

**IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I**

**STATE OF WEST VIRGINIA,
ex rel. RAYMOND PRATT,**

Petitioner;

v.

Civil Action No. 12-C-415

**DAVID BALLARD,
Warden of the Mount Olive
Correctional Facility,**

Respondent.

**RE-ENTRY OF
ORDER DENYING FURTHER RELIEF AND DISMISSING PETITION**

This case involves a Petition for a Writ of Habeas Corpus Ad Subjiciendum originally filed on November 19, 2012, and re-filed as amended by counsel on January 2, 2014. The Petition challenges Raymond Pratt's 1976 conviction for armed robbery and subsequent sentence of life imprisonment. It raises two primary issues. First, the Petition argues that an insufficient sentencing record violated the Supreme Court of Appeals's holding in State v. Houston, 166 W. Va. 202 (1980), as well as the same Court's directions on remand of the Petitioner's prior habeas action. See Pratt v. Holland, 175 W. Va. 756 (1985). Second, the Petition argues that the Parole Board violated the Petitioner's due process rights by refusing him an opportunity to challenge a legal conclusion it relied upon in declaring him ineligible for parole.

On January 29, 2015, the Court convened a hearing on the Petition to develop an adequate sentencing record as required by Pratt v. Holland and to hear arguments on the Petitioner's due process claim. The Petitioner appeared in person and by counsel Justin

Gregory; the Respondent and the State of West Virginia appeared by counsel Katica Ribel. After reviewing the Petition itself, all related filings, the extensive record of the proceedings below, and the arguments presented at the hearings on the Petition, the Court is ultimately of the opinion that the Petitioner is entitled to no further relief and that the Petition should be dismissed. In support of this ruling, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. In April of 1976, a Marion County jury convicted the Petitioner of armed robbery. Following his conviction, the Court sentenced him to life imprisonment. In order to preserve his ability to appeal his conviction, the Court subsequently resentenced the Petitioner several times. At some point in the course of these resentencing proceedings, the Petitioner moved for a reduction in his sentence. In response, the Court ordered the preparation of a pre-sentencing report and convened a hearing on the motion. At that hearing, held on November 15, 1983, the Court granted the motion and resentenced the Petitioner to life imprisonment "with the intention that he be eligible for parole after serving a minimum of ten years."
2. In the time between the imposition of his initial sentence and his subsequent reduced sentence, the Supreme Court of Appeals decided State v. Houston, 166 W. Va. 202 (1980). While maintaining that life imprisonment was still a valid sentence for an armed robbery conviction, the Houston Court recognized that life imprisonment may, in certain circumstances, constitute a disproportionately severe punishment under the West Virginia Constitution. 166 W. Va. at 377-78. In order to ensure that the

constitutionality of a life sentence for armed robbery could be meaningfully reviewed, the Supreme Court of Appeals held that a sentencing court must make “an appropriate record . . . to provide the factual basis for the sentence.” 166 W. Va. at 209.

3. Relying on Houston, the Petitioner appealed his sentence, arguing that the trial court judge erred by failing to produce an adequate record justifying his life sentence. The Supreme Court of Appeals agreed and remanded the case for the development of a sentencing record. Pratt v. Holland, 175 W. Va. 756 (1985). Within a matter of months after remand and before the trial Court could convene a hearing to develop a sentencing record, the Petitioner attained parole and relocated to Pennsylvania.
4. While in Pennsylvania, the Petitioner was arrested for first-degree murder. A Pennsylvania jury convicted him on January 15, 1988, but the Superior Court of Pennsylvania overturned the conviction on August 16, 1989. See Commonwealth v. Pratt, 565 A.2d 821 (Pa. Super. Ct. 1989), aff’d 574 A.2d 68 (Pa. 1990). On remand, the Petitioner pled to third-degree murder, a violation of Section 2502 of Pennsylvania’s Crimes Code. See 18 Pa. Stat. § 2502.
5. The Petitioner served a twenty-year sentence on his third-degree murder conviction in Pennsylvania. Immediately upon his discharge from custody in Pennsylvania, however, the West Virginia Parole Board revoked his parole pursuant to West Virginia Code Sections 62-12-18 and 62-12-19(c). Under those provisions, any parolee who “has violated the conditions of his or her release on parole by confession to, or being convicted” of “murder . . . or [an] offense with the same essential elements if known by other terms in other jurisdictions” shall be “returned to the custody of the Division

of Corrections to serve the remainder of his or her maximum sentence.” Accordingly, the Petitioner was returned to the custody of the Division of Corrections.

6. At a final revocation hearing in October of 2007, the Parole Board formally revoked the Petitioner’s parole and informed him that he would be able to reapply for release within a few years. Soon thereafter, however, the Petitioner received a letter from the Chairman of the Parole Board informing him that he was entirely ineligible for parole under West Virginia Code Section 62-12-18. That statute provides that any parolee who has been convicted of murder while on release is ineligible for parole. Attached to the letter from the Chairman was a legal memorandum prepared by a Division of Corrections attorney discussing whether third-degree murder under Pennsylvania law “has the same essential elements as ‘murder’” under West Virginia law. This Division of Corrections Memorandum concluded that Pennsylvania’s offense of third-degree murder is equivalent to second-degree murder in West Virginia¹ and that the Petitioner was therefore ineligible for parole under Section 62-12-18.
7. The Petitioner filed the present Petition for Habeas Corpus Ad Subjiciendum on November 19, 2012 and, with the assistance of counsel, filed an Amended Petition on January 2, 2014. The Petition raises two primary grounds for relief:
 - a. First, the Petition argues that an insufficient sentencing record violates the Supreme Court of Appeals’s holding in State v. Houston, 166 W. Va. 202

¹ Pennsylvania’s second-degree murder statute is a codification of the so-called “felony murder” rule. See 18 Pa. Stat. § 2502(b) (“A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony”). In West Virginia, the felony murder rule is encoded as a form of first-degree murder. See W. Va. Code § 61-2-1 (defining first degree murder as, *inter alia*, any murder committed in the course or attempted course of committing certain other enumerated felonies). Third-degree murder in Pennsylvania and second-degree murder in West Virginia are both “catch-all” offenses for any murder that fails to qualify as a murder of a more aggravated degree. Compare 18 Pa. Stat. § 2502(c) with W. Va. Code § 61-2-1.

(1980), as well as the same Court's directions on remand of the Petitioner's prior habeas action. See Pratt v. Holland, 175 W. Va. 756 (1985). Because this record was never developed on remand, the Petitioner argues that his underlying life sentence is invalid.

b. Second, the Petition argues that the Parole Board violated the Petitioner's rights of due process by refusing him an opportunity to challenge the Division of Corrections Memorandum ultimately relied upon by the Board in declaring him ineligible for parole.

8. On July 7, 2014, this Court held an omnibus hearing pursuant to Rule 9 of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. In response to concerns expressed by the Court in that hearing, the Petitioner filed a "Memorandum Re Distinction Between Third Degree Murder in Pennsylvania and Second Degree Murder in West Virginia" on August 6, 2014. The Memorandum discusses the murder statutes of the respective states and ultimately concludes that the Petitioner "cannot in good faith argue that there exists a distinction" between the essential elements of third-degree murder in Pennsylvania and second-degree murder in West Virginia.

9. On December 30, 2014, the Court entered an "Order Setting Hearing for Development of Sentencing Record." In this Order, the Court stated that regardless of the delay between the Supreme Court of Appeals's decision in Pratt v. Holland and the current proceedings, the Defendant was still entitled to the development of an adequate sentencing record pursuant to State v. Houston. Accordingly, the Court ordered that the parties appear for a hearing on January 29, 2015, for the purpose of developing such a record. On January 5, 2015, the Court provided the parties with a copy of the

1983 Pre-Sentence Investigation Report relied upon in imposing the reduced sentence. The Court's reporter also provided the parties with a transcript of the November 15, 1983 hearing on the Petitioner's motion for a reduced sentence.

10. The Court convened the hearing as scheduled on January 29, 2015. At that time, the Court elicited recommendations from both the Petitioner's counsel and from the State of West Virginia as to the propriety of a life sentence. The Court also invited them to offer any corrections, objections, additions, or arguments related to the 1983 Pre-Sentence Investigation Report. Most importantly, the Court addressed the Petitioner personally and permitted him an opportunity to allocute. Ultimately, however, the Court expressed on the record its intention to affirm the underlying life sentence and its reasons for doing so, including:

- a. the severity and violent nature of the offense;
- b. the Petitioner's criminal history, including at least three other armed robberies;
- c. the absence of any serious mitigating factors related to the Petitioner's upbringing or the armed robbery itself;
- d. the community sentiment at the time of the original sentencing, including the victim's belief that he should be incarcerated "for a considerable amount of time" and the arresting officer's belief that he was "a habitual criminal beyond rehabilitation" who "should spend the rest of his life in the penitentiary;" and
- e. that although the Petitioner's criminal career began in his youth, it continued well into his forties.

The Court also considered that the sentence imposed was relatively favorable given the State's original recommendation of a fifty year sentence—a sentence that would

have required him to remain incarcerated for at least fifteen years, rather than ten. In other words, it was actually intended to reduce the necessary term of imprisonment and allow the Petitioner an earlier opportunity to re-enter the community subject to the deterring influence of the life sentence. By attaining parole after ten years, the Petitioner reaped the benefits of this sentence, even if he ultimately squandered the opportunity by re-offending shortly after his discharge.

Conclusions of Law

1. The Petitioner's challenge to his underlying life sentence has been addressed and remedied by the development of a more specific sentencing record.
 - a. State v. Houston requires that a sentencing record "include the presentence report and any other diagnostic reports used as an aid in imposing the sentence. The court shall also permit statements relevant to the sentence to be made on the record by the defendant, his attorney, and the prosecuting attorney, if the statements have not already been recorded at or prior to the time sentence was initially imposed. Finally, the sentencing judge shall state on the record his reasons for selecting the particular sentence." 166 W. Va. at 209.
 - b. As discussed above in Finding of Fact No. 10, the Court developed such a record at the January 29, 2015 hearing. To the extent the Petitioner wishes to avail himself of the purpose behind the Houston record requirement—that is, to challenge the constitutionality of his life sentence—this is an issue beyond

the scope of his present Petition.²

2. The Petitioner is entitled to no relief on his claim for violation of due process.
 - a. In his Amended Petition, the Petitioner argues that the Parole Board violated his due process rights by refusing him an opportunity to challenge the Board's conclusion that a conviction for "murder of the third degree" in Pennsylvania is an offense "with the same essential elements" as murder but otherwise "known by other terms" in that state. See W. Va. Code §§ 62-12-18.
 - b. On August 6, 2014, the Petitioner filed a "Memorandum Re Distinction Between Third Degree Murder in Pennsylvania and Second Degree Murder in West Virginia" concluding that the Petitioner "cannot in good faith argue that there exists a distinction" between the essential elements of third-degree murder in Pennsylvania and second-degree murder in West Virginia." Similarly, the Petitioner conceded at the January 29, 2015 hearing that an opportunity to be heard in the disputed parole board determination would prove an empty gesture and "make no difference in the end."
 - c. In light of this admission, the Court believes that the due process claim is "no longer 'live'" and that the Petitioner "lack[s] a legally cognizable interest in the outcome." State ex rel. Bluestone Coal Corp. v. Mazzone, 226 W. Va. 148,

² The Court notes, however, that it would not hesitate to correct a sentence it believed unconstitutionally disproportionate. In State ex rel. Hatcher v. McBride, 221 W. Va. 760 (2007), our Supreme Court upheld the constitutionality of a 212-year sentence for aggravated robbery. The petitioner in Hatcher struck a pizza delivery person with a baseball bat and then stole two pizzas and a bottle of soda. In imposing the 212-year sentence, the trial court considered the fact that the petitioner was convicted of an unrelated murder following the robbery. The Supreme Court of Appeals, writing per curiam, held that the subsequent murder was not an "impermissible factor" to consider and that, ultimately, the sentence did not violate the proportionality clause. 221 W. Va. at 765. The only practical difference between the sentence imposed in Hatcher and the life sentence in this case is that the Petitioner here was eligible for parole long before the petitioner in Hatcher. As such, the Court does not believe the Petitioner's sentence to be unconstitutionally disproportionate. Cf. State v. David, 214 W. Va. 167, 175-76 (2003) (concluding that sentence of 1,140 to 2,660 years imprisonment was unconstitutionally disproportionate).

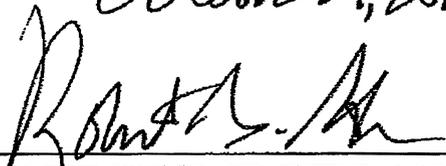
155 (2010). As such, this ground for relief is moot and “cannot properly be considered on its merits.” Id. See also, Syl. Pt. 1, State ex rel. Lilly v. Carter, 63 W. Va. 684 (1908) (“abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court”).

Accordingly, it is **ORDERED** that the Petition for Writ of Habeas Corpus Ad Subjiciendum be **DISMISSED** and that this matter be removed from the docket of this Court. This Order is a Final Order in this case such that the matter may be appealed.

The Circuit Clerk of Marion County is hereby directed to provide certified copies of this Order to:

1. **Justin Gregory**
5000 Thayer Center
Oakland, Maryland 21550
2. **Katica Ribel**
213 Jackson Street
Fairmont, West Virginia 26554

ENTER: *October 29, 2015*



ROBERT STONE, CIRCUIT JUDGE



West Virginia E-Filing Notice

CK-24-2012-C-415

Judge: Judge Michael J. Aloï

To: Justin Nathaniel Gregory
jngregory.law@gmail.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I
RAYMOND PRATT C/O MT OLIVE CORRECTIONAL v. RE: WRIT OF HABEAS CORPUS
CK-24-2012-C-415

The following order - case was FILED on 10/29/2015 2:19:37 PM

Notice Date: 10/29/2015 2:19:37 PM

RHONDA STARN
CLERK OF THE CIRCUIT COURT
MARION COUNTY
219 ADAMS STREET, ROOM 211
FAIRMONT, WV 26554

304-367-5360

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I

STATE OF WEST VIRGINIA,
ex rel RAYMOND PRATT,

PETITIONER,

v.

DAVID BALLARD, WARDEN
MOUNT OLIVE CORRECTIONAL COMPLEX,

RESPONDENT.

CASE NO. 12-C-415

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CIRCUIT CLERK

ORDER APPOINTING COUNSEL

The above named petitioner has filed, with this Court, an affidavit reciting financial inability to employ counsel in connection with certain proceedings before this Court. After reviewing the affidavit and considering the matter, the Court is of the opinion that the eligibility requirements of West Virginia Code 29-21-1, et seq. are satisfied. Accordingly, the Court ORDERS that:

JUSTIN GREGORY, ESQUIRE, a licensed lawyer practicing before the Bar of this Court, is hereby appointed to represent the petitioner in an OMNIBUS WRIT OF HABEAS CORPUS and is instructed to contact the petitioner forthwith.

The Circuit Clerk of Marion County shall provide a certified copy of this Order to Justin Gregory, Esquire, at 309 Cleveland Avenue, Suite 215, Fairmont, West Virginia 26554 (301) 616-1879; to L. Elizabeth Shaw, Marion County Assistant Prosecuting Attorney; and to Raymond Pratt #9572-1, c/o Mount Olive Correctional Center, One Mountainside Way, Mount Olive, West Virginia 25185.

ENTER: JUNE 5, 2013

A COPY TESTE
Barbara A. Cole
CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA

Michael John Aloi
MICHAEL JOHN ALOI, CIRCUIT JUDGE

6/7/13
Proc. (3)

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION II

STATE OF WEST VIRGINIA,

Plaintiff

Vs.

// FELLOWY NO. 7216

RAYMOND PRATT,

Defendant

ORDER

On the 24th day of May, 1976, came the State of West Virginia by G. Richard Bunner, its Assistant Prosecuting Attorney, and the defendant, Raymond Pratt, being in custody, was brought into Court by the Sheriff and set before the Bar of this Court by his attorneys, Robert Cohen and Brent E. Beveridge, and the Court thereupon proceeded to inquire of the defendant if there be any reason why judgment should not now be pronounced against him, and nothing being offered or alleged, it is adjudged and ordered that the defendant, Raymond Pratt, be confined in the West Virginia State Penitentiary at Moundsville, West Virginia, for the remainder of his natural life.

And thereupon the defendant was remanded to the Marion County Jail in the care and custody of Leonard L. Nappie, Sheriff and Jailer of Marion County, there to be kept until the Warden of said West Virginia State Penitentiary shall send some

authorized guard to convey said defendant to the West Virginia
State Penitentiary at Moundsville, West Virginia, forthwith.

ENTER: 6/1/76

/s/ Fred L. Fox II
Judge

A COPY

TESTE:

Charles N. Dodd

CLERK OF THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA