

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-5551  
Summary Calendar

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JOSEPH A. ROME,

Petitioner-Appellant,

VERSUS

JACK KYLE, Director,  
Board of Pardons and Parole,

Respondent-Appellee.

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Appeal from the United States District Court  
For the Eastern District of Texas

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(4:93-CV-175)

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(November 30, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:\*

Joseph A. Rome pleaded guilty to aggravated sexual abuse of a child in February 1983, and a jury assessed a term of imprisonment of twelve years. Rome filed a notice of appeal, but subsequently withdrew the notice. Rome filed two petitions for habeas relief in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

state court challenging the validity of his original conviction which were denied without written orders. Rome was released from prison subject to mandatory supervision in April 1988. Following his release, Rome filed a habeas petition in state court alleging that he had been unlawfully released subject to mandatory supervision because he did not sign any documents agreeing to the restricted release. Rome requested a discharge or "a quick revocation hearing."

The state trial court determined, based on an affidavit of a representative of the Parole Board, that Rome was eligible for release subject to mandatory supervision on April 8, 1988, and that his signature was not required on the release documents. The trial court determined that Rome was lawfully released, but then made the contradictory recommendation that "the relief requested be granted." Rome filed objections to the trial court's findings. The Court of Criminal Appeals denied the application without written order based on the trial court's findings.

Rome filed this federal habeas application alleging that he did not contract with the Board of Pardon and Parole to be released subject to mandatory supervision in 1988. Rome was charged in April 1988 with failure to report to his parole officer upon his release and failure to go to the designated halfway house. However, Rome was not arrested until 1993 although he remained in the area and did not conceal his whereabouts. Rome filed an amended complaint that questioned the validity of the process and evidence used at his revocation hearing.

Prior to the respondent's answer, Rome also filed a request for an order directing jail officials to "allow [Rome] proper time in the law library." The magistrate judge denied the request. Rome also filed a motion for a contempt order against the sheriff of the Denton County jail, arguing that the Sheriff was violating the decree in Ruiz v. Estelle<sup>1</sup> by denying Rome sufficient law library time and access to legal materials.

The respondent answered and argued that Rome had not exhausted his state habeas remedies with respect to his claim that the revocation of his release is invalid. Rome filed a response in which he argued that he has fairly presented the revocation issue to the state courts because he alternatively requested an immediate revocation hearing in his 1988 habeas application.

The magistrate judge determined that the issues raised in the present petition had not been fairly presented to the Texas Court of Criminal Appeals and recommended dismissal of the complaint for failure to exhaust. The district court adopted the recommendation of the magistrate judge over Rome's objections, and dismissed the complaint without prejudice for failure to exhaust state remedies. The district court denied CPC.

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<sup>1</sup> 503 F.Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part and vacated in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). There has been a settlement in the Ruiz case resulting in the termination of the class action. See Bankhead v. Mannix, No. 92-8206 (5th Cir. Jan. 11, 1993) (unpublished).

## OPINION

The defendant argues that this Court has no jurisdiction to hear this case unless it first grants a certificate of probable cause.

Rome is not contesting the legality of his conviction or the validity of his initial sentence, and, thus, the district court improperly characterized his petition as arising under § 2254. See United States v. Gabor, 905 F.2d 76, 77-78 (5th Cir. 1990). Rome's petition must be construed as seeking relief under 28 U.S.C. § 2241 because he is contesting the manner in which his sentence is being executed by the Texas Parole Board. Id. at 77-78; see Story v. Collins, 920 F.2d 1247, 1250 (5th Cir. 1991) (jurisdiction over state prisoner's good conduct claim is based on § 2241 rather than § 2254).

The issuance of CPC is required to take an appeal from a final order in a habeas corpus proceeding only "where the detention complained of arises out of process issued by a State court." See 28 U.S.C. § 2253. The issuance of CPC is not necessary to provide appellate jurisdiction because Rome's present detention does not arise out of process issued by a State court. Id.

Rome argues that he was entitled to be discharged from prison because he served his twelve-year sentence, having served four years and earned eight years of good time credit, and that he presented the issue of his right to discharge in his state habeas

petition. Rome argues that he has exhausted his state remedies because the state appellate court denied his petition by issuing a white card and no written reasons.

An initial issue that must be addressed is whether an exhaustion requirement is applicable to § 2241 petitions. Because Rome is not presently in custody directly as a result of a state court judgment, the exhaustion requirement of § 2254(b) is not applicable. Section 2241 contains no statutory exhaustion requirement. See § 2241(c)(3).

There are apparently no cases holding that a post-trial state prisoner seeking relief under § 2241 is required to exhaust his state remedies. However, an exhaustion requirement has been jurisprudentially created in cases involving pre-trial § 2241 habeas petitions by state prisoners. See Dickerson v. State, 816 F.2d 220, 225 (5th Cir.), cert. denied, 484 U.S. 956 (1987), and cases cited therein. The rationale behind these decisions is:

that although section 2241 establishes jurisdiction in the federal courts to consider pre-trial habeas corpus petitions, federal courts should abstain from the exercise of that jurisdiction if the issues raised in the petition may be resolved either by trial on the merits in the state court or by other state procedures available to the petitioner.

Id. This rationale may be applied to require the exhaustion of state remedies prior to federal review of a § 2241 post-trial petition attacking the manner in which a petitioner's sentence is being executed. It is noteworthy that federal prisoners who file § 2241 petitions challenging the manner in which their sentence is being executed by the Parole Board are also required to exhaust administrative remedies prior to seeking federal habeas relief.

See Fuller v. Rich, 11 F.3d 61, 62 (5th Cir. 1994). A district court's dismissal of a § 2241 complaint for failure to exhaust such remedies is reviewed for an abuse of discretion. Id.

The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court. Picard v. Conner, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). The federal claim must be the substantial equivalent of that presented to the state courts in order to satisfy the "fairly presented" requirement. Id. at 275-76, 278. In Texas, the highest state court for criminal matters is the Texas Court of Criminal Appeals. Richardson v. Procunier, 762 F.2d 429, 431-32 (5th Cir. 1985).

Rome alleged in his previous state court habeas application that he was unlawfully released subject to mandatory supervision because he did not sign any documents consenting to that form of release and because he had committed an aggravated offense. In his prayer, Rome requested " a discharge" or alternatively "a quick revocation hearing."

In his present application for federal habeas relief, Rome is alleging that his release was improperly revoked because 1) he did not consent in writing to being released subject to mandatory supervision; 2) although officials were aware of his presence in the area, the warrant of arrest was not executed for six years; and 3) the evidence presented at the revocation hearing was unauthentic and invalid.

Although Rome's earlier state habeas petition raised the issue of the applicability of the mandatory supervision condition to his release, the petition could not have addressed the validity of Rome's subsequent revocation proceedings. For that same reason, the "white card" dismissal of his writ in 1988 cannot be construed as having addressed the issues arising out of Rome's 1993 revocation proceeding. Because Rome's petition contains exhausted and unexhausted claims, it was subject to dismissal without prejudice. See Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982) (petitions that contain both exhausted and unexhausted claims must be dismissed).

Rome argues for the first time on appeal that he was denied meaningful access to the courts as required by Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). Rome argues that the courts denied him access as a result of making ambiguous ruling that cannot be understood by pro se prisoners.

Prisoners have a constitutionally protected right of access to the courts. Bounds, 430 U.S. at 821. However, Rome did not make an argument under Bounds in the district court. Rome argued in the district court that the Sheriff of the Denton County Jail failed to comply with the minimum requirements of Ruiz concerning an inmate's access to a law library and legal materials as well as in other respects. Rome has not made the Ruiz argument on appeal.

This Court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal

questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Therefore, Rome's claim that he was denied access to the courts under Bounds is not subject to review on appeal.

Rome also argues for the first time on appeal that he was transferred from the Denton County Jail to the Limestone County Detention Center in retaliation for performing his own legal work and legal work for other prisoners. This claim which requires the resolution of factual issues is not subject to initial review on appeal. Varnado, 920 F. 2d at 321.

Rome argues that he does not have access to his computer disk at the Limestone Center. After the magistrate judge had issued a recommendation that Rome's habeas petition be denied without prejudice, Rome wrote a letter to the district court advising that he had been transferred to the Limestone Jail and that he had been denied access to his legal work, which was on a computer in Denton County. Rome also asserted that the Limestone law library was inadequate and requested an order that he be permitted to remain in Denton County until his case is concluded.

Rome did not file a denial-of-access-to-the-courts claim against the officials operating the Limestone County Jail in the district court. Further, he could not have amended his complaint to include such a claim in this case because the Limestone jail is located outside the Eastern District of Texas. See 28 U.S.C.



§ 124(d)(2). Because this claim was not properly raised in the district court, it is not subject to review on appeal. Varnado, 920 F. 2d at 321.

Dismissal without prejudice is AFFIRMED.