IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4228

Summary Calendar

ROBERT JOSEPH ZANI,

Petitioner-Appellant,

v.

TEXAS BOARD OF PARDONS and PAROLES,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(91-CV-70)

(October 29, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Robert Joseph Zani appeals the district court's denial of federal habeas corpus relief. We affirm the judgment of the district court.

I.

In 1981, Zani was convicted of first-degree felony murder for the 1967 murder of a convenience store clerk in Austin,

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Texas. He was sentenced to ninety-nine years imprisonment in the Texas Department of Corrections.

In February 1991, Zani filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Texas. In that petition, Zani did not challenge his state conviction but instead challenged the actions of the Texas Board of Pardons and Paroles (the Board) in denying him parole. He alleged that (1) the Board had applied an ex post facto parole-eligibility law in his case, (2) the Board had retaliated against him because he had directly appealed his conviction and had refused to admit his guilt, (3) the Board's records contained false information, and (4) he is factually innocent of the crime with which he was convicted.

The magistrate issued his proposed findings and recommended that Zani's petition for writ of habeas corpus be denied. Although the district court adopted the magistrate's findings, the court also found that Zani's claims against the Board should have been brought under 42 U.S.C. § 1983 rather than in a federal habeas proceeding. The district court then denied Zani's petition with prejudice and issued a certificate of probable cause. This appeal ensued.

II.

Zani first contends that his claims regarding the Board's actions are proper in a federal habeas petition. We disagree.

Under the guidelines which this court established in Serio v. Members of Louisiana State Bd. of Pardons, 821 F.2d 1112 (5th

Cir. 1987), a petition for habeas corpus relief is initially the proper vehicle for prisoners who challenge "either (1) the constitutionality of the state court conviction or sentence underlying their confinement or (2) a single allegedly defective hearing affecting eligibility for, or entitlement to, accelerated release." Johnson v. Pfeiffer, 821 F.2d 1120, 1123 (5th Cir. 1987). Moreover, a broad-based challenge to Board procedures which were used to make a decision about a prisoner's release date must be pursued in a petition for habeas relief if resolution of the issues necessary to decide an underlying § 1983 claim would automatically entitle the prisoner to accelerated release. Id. This court, however, draws a "distinction between claims that would merely enhance eligibility for accelerated release and those that would create entitlement to such relief." Serio, 821 F.2d at 1119. Thus, what we focus on in determining if a prisoner must initially pursue relief through a petition for habeas corpus instead of a civil rights action under § 1983 is whether the prisoner is challenging the "'fact or duration' of his confinement or merely rules, customs, and procedures affecting 'conditions' of confinement." Spina v. Aaron, 821 F.2d 1126, 1128 (5th Cir. 1987).

Zani does not challenge the constitutionality of his conviction or a single hearing of the Board. Furthermore, success on the merits of his claim would not automatically entitle him to accelerated release. Should Zani prevail on all of his contentions against the Board, he would only be eligible

for parole consideration earlier than he might otherwise have been, with the Board prohibited from retaliating against him for his pursuit of state appellate remedies or his refusal to admit guilt.

The district court, therefore, properly found that a petition for habeas corpus was not the appropriate vehicle in which Zani could bring his allegations into federal court. However, the district court should have construed Zani's claims regarding the Board's actions as seeking injunctive relief under § 1983 and should have proceeded to consider those claims. See Serio, 821 F.2d at 1119. Nonetheless, Zani's claims regarding the Board's actions are meritless even if viewed as being brought under § 1983 for injunctive relief. See Parts III-V, supra.

III.

Zani argues that the crime of which he was convicted occurred in July 1967 but that his consideration for parole was governed by a law which went into effect in August 1967. He contends that the pre-August 1967 law provided for parole eligibility after fifteen years of time served, calculated by combining the amount of time actually served with "good time" credit, but that the post-August 1967 law provides for parole eligibility after twenty years of time served, calculated in the same manner. Zani thus contends that because he was first considered for parole in 1988 instead of 1987, the Board's application of post-1967 Texas parole law in his case violated the ex post facto provisions of the United States and Texas

Constitutions. Despite Zani's argument, his claim for an ex post facto violation is moot.

The doctrine of mootness applies when (1) the controversy presented to the federal court is no longer live or (2) the parties lack a personal stake in its outcome. Rocky v. King, 900 F.2d 864, 867 (5th Cir. 1990); see United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980). Here, the Board agrees with Zani that he should have been considered for parole before his 1988 review. Zani was, however, denied parole when he was initially considered in 1988 and has lost "good time" credit as a result of disciplinary violations since that review. The Board has also agreed that when Zani's time credited for release equals fifteen years--calculated according to the pre-1967 law applicable in Zani's case, Zani will again be considered for parole. Therefore, any claim he may have for unlawful confinement based on improper calculation of parole eligibility is moot.

IV.

Zani also asserts that the Board retaliated against him by denying him parole and parole consideration because his state appeal was pending and because he refused to admit his guilt. We find Zani's retaliation claim to be without merit.

Although we construe pro se petitions liberally, "mere conclusory allegations on a critical issue are insufficient to raise a constitutional issue." Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990) (citing United States v. Woods, 870 F.2d 285,

288 n.3 (5th Cir. 1989)); see Joseph v. Butler, 838 F.2d 786, 788 (5th Cir. 1988); Ross v. Estelle, 694 F.2d 1008, 1012 (5th Cir. 1983). Absent record evidence, we cannot consider a habeas petitioner's assertions "on a critical issue in his pro se petition . . . to be of probative evidentiary value." Ross, 694 F.2d at 1011.

Our review of the record indicates that Zani's allegations are merely conclusory. In his repleader filed March 16, 1991, Zani stated as follows:

> Has the [Board] retaliated against petitioner for his legal activities? Yes.
>
> Excluding the fact of petitioner's direct appeal, the [Board] was well aware (1987-88) of petitioner's extensive legal filings on his own behalf. According to petitioner's records, he sent approximately 20 single-spaced typewritten pages to the [Board] prior to March of 1988, many of which were copies of federal court documents . . . . Petitioner also included "horror stories" . . . and a copy of a 3-page letter-statement about the "perfect crime"--i.e. three jurors blanket-pleading the Fifth Amendment during petitioner's motion for new trial, held April 15, 1981, and walking away scot-free; while, simultaneously, sending innocent petitioner to prison--a decision based on their own admitted corruption. . . .
>
> The [Board] . . . considered petitioner's actions to be "making waves" and viewed such actions as "counterproductive" to "getting out of prison."

Zani thus offers nothing to show that his legal activities or his refusal to admit his guilt were in any way connected with the Board's decision to deny him parole. His allegations are speculative at best and are hence meritless.

V.

Zani next asserts that his Board record contains false information. However, he does not allege what information he believes his record contains beyond maintaining that an Austin policeman suborned perjury. His claim for relief on this point is based wholly on conclusory allegations and cannot therefore be considered to give rise to a valid constitutional claim. See Koch, 907 F.2d at 530. Zani's claim with respect to false information in his Board record is therefore meritless.

VI.

Zani further maintains that he is factually innocent of the crime for which he was convicted. This court recently remanded Zani's petition for habeas corpus which challenges his conviction to the United States District Court for the Western District of Texas. See Zani v. Collins, No. 93-8069 (5th Cir. Aug. 19, 1993) (unpublished). Zani's claim of factual innocence--assuming arguendo that it is a viable claim, see Herrera v. Collins, 113 S. Ct. 853 (1993)--should be raised in that proceeding.

VII.

Zani also alleges that the district court should have considered testimony from an evidentiary hearing held in another federal habeas proceeding because testimony elicited in conjunction with that cause will support his claims in the instant habeas proceeding. Assuming arguendo that the other federal habeas proceeding has parole implications for Zani, it is unrelated to his instant habeas petition. This other federal

habeas proceeding involves a challenge to prison disciplinary proceedings and a denial of good conduct time while the instant case involves the denial of parole. Thus, the district court did not err by refusing to consider testimony from this other federal habeas proceeding.

VIII.

For the foregoing reasons, we hold that the district court reached the correct result in denying Zani's petition for habeas corpus relief. We note that on March 24, 1993, this court imposed appellate sanctions on Zani and ordered that Zani must obtain the written permission of a judge of this court before prosecuting an appeal. Zani v. Raines, No. 92-4990 (5th Cir. March 24, 1993) (unpublished). This court further ordered that Zani be taxed with all costs of his previous appeal and, until he pays those costs, to obtain certification of a district court that any appeal is taken in good faith before he may prosecute another appeal in forma pauperis. Id. Although those sanctions are not applicable here because the notice of appeal in this case predates our March 24, 1993 order, we remind Zani of the sanctions we have imposed and stress that these sanctions are not to be taken lightly.

The judgment of the district court is AFFIRMED.