DPS-299 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO: 04-3042

RICHARD M. SIMMONS,
Appellant

v.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE;
PENNSYLVANIA ATTORNEY GENERAL

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On Appeal From the United States District Court
For the Middle District of Pennsylvania
(M.D. Pa. Civ. No. 04-cv-01001)
District Judge: Honorable John E. Jones III

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Submitted Under Third Circuit L.A.R. 27.4 and I.O.P. 10.6
August 10, 2006
Before: FUENTES, VANANTWERPEN AND CHAGARES, Circuit Judges

(Filed: August 23, 2006)

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OPINION

_____

PER CURIAM

Appellant Richard Simmons filed a petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Pennsylvania. He claimed that the Pennsylvania Parole Board violated the Ex Post Facto Clause by applying the amended version of the Parole Act of 1941, as amended, 61 P.S. § 331.1 et seq. Instead of

exhausting his claim in the state courts, see 28 U.S.C. § 2254(b)(1)(A), he brought the claim immediately in the District Court arguing that it would be futile to pursue the claim in Pennsylvania. The District Court overruled a Magistrate Judge's report and recommendation, and dismissed the petition without prejudice for failure to exhaust. Simmons appealed.

On December 17, 2004, we granted Simmons' request for a certificate of appealability stating:

> The foregoing request for a certificate of appealability is granted as to the following issue: whether the District Court erred in dismissing Appellant's petition for writ of habeas corpus without prejudice for failure to exhaust state remedies. See 28 U.S.C. § 2254(b)(1)(A). In their briefs, the parties shall address whether exhaustion of state court remedies may be excused as futile based on the Pennsylvania Supreme Court's unfavorable rulings on claims alleging that the application of the post-1996 Pennsylvania Parole Act standards violates the Ex Post Facto Clause. See Lines v. Larkins, 208 F.3d 153, 162 (3d Cir. 2000). If Appellant wishes for the Court to appoint counsel to represent him in this appeal under I.O.P. 10.3.2, he must submit a motion for leave to appeal in forma pauperis and an affidavit in support thereof not later than 21 days after the date of this order.

Last year, we decided Parker v. Kelchner, 429 F.3d 58 (3d Cir. 2005). Parker also involved a Pennsylvania inmate who attempted to raise an ex post facto challenge to the Parole Board's decision without first exhausting his claim. We held:

> We agree with our sister Circuits and hold here that likely futility on the merits (even if it were present here) in state court of a petitioner's habeas claim does not render that claim "exhausted" within the meaning of § 2254(b)(1)(A) so as to excuse the petitioner's failure to exhaust that claim by presenting it in state court before asserting in a federal habeas petition.

Id. at 64. We find no distinguishing elements between Parker and the instant case.

Parker is dispositive and the claim is unexhausted.

We note that Simmons' claim is not necessarily procedurally defaulted. Under Pennsylvania law, Simmons can challenge the denial of parole by petitioning for a writ of mandamus. See Richardson v. Pennsylvania Bd. of Probation and Parole, 423 F.3d 282, 285 (3d Cir. 2005) citing Coady v. Vaughn, 778 A.2d 287, 290 (Pa. 2001) (explaining that mandamus is the proper avenue for relief from the denial of a parole decision). While we recognize that it is possible that Simmons should have filed his mandamus petition within six months of issuance of the Parole Board's decision, see 42 Pa.C.S. § 5522(b)(1); Tulio v. Beard, 858 A.2d 156, 160 (Pa. Cmwlth. 2004) (finding a six month statute of limitation applicable in similar circumstances), in order for us to find procedural default, state law must "clearly foreclose state court review of [the] unexhausted claim[]." Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir.1993).

As explained by the Supreme Court in James v. Kentucky, 466 U.S. 341, 348-351 (1984), only a "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent review in federal court of a federal constitutional claim. We are not convinced that § 5522(b)(1) fits this bill. Although several cases apply § 5522 to mandamus petition, none applies the provision in a context similar to the one presented by the instant appeal. See, e.g., Township of Bensalem v. Moore, 620 A.2d 76, 79-80 (Pa. Cmwlth. 1993) (citing several additional cases). As we have stated on numerous occasions, "[i]f the federal court is uncertain how a state court

would resolve a procedural default issue, it should dismiss the petition for failure to exhaust state remedies even if it is unlikely that the state court would consider the merits to ensure that, in the interests of comity and federalism, state courts are given every opportunity to address claims arising from state proceedings." Lines v. Larkins, 208 F.3d 153, 163 (3d Cir. 2000), citing Doctor v. Walters, 96 F.3d 675 (3rd Cir.1996).

We will therefore affirm the District Court's order dismissing Simmons' § 2254 petition.