

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 91-4906  
Summary Calendar

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NORMAN FLICK,

Petitioner-Appellant,

VERSUS

US PAROLE COMMISSION, WARDEN FEDERAL  
DETENTION CENTER AT OAKDALE,

Respondents-Appellees.

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Appeal from the United States District Court  
For the Western District of Louisiana

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91 CV 108

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( March 25, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

Norman Flick was a prisoner confined at the Federal Correctional Institution at Oakdale, Louisiana, at the time he

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

filed this petition.<sup>1</sup> In 1981 the U. S. District Court (USDC) for the Southern District of Indiana imposed a sentence of 22 years imprisonment for various counts of mail fraud and possession of stolen goods. In 1982 the State of Indiana lodged a detainer against Flick for a 35-year state sentence that was imposed to run concurrently with the federal sentence. Under the terms of the detainer, Indiana would take custody of Flick if release from his federal sentence occurred prior to March 1999.

On November 4, 1988, the U.S. Parole Commission issued a certificate granting Flick's parole "to the actual physical custody of detaining authorities only" on December 6, 1988. The Parole Commission rescinded the certificate because Flick's failure to sign it constituted withdrawal of the application for parole under 28 C.F.R. § 2.40(i).

In January 1991, Flick filed a pro se application for federal writ of habeas corpus under 28 U.S.C. § 2241 in the USDC for the Western District of Louisiana challenging his parole to the State of Indiana under the detainer.<sup>2</sup> He argues that 1) he should be

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<sup>1</sup> The Bureau of Prisons received approval from the district court to transfer Flick to FCI, Loretto, Pennsylvania.

<sup>2</sup> Prior to his transfer to the Louisiana federal facility, Flick was incarcerated in the Federal Medical Center at Rochester, Minnesota. While there, he filed a federal habeas corpus petition in the District of Minnesota challenging his parole to the detaining authorities and asserting a due process violation. That district court denied relief, and the Court of Appeals for the Eighth Circuit affirmed. The magistrate judge for the Western District of Louisiana concluded that there were sufficient differences in the issues presented in the petitions. The correctness of the magistrate judge's determination is not an issue on appeal.

paroled to the community because the state conviction for which he was detained was unconstitutional and 2) the Commission "manipulated" the computation of his sentence in violation of Bureau of Prison Policy 5050.9 because it did not reflect that he had served in excess of two-thirds of his federal sentence. The magistrate judge determined that Flick's challenge to his Indiana conviction should have been brought in a petition under 28 U.S.C. § 2254. The magistrate judge recommended dismissal of the petition for failure to exhaust state remedies and, alternatively, for lack of jurisdiction to determine the constitutionality of the Indiana proceedings. On Flick's second claim, the magistrate judge recommended dismissal on the merits because the Commission had properly granted parole. The district court, after conducting an independent review of the record and Flick's objections to the magistrate judge's report, dismissed the action. Flick filed a timely notice of appeal and a motion for Certificate of Probable Cause (CPC). The district court denied CPC, stating that Flick failed to exhaust state remedies on his state conviction claim and failed to exhaust administrative remedies on his sentence calculation claim.<sup>3</sup> Flick has not filed a motion for CPC in this Court. For purposes of this appeal, that portion of the notice of appeal that pertains to the challenge to the Indiana conviction

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<sup>3</sup> The district court apparently converted a portion of the petition to one under § 2254 when the court adopted the magistrate judge's recommendation to dismiss the action for failure to exhaust and denied CPC.

should be construed as a request for CPC. See Fed. R. App. P. 22(b).

#### OPINION

##### Motion for CPC on the § 2254 question

The standard for granting CPC requires a substantial showing of the denial of a federal right. Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). Flick contends that the U.S. Parole Commission based its decision to deny parole to the community on an unconstitutional state-court conviction. He argues that he is not required to exhaust state remedies for the Indiana conviction because he is challenging the "`federal use' of an unconstitutional conviction" to "execute" his federal sentence.

Federal courts have "jurisdiction to entertain petitions for habeas relief only from persons who are `in custody in violation of the Constitution or laws or treaties of the United States.'" Maleng v. Cook, 490 U.S. 488, 490, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) (citation omitted). Flick is "in custody" for the purpose of habeas corpus attack on the Indiana conviction upon which the detainer rests and for the federal conviction. See id., 490 U.S. at 493.

Because of the outstanding state-court conviction, Flick must be paroled to the detaining authorities unless the detainer is withdrawn or the state makes no effort to assume custody. See 28 C.F.R. § 2.32(c). In this case, Flick effectively withdrew his

right to be paroled by refusing to sign the Certificate of Parole and sought federal habeas relief. See 28 C.F.R. § 2.40(i).

Although Flick asserts that he challenges only his federal sentence, his argument that he should be paroled to the community necessarily calls into the question the constitutionality of his state court conviction.

[A] petitioner who seeks federal redress must first seek relief in state courts and thus exhaust his state remedies . . . . The exhaustion requirement . . . forbids a federal court to grant an application for a writ of habeas corpus unless "it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Dispensa v. Lynaugh, 847 F.2d 211, 217 (5th Cir. 1988) (quoting 28 U.S.C. § 2254(b)). Flick has not presented his claims to the courts of the State of Indiana and maintains that he is not required to do so. He does not assert that redress is not available or that application to the State would be futile. The State of Indiana is not a party to this proceeding and it has not been served; however, the respondent raised the exhaustion issue in the district court. Therefore, the district court properly disposed of the claims by determining that Flick has failed to exhaust state remedies to challenge the constitutionality of his state court conviction.

Accordingly, Flick has not made a substantial showing of the denial of a federal right; and his motion for CPC in this trial court was correctly denied.

The 2241 Question

By reference to an addendum to his brief, Flick asserts that the Parole Commission has manipulated the calculation of his sentence. He argues that he is entitled to mandatory release because he has served two-thirds of his sentence. He contends that he exhausted his administrative remedies in his first application for parole, implying that he need not reapply. His argument is frivolous. Assuming arguendo that the calculation of Flick's parole was erroneous and that he has exhausted his administrative remedies, this habeas claim still lacks merit. The Parole Commission granted parole to the detaining authority, and Flick effectively withdrew his application by refusing to sign the certificate of parole. See 28 C.F.R. §2.40(i). Contrary to his contention, he must reapply in order to be considered again for parole. Id. He has not shown that any miscalculation has prejudiced him vis-a-vis his eligibility for parole. There is no merit to his claim.

We AFFIRM the judgment of the Trial Court.