

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1101

IN RE: FRANK NELLOM,
Petitioner

On a Petition for Writ of Mandamus from the
United States District Court for the Eastern District of Pennsylvania
(Related to Civ. No. 2-18-cv-04324)

Submitted Pursuant to Rule 21, Fed. R. App. P.
February 9, 2023

Before: KRAUSE, PORTER, and AMBRO, Circuit Judges

(Opinion filed: February 23, 2023)

OPINION*

PER CURIAM

Frank Nellom petitions for a writ of mandamus. For the reasons that follow, we will deny the petition.

The writ of mandamus will issue only in extraordinary circumstances. See Sporck v. Peil, 759 F.2d 312, 314 (3d Cir. 1985). Nellom must show that he lacks adequate

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

alternative means to obtain the relief he seeks, and he carries the burden of showing that his right to relief is clear and undisputable. See Mallard v. U.S. Dist. Court for S. Dist. of Ia., 490 U.S. 296, 309 (1989).

In his petition, Nellom requests that we certify a question to the Supreme Court of Pennsylvania: whether the Superior Court's decision in Commonwealth v. Nellom, 565 A.2d 770 (Pa. Super. Ct. 1989), was carried out. In that decision, the Superior Court vacated Nellom's convictions for rape and Involuntary Deviate Sexual Intercourse (IDSI) and remanded for a new trial. At his retrial, Nellom was convicted of rape but acquitted of IDSI.

(Appendix I)

We may certify to the highest court of a state a question of state law which will control the outcome of a case pending in federal court. See 3d Cir. L.A.R. Misc. 110.1 (2011). Nellom, however, is not clearly and indisputably entitled to have his question certified to the Supreme Court of Pennsylvania. The Superior Court's decision was carried out: Nellom was retried. Therefore, the answer the question for which he seeks certification is clear. See United States v. Defreitas, 29 F.4th 135, 141 (3d Cir. 2022) (noting that "[c]ertifying a question where the answer is clear is inappropriate and unnecessary."). Contrary to Nellom's mistaken belief, the Superior Court did not state that Nellom must be either convicted of both charges or acquitted of both charges at

retrial.¹ Moreover, his rape conviction was reviewed by the state courts on direct appeal and during PCRA proceedings.² Thus, he has had prior opportunities to have the state courts address his question.

Nellom is not entitled to the mandamus relief that he seeks. Accordingly, we will deny the mandamus petition. His request that Respondents be ordered to file an answer is denied.

¹ Nellom contends that his acquittal on the IDSI charge required that he be acquitted of rape as well. He appears to base this on language in the 1989 Superior Court opinion: “The primary issue for the jury in this case was whether there had been forcible rape or consensual sexual intercourse.” Nellom, 565 A.2d at 776. However, the court was explaining that the case came down to credibility and that the character evidence at issue in the appeal was important. The Superior Court did not conclude that the *only* issue in the case was consent.

² While Nellom attaches to his petition a 2014 order of the Court of Common Pleas expunging the rape charge, he fails to mention that the order was mistakenly entered and subsequently vacated. See Commonwealth v. Nellom, No. 1529 EDA 2014, 2016 WL 490024, at *2 (Pa. Super. Ct. Feb. 5, 2016).

UNITED STATES COURT OF APPEALS
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In re: FRANK NELLOM,

Petitioner

(Related to E.D. of Pa. No. 2-18-cv-04324)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, GREENAWAY, JR.,
SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN,
MONTGOMERY-REEVES, CHUNG & AMBRO*, Circuit Judges

The petition for rehearing filed by Petitioner Frank Nellom in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: March 31, 2023
Lmr/cc: Frank Nellom

(Appendix J)

* Judge Ambro's Vote is Limited to Panel Rehearing Only.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANK NELLOM,

v.

COMMONWEALTH OF
PENNSYLVANIA, *et al.*

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CIVIL ACTION

NO. 18-4324

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE

September 27, 2019

Presently before the court is a Petition for a Writ of Habeas Corpus filed by Frank Nellom ("Petitioner"), *pro se*, pursuant to 28 U.S.C. § 2254. Petitioner seeks habeas relief to expunge his 1991 rape conviction, for which he finished serving his sentence in 2009. The Honorable Edward G. Smith referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(B)(1)(B). For the reasons set forth below, it is recommended that the habeas petition be DISMISSED.

I. FACTUAL AND PROCEDURAL HISTORY¹

Petitioner is challenging his March 12, 1991 conviction in the Court of Common Pleas for Philadelphia County. Pet. at 1. *See also Commonwealth v. Nellom*, 141 A.3d 586 (Pa. Super. Ct. 2016). He was convicted of rape and sentenced to serve six to twenty years in prison. *Nellom*, 141 A.3d at 586. The Pennsylvania Superior Court affirmed Petitioner's judgment of sentence on October 29, 1992 and the Pennsylvania Supreme Court denied allowance of appeal on August 25, 1993. *Id.*

¹ The facts set forth in this background and procedural history were gleaned from Petitioner's original habeas corpus petition ("Pet."), Commonwealth's Response thereto ("Resp."), and the Superior Court of Pennsylvania's decision in *Commonwealth v. Nellom*, 141 A.3d 586 (Pa. Super. Ct. 2016).

Subsequently, Petitioner filed several unsuccessful state court challenges to his rape conviction, sentence calculation, and parole revocation. Resp. at 2. Further, between October 2001 and May 2004, Petitioner sought habeas relief *via* two separate petitions for habeas corpus, both of which were denied. *Nellom v. Vaughn*, No. 01-5416; *Nellom v. DiGuglielmo*, No. 04-3399. In January 2009, Petitioner completed the sentence for his rape conviction and was released from prison. *Id.*

II. DISCUSSION

“[A] district court shall entertain an application for a writ of habeas corpus . . . only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a) (2019). Further, the custody requirement demands “that the habeas petitioner be ‘in custody’ under the conviction or sentence under attack at the time his petition is filed.” *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). Petitioner does not seek to challenge his 1991 conviction, but instead seeks to have his 1991 rape conviction removed from his record. Pet. at 6. However, Petitioner had already fully served the sentence imposed for his 1991 rape conviction before filing this habeas petition. Resp. at 2. Hence, he is not “in custody” for that conviction. See *Lackawanna Cty. Dist. Atty. v. Coss*, 532 U.S. 394, 401 (2001) (citing *Maleng*, 490 U.S. at 492).

Further, when “a state conviction is no longer open to . . . attack in its own right because the defendant failed to [successfully] pursue those remedies [but] that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.” *Coss*, 532 U.S. at 403. An exception to this general rule exists when the petitioner is

serving a sentence that was enhanced by an expired sentence, if the expired sentence is challenged on the basis of an alleged violation of the petitioner's right to counsel under the Sixth Amendment. *Id.* at 404 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). Another exception exists when the petitioner cannot be faulted for failing to obtain timely review. *Id.* at 405-06. An example of this exception would be if a state court, "without justification, refuse[s] to rule on a constitutional claim that has been properly presented to it." *Id.* at 405. Similarly, an exception would exist if, "after the time for direct or collateral review has expired, a defendant . . . obtain[s] compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner." *Id.* Petitioner does not advance any of these exceptions; therefore, he is unable to challenge his 1991 conviction on the ground that it may have enhanced the sentence he is presently serving.²

III. CONCLUSION

Petitioner's sole claim is not cognizable. Reasonable jurists would not debate this court's procedural disposition of this claim; therefore, a certificate of appealability should not be issued. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, I make the following:

² Petitioner is currently serving a sentence from Delaware County. Frank Nellom Inmate Details, INMATE/PAROLEE LOCATOR, <http://inmatelocator.cor.pa.gov/#/> (to find Petitioner's search results, fill in Petitioner's first and last name).

RECOMMENDATION

AND NOW, on this 27th day of September, 2019, for the reasons contained in the preceding Report, it is hereby **RECOMMENDED** that Petitioner's claim be **DISMISSED**, without an evidentiary hearing. Petitioner has neither demonstrated that any reasonable jurist could find this court's ruling debatable, nor shown denial of any federal constitutional right. Hence, there is no probable cause to issue a certificate of appealability.

Petitioner may file objections to this Report and Recommendation within fourteen (14) days of being served with a copy of it. *See* Local R. Civ. P. 72.1(IV). Failure to file timely objections may constitute a waiver of any appellate rights.

It be so **ORDERED**.

/s/ Carol Sandra Moore Wells
CAROL SANDRA MOORE WELLS
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANK NELLOM,

v.

COMMONWEALTH OF
PENNSYLVANIA, *et al.*

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CIVIL ACTION

NO. 18-4324

ORDER

AND NOW, this day of , 2019, upon consideration of the
Petition for Writ of Habeas Corpus, the Commonwealth's Response, the other documents filed
by the parties, and after review of the Report and Recommendation of United States Magistrate
Judge Carol Sandra Moore Wells, is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED AND ADOPTED**;
2. The Petition for a Writ of Habeas Corpus is **DISMISSED**, without an evidentiary hearing; and
3. Petitioner has neither shown denial of a federal constitutional right, nor established that reasonable jurists would disagree with this court's procedural disposition of his claims. Consequently, a certificate of appealability is **DENIED**.

IT IS SO ORDERED.

BY THE COURT:

Edward G. Smith, J.

**Additional material
from this filing is
available in the
Clerk's Office.**