court is not persuaded that this is a case where the interests of justice require that counsel should be appointed. See Ellis v. United States, 313 F.3d 636, 653 (1st Cir. 2002) (habeas cases where counsel should be appointed are "few and far between"); United States v. Gonzalez-Vazquez, 219 F.3d 37, 42 (1st

Cir. 2000) (appointment of counsel in habeas cases will be “rare”); Serrano v. Dickhaut, Civil No. 12-40012-FDS, 2012 WL 2343730, at \*1-2 (D. Mass. June 19, 2012) (when habeas petition time-barred appointment of counsel not warranted). Accordingly, I recommend that the motion for appointment of counsel (ECF No. 3) be denied.

### **III. CONCLUSION**

For the reasons stated above, I recommend that Petitioner’s application to proceed *in forma pauperis* (ECF No. 2) be DENIED and that he be ordered to pay the fee within thirty days of the District Court’s adoption of this Report and Recommendation. If he fails to do so, I recommend that the Petition be dismissed without prejudice. I further recommend that the motion for appointment of counsel (ECF No. 3) be DENIED.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen (14) days of its service. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court’s decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan  
PATRICIA A. SULLIVAN  
United States Magistrate Judge  
October 28, 2013