

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

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|------------------|---|---------------------|
| DANIEL FIAMENGO, | : | |
| | : | |
| Petitioner, | : | |
| | : | No. 3:05CV617 (MRK) |
| v. | : | PRISONER |
| | : | |
| JOHN SIEMINSKI, | : | |
| | : | |
| Respondent. | : | |

RULING AND ORDER

Petitioner Daniel Fiamengo has filed an Application for a Writ of Habeas Corpus [doc. #1], seeking release from state custody at the MacDougall-Walker Correctional Institution. He has also filed two motions seeking release during the pendency of this action [docs. ## 6 & 7], as well as a third motion asking the Court to order his release, to grant all relief requested in the petition, and to award him damages [doc. #14]. Respondent, Warden John Sieminski, has filed a motion for more definite statement [doc. #15]. For the reasons that follow, Petitioner's Application for a Writ of Habeas Corpus [doc. #1] is DISMISSED without prejudice. As a result, Petitioner's motions [docs. ## 6, 7, & 14] and Respondent's motion [doc. #15] are DISMISSED as moot.

I

In his Application for a Writ of Habeas Corpus [doc. #1], Petitioner does not detail the facts giving rise to his claim for relief, stating only that "this court is well aware of the civil conspiracy, violations of Mr. Fiamengo's right." *Id.* at 6. Attached to his application, however, is a copy of a previously filed § 1983 complaint. In a ruling dated December 21, 2004, that complaint was dismissed by Judge Janet Hall, who described Petitioner's claims in that complaint as follows:

The plaintiff alleges that on November 23, 2001, during his arraignment on charges in two state criminal matters, "Judge O'Keefe was going to release [him] on a promise to appear into an in-patient treatment program." The plaintiff's Assistant Public Defender, Robin Smith, attempted to assist the Court in placing the plaintiff in a treatment program. On November 27, 2001, in a hearing on two different state criminal matters and two motor vehicle matters, Judge Richard Damiani sentenced the plaintiff to three years of incarceration suspended after one year and followed by three years of probation.

The plaintiff filed a petition for writ of habeas corpus on May 8, 2002, claiming his Assistant Public Defender, Robin Smith had rendered ineffective assistance of counsel in connection with his criminal conviction. In November 2002, Judge Dale Radcliffe entered a judgment of dismissal in the habeas matter because the plaintiff's sentence had expired in September 2002. Plaintiff was on probation at the time of the dismissal. In March 2003, Judge Radcliffe denied plaintiff's motion to reopen the judgment.

Plaintiff subsequently violated his probation, and the court sentenced him to four years of imprisonment. The plaintiff appealed the denial of his motion to reopen judgment. The Connecticut Appellate Court dismissed the appeal as frivolous in December 2003. The plaintiff filed a second petition for writ of habeas corpus in state court. The plaintiff seeks an order directing the State of Connecticut to release him immediately, an order vacating his DUI convictions, and \$400,000.00 in monetary damages.

Ruling and Order [doc. #13], *Fiamengo v. Damiani et al.*, 3:04-cv-538 (JCH) (D. Conn. Dec. 21, 2004) at 1-2 (internal citation omitted). Judge Hall dismissed Petitioner's requests for immediate release and for an order vacating his DUI convictions, holding that he had not yet exhausted his available state court remedies. *Id.* at 4-6. Judge Hall also dismissed his damages claims against all defendants. *Id.* at 6-11. Petitioner appealed Judge Hall's decision to the Second Circuit, which dismissed his appeal as lacking an arguable basis. *See Fiamengo v. Damiani et al.*, 05-0393-pr (2d Cir. Apr. 21, 2005) (unpublished order).

Petitioner filed the present petition for a writ of habeas corpus on April 14, 2005. In it he maintains that he has been unjustly incarcerated, and that the "Connecticut Courts all of them" have dismissed his claims "because they know what they did to [him]." Application for a Writ of Habeas Corpus [doc. #1] at 8. Petitioner then filed two identical Motions for Release from Custody [docs.

##6 & 7] seeking to be released during the pendency of his habeas petition, and claiming that his public defenders failed effectively to represent him, that "there is a civil conspiracy against him," and that he has been prosecuted unconstitutionally for being an alcoholic. *Id.* at 1-3. Next, Petitioner moved for an order granting all relief sought in his original habeas petition, again citing the conspiracy against him. *See* Motion for Order [doc. #14]. Respondent filed a Motion for a More Definite Statement [doc. #15], requesting that Petitioner specify which of his various criminal convictions he seeks to challenge. Petitioner's responses [docs. ## 17 & 18] essentially reassert the various allegations in his original habeas petition.

II

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at, *inter alia*, 28 U.S.C. § 2254), provides that before a federal court can consider a state prisoner's habeas petition, the prisoner must exhaust his available state remedies. *See* 28 U.S.C. § 2254(b)(1)(A); *Galdamez v. Keane*, 394 F.3d 68, 73 (2d Cir. 2005). To do so, "a petitioner must present the substance of the same federal constitutional claims that he now urges upon the federal court to the highest court in the pertinent state." *Aparicio v. Artuz*, 269 F.3d 78, 89-90 (2d Cir. 2001) (internal quotation marks and citations omitted). The prisoner need not wait until he has sought state habeas review, *see O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999), but state high-court review is a prerequisite, *see Morgan v. Bennett*, 204 F.3d 360, 369 (2d Cir. 2000) (noting that a state habeas petitioner "must first have presented his claim to the highest court of the state"). In other words, federal review of a state prisoner's habeas petition is forbidden until "the state courts [are given] one full opportunity to resolve any constitutional issues by invoking *one complete round* of the State's established appellate review process." *Galdamez v. Keane*, 394 F.3d

68, 73 (2d Cir. 2005) (emphasis supplied) (internal quotation marks omitted).

This exhaustion requirement is designed to "prevent[] prisoners who are charged with criminal offenses from rushing into federal court to advance federal claims and, instead, forces them to offer those claims at trial and on direct review in state court." Larry W. Yackle, *Federal Courts: Habeas Corpus* 152 (2003). "[B]y giving state courts an opportunity to correct any constitutional errors that may have crept into the state criminal process," the exhaustion requirement "pay[s] due respect to the federalist principles of our Constitution." *Edwards v. Choinski*, No. 305CV444, 2005 WL 3334442, at *3 (D. Conn. Dec. 5, 2005); see *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (per curiam).

Petitioner cites five cases for the proposition that he has exhausted available state-court remedies. (1) *Fiamengo v. Warden-Cheshire*, No. CV02-0464097-S, is a state habeas corpus petition he filed in New Haven Superior Court to challenge the sentence he received in November 2001. As noted above, this petition was dismissed in November 2002 because Petitioner had been released from custody. (2) *Fiamengo v. Commissioner of Correction*, No. 24236, is an appeal of this dismissal to the Connecticut Appellate Court. Also noted above, this appeal was dismissed as frivolous in December 2003. (3) *Fiamengo v. Warden*, No. CV03-4190, is another state-court habeas petition, which is currently still pending in Connecticut Superior Court. (4) *Fiamengo v. Damiani et al.*, No. 3:04-cv-538 (JCH), is a § 1983 action in which Judge Hall dismissed as insufficiently exhausted Petitioner's claims for release from prison. (5) *Fiamengo v. Damiani et al.*, No. 05-0393-pr, is an appeal from Judge Hall's decision. The Second Circuit dismissed this appeal in April 2005.

These cases do not demonstrate that Petitioner has exhausted the claims he seeks to pursue

here. To the contrary, Petitioner provides no evidence that he has ever sought review of his sentence in the Connecticut Supreme Court. Moreover, the first two cases – the state habeas corpus petition challenging his November 2001 sentence and the subsequent appeal – do not even relate to the term of incarceration he currently challenges. Indeed, Petitioner's claims in those cases were dismissed in November 2002 and December 2003, respectively, precisely because Petitioner had by then already been released from custody.

The only evidence that Petitioner has challenged his present incarceration in state court is the habeas petition *still pending* in Superior Court. In other words, Petitioner has not shown that a single Connecticut court has heard and ruled on his challenge, let alone Connecticut's highest court. Faced with a substantially identical record, Judge Hall concluded that Petitioner had not yet fulfilled AEDPA's exhaustion requirement, and the Second Circuit agreed. Indeed, so far as the Court can discern, Petitioner has done nothing further to exhaust his state court remedies since Judge Hall's ruling informing him that he must do so. It is apparent, therefore, that Petitioner has not made the required showing that he ever presented his arguments to the Connecticut Supreme Court. Nor has he shown any cause for this failure, which is particularly glaring in light of the fact that Judge Hall already instructed him that federal courts cannot consider his unexhausted habeas claims.

Because Petitioner has failed to exhaust his state-court remedies, the Court dismisses his Application for a Writ of Habeas Corpus [doc. #1] without prejudice to renewal in the event that he exhausts his claims in the Connecticut Supreme Court. *See, e.g., Shomo v. Maher*, No. 04-CV-4149, 2005 WL 743156, at *7 n.12 (S.D.N.Y. Mar. 31, 2005) ("[T]here is no basis to retain jurisdiction over a petition that contains only unexhausted claims."). The Court admonishes Petitioner that he must wait until the Connecticut Supreme Court has acted – either by ruling on his

claims or by denying review – before he can re-file his habeas petition in federal court.

Petitioner filed his state-court habeas petition within months after imposition of the sentence of which he complains here, and that state-court habeas petition is apparently still pending, which tolls AEDPA's one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(2) (providing that the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending"); *see Edwards*, 2005 WL 3334442, at *3 ("The limitations period is tolled by the filing of a state habeas petition, but not by the filing of a federal habeas petition."); *Pettus v. McGinnis*, No. 04Civ.2619, 2005 WL 1163008, at *2 (S.D.N.Y. May 18, 2005) ("Here, because [petitioner's] direct appeal still is pending, he has over a year to timely re-bring his federal habeas petition, and thus the petition should be dismissed rather than stayed."). Nevertheless, the Court cautions Plaintiff that if he wishes to re-file his habeas claim in federal court after exhausting his state remedies, he will need to do so promptly after the Connecticut Supreme Court has acted or risk having his federal habeas claim barred by AEDPA's one-year statute of limitations.

III

In sum, because Petitioner has failed to exhaust his claims in state court, his Application for a Writ of Habeas Corpus [doc. #1] is DENIED without prejudice. Petitioner's motions [docs. ## 6, 7, 14] and Respondent's motion [doc. #15] are DENIED as moot. **The Clerk is directed to close the file.**

SO ORDERED,

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut, on January 4, 2006.