

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JERRY LARRIVEE,)	
)	
<i>Petitioner</i>)	
)	
v.)	<i>Docket No. 99-333-P-C</i>
)	
WARDEN, MAINE STATE PRISON,)	
)	
<i>Respondent</i>)	

**MEMORANDUM DECISION ON MOTION FOR STAY AND
RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS**

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his sentence imposed by the Maine Superior Court (Cumberland County) after his guilty plea to charges of escape and theft in violation of 17-A M.R.S.A. §§ 353 and 755. After the respondent filed an opposition to the petition contending that the claims raised in the petition have not been exhausted and are currently pending before the Maine Law Court, the petitioner filed a motion to stay this proceeding until the Law Court decides his appeal. I deny the motion to stay and recommend that the petition be dismissed.

I. Background

On August 23, 1993 the petitioner pleaded guilty to charges of escape, in violation of 17-A M.R.S.A. § 755, and theft, in violation of 17-A M.R.S.A. § 353, in the Maine Superior Court. *State*

of Maine v. Jerry Larrivee, et al., Maine Superior Court (Cumberland County), Docket No. CR93-59, Docket at 2. At that time, he also admitted violating probation imposed on an earlier conviction. *State of Maine v. Jerry Larrivee*, Maine Superior Court (Cumberland County), Docket No. CR-93-59, Transcript of Rule 11 & Sentence (August 23, 1993), at 3. That term of probation was revoked and the petitioner was required to serve the three years remaining on the sentence from the earlier conviction. *Id.* at 12-13. The sentence imposed on the escape charge was 2½ years, consecutive to the reinstated sentence on the earlier conviction, and on the theft charge, three years, all suspended, with two years probation consecutive to the sentence on the escape charge. *Id.* at 13.

The petitioner took an appeal from the judgment in the escape and theft case, which was denied. *State v. Larrivee*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. CUM 93-602, Decision No. 6913 (June 23, 1994). The petitioner then filed a petition for a writ of habeas corpus in this court, on grounds not asserted in his direct appeal in state court, which was dismissed for failure to exhaust state-court remedies. *Larrivee v. Warden*, Docket No. 94-147-B, Order dated March 6, 1995 (Docket No. 11). On August 21, 1996 the petitioner filed a petition for post-conviction review in the state courts that raised the issue he attempts to raise in the petition at issue here. *Jerry Larrivee v. State of Maine*, Maine Superior Court (Cumberland County), Docket No. CR96-1546, Docket at [1]. On October 8, 1998 the court denied the petition. *Id.* at [3]. Upon the petitioner's attempt to appeal from this denial, the Law Court denied a certificate of probable cause. *Larrivee v. State*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. Cum-98-566, Order dated May 4, 1999. On October 30, 1998 the petitioner filed a motion to withdraw his plea in the escape and theft case. *State of Maine v. Jerry Larrivee*, Docket No. CR93-59, Docket at 3 (back side). That motion was denied, and an appeal from that denial is pending before the Law

Court. *Id.* at 3 (back side)-4. The petitioner’s argument in support of his motion to withdraw his plea is the same as his argument in support of the petition at issue here. *Compare* Brief of Appellant, *State v. Larrivee*, Law Court Docket No. CUM-99-439, at 8-10 *with* Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody (Docket No. 2) at 5-6 and two-page narrative supplement thereto.

II. Discussion

The statute applicable to this petition provides, in relevant part:

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). Because the issues raised by the petitioner before this court are identical to or necessarily arise out of the issues presently before the Law Court, he cannot be said to have exhausted the remedies available in state court.¹ 28 U.S.C. § 2254(c) (“An applicant shall not be

¹ The petitioner suggests that “he will not receive a fair review on Appeal of the denial of his withdrawal of plea motion as dictated by the Maine Law Court’s action as previously dictated,” Petitioner’s Reply to the Government’s Response, etc. (Docket No. 6) at 3, an apparent reference to the Law Court’s denial of a certificate of probable cause when the petitioner sought to appeal from the Superior Court’s denial of his petition for post-conviction review that was based on essentially the same ground as his motion to withdraw his plea. The fact that the likely outcome of his current appeal may appear obvious to the petitioner does not render that process, which he chose to invoke, “ineffective to protect [his] rights” so that the exhaustion requirement of § 2254(b)(1) may be (continued...)

deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”); *Lopez v. Vaughn*, 1999 WL 545011 (E.D.Pa. July 28, 1999), at *3. Under these circumstances, the petition would ordinarily be subject to dismissal without prejudice.

In this case, however, the petitioner has asked this court to stay this proceeding until the Law Court resolves his pending appeal. Motion to Stay § 2254 Proceedings (Docket No. 7). The respondent has not filed any objection to this motion and therefore is deemed to have waived objection. Local Rule 7(b). However, this court may not grant a motion, even if unopposed, that seeks relief which it lacks the power to give. Courts that have addressed this issue have uniformly held that a federal court has the power to stay an action brought under section 2254 only to the extent that the action raises exhausted claims. *E.g.*, *Calderon v. United States Dist. Court*, 134 F.3d 981, 986-87 (9th Cir. 1998); *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996); *Burris v. Farley*, 51 F.3d 655, 658-59 (7th Cir. 1995). Here, the petition raises only unexhausted claims, and this court accordingly lacks the power to stay the proceeding pending resolution of the Law Court appeal. I therefore deny the motion to stay.

III. Conclusion

Under the circumstances, I recommend that the petition be **DISMISSED** without an evidentiary hearing. *See United States v. Gilmore*, 1992 WL 22208 (N.D.Ill. Jan. 31, 1992), at *2

¹(...continued)
ignored. *See, e.g., Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (would-be habeas corpus petitioner must await outcome of state-court appeal even where issue to be challenged in habeas petition has been finally settled in state courts).

(post-conviction appeal including denial of motion to withdraw guilty plea pending before state court; habeas corpus petition dismissed).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of January, 2000.

*David M. Cohen
United States Magistrate Judge*