No. 17-2464

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS BURNS,)
)
Petitioner-Appellant,)
) ORDER
v.)
)
CONNIE HORTON, Warden,)
)
Respondent-Appellee.)

Douglas Burns, a pro se Michigan prisoner, applies for a certificate of appealability (COA) in his appeal from a district court judgment denying his 28 U.S.C. § 2254 habeas corpus petition. *See* Fed. R. App. P. 22(b). He moves to proceed in forma pauperis on appeal.

A Michigan jury convicted Burns of two counts of assault with intent to commit murder and two counts of possession of a firearm during the commission of a felony. These convictions stemmed from an incident in which Burns shot at two police officers. The trial court sentenced him to concurrent terms of seventeen to thirty years on the assault counts, which ran consecutively to concurrent terms of two years on the firearm counts. The Michigan Court of Appeals affirmed his convictions. *People v. Burns*, No. 305037, 2012 WL 4093758, at *1 (Mich. Ct. App. Sept. 18, 2012), *leave to appeal denied*, 826 N.W.2d 719 (Mich. 2013) (mem.).

In 2014, Burns filed this § 2254 petition, arguing, among other things, that he was denied the right to present a defense because the trial court prevented him from presenting evidence regarding his mental illness. The district court held the habeas petition in abeyance because Burns's petition contained other unexhausted claims. Burns responded by expressly abandoning his unexhausted claims. Accordingly, the district court reinstated the case and reviewed only

Burns's right-to-present-a-defense claim. It ultimately rejected the claim on the merits, denied the petition with prejudice, and declined to issue a COA.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the denial of relief is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

At trial, Burns attempted to present evidence of his mental illness as character evidence under Michigan Rule of Evidence 404(a)(1) to show that his crimes "occurred because of his mental condition." *Burns*, 2012 WL 4093758, at *2. In reviewing the trial court's prohibition of this evidence, the Michigan Court of Appeals noted that Burns "was determined to be legally sane," and thus his mental illness evidence could be used only to present a diminished capacity defense, i.e., that "his mental illness prevented him from forming the specific intent to kill" that was necessary to sustain his assault convictions. *Id.* The Michigan Court of Appeals determined that Burns's constitutional right to present a defense was not violated because Michigan does not recognize a diminished capacity defense short of legal insanity for the purpose of negating specific intent. *Id.* The district court concluded that this determination was not an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

While "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)), "[t]he accused does not have an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence," *Taylor v. Illinois*, 484 U.S. 400, 410 (1988). The federal habeas court does not "determine whether the exclusion of the evidence by the trial judge was correct or incorrect under state law, but rather whether such exclusion rendered petitioner's trial so fundamentally unfair as to constitute a denial of federal constitutional rights." *Lewis v. Wilkinson*, 307 F.3d 413, 420 (6th Cir. 2002) (quoting *Logan v. Marshall*, 680 F.2d 1121, 1123 (6th Cir. 1982)).

Michigan does not recognize a diminished capacity defense, a point that Burns appears to concede. *See People v. Carpenter*, 627 N.W.2d 276, 283 (Mich. 2001). However, he asserts that it is unconstitutional for Michigan to bar such a defense to negate the specific intent element of his crime. But, "the Constitution does not require [a state] to recognize the defense of diminished capacity." *Wong v. Money*, 142 F.3d 313, 324 (6th Cir. 1998); *see Schorling v. Warren*, 458 F. App'x 522, 523 (6th Cir. 2012) ("[T]he right to present a diminished capacity defense has never been recognized by clearly-established federal law."). Therefore, reasonable jurists would not debate the district court's rejection of Burns's right-to-present-a-defense claim.

Accordingly, this court **DENIES** Burns's COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOUGLAS ROY BURNS,

Petitioner,

v.

JEFFREY WOODS,

Respondent.
_____/

Civil No. 2:14-CV-13862
HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

OPINION AND ORDER DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY OR LEAVE TO APPEAL *IN FORMA PAUPERIS*

Douglas Roy Burns, ("petitioner"), confined at the Chippewa Correctional Facility in Kincheloe, Michigan, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his *pro se* application, petitioner challenges his convictions for two counts of assault with intent to commit murder, M.C.L.A. 750.83, and two counts of possession of a firearm during the commission of a felony, M.C.L.A. 750.227b. For the reasons that follow, the petition for a writ of habeas corpus is DENIED.

I. Background

Petitioner was convicted following a jury trial in the Oakland County Circuit Court. Petitioner's conviction arose from an encounter between petitioner and the Pontiac Police Department. This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith,* 581 F.3d 410, 413 (6th Cir. 2009):

> Defendant's convictions arise out his assault of two police officers on May 27, 2010. City of Pontiac Police Sergeant Ryan Terry and Officer Tim Morton

> responded to defendant's home because of a dispute between defendant and his neighbors. Defendant was irate and yelled at the officers to get off of his property. Terry and Morton returned to defendant's home later that day because of threats that defendant had made to the mayor of Pontiac over the telephone. As the officers talked to defendant's wife at the front door, they could hear defendant yelling in the background. When defendant came to the front door, he was wearing only a bathrobe with large front pockets, and Terry saw defendant place a small handgun into one of the pockets. Terry yelled "gun, gun, gun" to alert Morton that defendant had a gun, and the officers unsuccessfully attempted to subdue defendant. After a brief struggle, defendant fired two shots at the officers, prompting Morton to fire one shot at defendant, which missed and struck a piano. Defendant then fired a third shot at the officers, who sustained nonlife-threatening injuries. Defendant was eventually subdued and apprehended after additional police officers arrived and sprayed tear gas into defendant's home.

People v. Burns, No. 305037, 2012 WL 4093758, at *1 (Mich. Ct. App. Sept. 18, 2012).

Petitioner's conviction was affirmed on direct appeal. *Id.*, *lv. den.* 493 Mich. 941, 826 N.W.2d 719 (2013).

Petitioner filed a petition for a writ of habeas corpus on October 1, 2014, [Doc. # 1], in which he sought habeas relief on the following grounds:[1]

I. Denial of right to present a defense.

II. Ineffective assistance of trial counsel.

III. The trial court inappropriately ignored petitioner's request for substitute counsel.

Respondent filed an answer on May 8, 2015, [Doc. # 11]. As part of their answer, respondent alleged that petitioner's second and third claims were defaulted because petitioner abandoned the claims by not properly raising them in his Standard 4 brief on his appeal of right.

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[1] Under the prison mailbox rule, this Court assumes that petitioner filed his habeas petition on October 1, 2014, the date that it was signed and dated. *See See Towns v. U.S.*, 190 F.3d 468, 469 (6th Cir. 1999).

On January 20, 2017, this Court held the petition in abeyance, staying the proceedings to permit petitioner to return to the state courts to exhaust his second and third claims. [Doc. # 14].

In a letter request, dated May 31, 2017, [Doc. # 15], petitioner requested that the petition be reopened and that "this matter be adjudicated on the sole exhausted issue, to wit, Issue # 1: Denial of right to present a defense." Petitioner further informed this Court that he intended to "forfeit and abandon the other two Issues, the non-exhausted ones, to wit II: Ineffective assistance of trial counsel, and III: The trial court inappropriately ignored petitioner's request for substitute counsel."

On June 9, 2017, this Court reopened the case. The Court amends the petition to delete Issue 2 and Issue 3.

Petitioner seeks a writ of habeas corpus on the following ground:

> The trial judges (sic) ruling prevented the petitioner from presenting evidence of his mental illness is contrary to the ruling in *Rompilla v. Beard*, and resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *Bell v. Cone*, 535 U.S. 685 (2002); *Lockyer v. Andrade*, 538 U.S. ___ (2003).

II. Standard of Review

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

> States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

The Supreme Court has explained that "[A] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,'and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010)((quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002)(*per curiam*)). "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011)(citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Therefore, in order to obtain habeas relief in federal court, a state prisoner is required to show that the state

court's rejection of his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington,* 562 U.S. at 103. A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

III. Discussion

Petitioner claims that he was denied his right to present a defense when the trial court prevented him from presenting evidence of his mental illness. Petitioner argues that evidence of his bipolar condition should have been allowed pursuant to M.R.E. 404(a)(1) as evidence of his character for purposes of proving that his actions were in conformity with a character trait.

The Michigan Court of Appeals rejected petitioner's claim, finding that petitioner was attempting to admit this evidence in a backhanded attempt to raise a diminished capacity defense by trying to establish that his mental illness negated his specific intent to commit the crimes. The Michigan Court of Appeals indicated that petitioner was not entitled to present such evidence, because diminished capacity or any mental illness short of legal insanity is no longer a defense in Michigan to a crime. *People v. Burns*, 2012 WL 4093758, at *1–2.

State courts are the "ultimate expositors of state law." *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). What is essential to establish the elements of a crime is a matter of state law. *See Sanford v. Yukins,* 288 F.3d 855, 862 (6th Cir. 2002). Likewise, "[D]ue process does not require that a defendant be permitted to present any defense he chooses. Rather, states are allowed to define the elements of, and defenses to, state crimes." *See*

Lakin v. Stine, 80 F.App'x 368, 373 (6th Cir. 2003)(citing *Apprendi v. New Jersey*, 530 U.S. 466, 484-87 (2000); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-86, (1986)). The circumstances under which a criminal defense may be asserted is thus a question of state law. *Id.* Under Michigan law, petitioner would not be entitled to invoke the doctrine of diminished capacity or any other mental illness defense, other than insanity, to negate the specific intent pertaining to assault with intent to commit murder.

In 1994, the Michigan legislature enacted Mich. Comp. Laws § 768.21a, which set forth the legal standards for an insanity defense in Michigan. The Michigan Supreme Court has subsequently held that this statute abolished the diminished capacity defense in Michigan, and that the insanity defense, as established by the Michigan Legislature in § 768.21a, is the sole standard for determining criminal responsibility as it relates to mental illness or retardation. *See People v. Carpenter,* 627 N.W.2d 276, 283-85 (Mich. 2001); *see also Wallace v. Smith,* 58 F.App'x 89, 94, n. 6. (6th Cir. 2003).

In *Wong v. Money,* 142 F.3d 313, 323-26 (6th Cir. 1998), the Sixth Circuit rejected the habeas petitioner's claim that her rights under the Sixth and Fourteenth Amendments had been violated when the state trial court prevented petitioner from presenting expert psychiatric testimony on the issue of diminished capacity, in light of the fact that the State of Ohio did not recognize the defense of diminished capacity.

In the present case, in light of the fact that the defense of diminished capacity is not a defense in Michigan, and insanity is the only recognized mental illness defense, petitioner cannot establish that his Sixth or Fourteenth Amendment rights were violated by the trial court precluding him from raising a defense pertaining to his bipolar condition, short of insanity. Petitioner is not entitled to relief on his claim that the trial court erred by

preventing him from bringing a defense based on his bi-polar condition.

IV. Conclusion

The Court will deny the petition for a writ of habeas corpus with prejudice. The Court will also deny a certificate of appealability to petitioner. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254; *see also Strayhorn v. Booker,* 718 F. Supp. 2d at 875.

For the reasons stated in this opinion, the Court will deny petitioner a certificate of appealability because he has failed to make a substantial showing of the denial of a federal constitutional right. *See Allen v. Stovall,* 156 F. Supp. 2d 791, 798 (E.D. Mich. 2001). The Court will also deny petitioner leave to appeal *in forma pauperis*, because the appeal would be frivolous. *Id.*

V. ORDER

Based upon the foregoing, IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED That a certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED that Petitioner will be **DENIED** leave to appeal *in forma*

pauperis.

s/ Nancy G. Edmunds
HON. NANCY G. EDMUNDS
UNITED STATES DISTRICT COURT

Dated: 10/31/17

CERTIFICATE OF SERVICE

I hereby certify that a copy of this order was mailed/served upon counsel and/or parties of record on this 31st day of October, 2017 by regular U.S. Mail and/or CM/ECF

s/ Carol J. Bethel
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOUGLAS BURNS,

Petitioner,

v.

JEFFREY WOODS,

Respondent.
_____/

Civil No. 2:14-CV-13862
HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

OPINION AND ORDER RE-OPENING THE PETITION FOR A WRIT OF HABEAS CORPUS TO THE COURT'S ACTIVE DOCKET AND GRANTING THE MOTION TO AMEND THE PETITION FOR A WRIT OF HABEAS CORPUS

Douglas Burns, ("Petitioner"), confined at the Chippewa Correctional Facility in Kincheloe, Michigan, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he challenges his convictions for two counts of assault with intent to commit murder, M.C.L.A. § 750.83, and two counts of possession of a firearm during the commission of a felony, M.C.L.A. § 750.227b.

As part of their answer [Dkt. # 11], respondent alleges that petitioner's second and third claims are defaulted because petitioner abandoned the claims by not properly raising them in his Standard 4 brief on his appeal of right.

On January 20, 2017 [Dkt. # 14], this Court entered an opinion and

order granting petitioner's motion to hold his habeas petition in abeyance to allow petitioner to return to the state courts to exhaust his additional claims that he had failed to exhaust in his state court remedies prior to filing his habeas petition. The Court also administratively closed the case.

On June 5, 2017 [Dkt. # 15], petitioner filed a motion to lift the stay, in which he essentially asks the Court to permit him to file an amended habeas petition that deletes his unexhausted claims and to re-open the petition to the Court's active docket. For the reasons stated below, petitioner's request to re-open the habeas petition is granted. The Court orders the Clerk of the Court to reactive this case to the Court's active docket. The Court will further grant petitioner's motion to amend his habeas petition to delete the unexhausted claims.

A district court must allow a habeas petitioner to delete the unexhausted claims from his or her petition, especially in circumstances in which dismissal of the entire petition without prejudice would "unreasonably impair the petitioner's right to obtain federal relief." *Rhines v. Weber,* 544 U.S. 269, 278 (2005); *see also Banks v. Jackson,* 149 F.Appx 414, 421 (6th Cir. 2005). The Court will grant petitioner's motion to reinstate the case and to amend the petition to delete the unexhausted claims from his original petition.

ORDER

Based on the foregoing, the motion to re-open the habeas petition to the Court's active docket is **GRANTED.**

IT IS FURTHER ORDERED that the Clerk of the Court reopen this case to the Court's active docket.

IT IS FURTHER ORDERED that the motion to amend the petition for a writ of habeas corpus is **GRANTED.**

IT IS SO ORDERED.

s/ Nancy G. Edmunds
HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

DATED: June 9, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOUGLAS BURNS,

Petitioner,

v.

JEFFREY WOODS,

Respondent.
_____/

Civil No. 2:14-CV-13862
HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

OPINION AND ORDER HOLDING IN ABEYANCE THE PETITION FOR A WRIT OF HABEAS CORPUS AND ADMINISTRATIVELY CLOSING THE CASE.

Douglas Burns, ("Petitioner"), confined at the Chippewa Correctional Facility in Kincheloe, Michigan, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his *pro se* application, petitioner challenges his convictions for two counts of assault with intent to commit murder, M.C.L.A. 750.83, and two counts of possession of a firearm during the commission of a felony, M.C.L.A. 750.227b.

As part of their answer, respondent alleges that petitioner's second and third claims are defaulted because petitioner abandoned the claims by not properly raising them in his Standard 4 brief on his appeal of right. Petitioner claims that the default should be excused because appellate counsel was ineffective for not raising these claims in his appeal brief, forcing petitioner to raise these claims in his own *pro se* Standard 4 brief. [1] Petitioner's ineffective assistance of appellate counsel claim has yet to be exhausted with the state courts and thus cannot be used either to excuse this default or as an independent claim for

[1]Standard 4 of Administrative Order 2004-6, 471 Mich. cii (2004), "explicitly provides that a *pro se* brief may be filed within 84 days of the filing of the brief by the appellant's counsel, and may be filed with accompanying motions." *Ware v. Harry*, 636 F. Supp. 2d 574, 594, n. 6 (E.D. Mich. 2008).

relief.

In *lieu* of dismissing the petition for a writ of habeas corpus, the Court will hold the petition in abeyance and will stay the proceedings under the terms outlined below in the opinion to permit petitioner to return to the state courts to exhaust his ineffective assistance of appellate counsel claim. The Court will also administratively close the case.

I. Discussion

Petitioner was convicted of the above offenses following a jury trial in the Oakland County Circuit Court. Petitioner's conviction was affirmed on appeal. *People v. Burns,* No. 305037, 2012 WL 4093758 *1 (Mich. Ct. App. Sept. 18, 2012), *lv. den.* 493 Mich. 941, 826 N.W.2d 719 (Mich. 2013).

Petitioner filed his petition for a writ of habeas corpus on October 1, 2014, in which he sought habeas relief on the following grounds:[2]

I. Denial of right to present a defense.

II. Ineffective assistance of trial counsel.

III. The trial court inappropriately ignored petitioner's request for substitute counsel.

Respondent argues that petitioner's second and third claims are defaulted because petitioner abandoned the claims by not properly raising them in his Standard 4 brief on his appeal of right. Petitioner argues that the default should be excused because appellate counsel was ineffective for not raising these claims in his appeal brief, forcing petitioner to raise these claims *pro se* in an inadequate manner in his own Standard 4 brief.

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[2] Under the prison mailbox rule, this Court assumes that petitioner filed his habeas petition on October 1, 2014, the date that it was signed and dated. *See See Towns v. U.S.,* 190 F.3d 468, 469 (6th Cir. 1999).

Ineffective assistance of counsel may establish cause for a procedural default. *See Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). However, for ineffective assistance of counsel to constitute cause to excuse a procedural default, that claim itself must be exhausted in the state courts. *Id.*

A review of petitioner's briefs on appeal to the Michigan Court of Appeals and the Michigan Supreme Court shows that petitioner never raised an ineffective assistance of appellate counsel claim on his direct appeal. Petitioner's claim of ineffective assistance of appellate counsel is subject to the exhaustion requirement. *See Baldwin v. Reese,* 541 U.S. 27, 30-33 (2004). To the extent that petitioner is attempting to argue ineffective assistance of appellate counsel either to excuse the default or as an independent claim, he must first exhaust his claim in the state courts.

The Court's only concern in dismissing the current petition on exhaustion grounds involves the possibility that petitioner might be prevented under the one year statute of limitations contained within 28 U.S.C. § 2244(d)(1) from re-filing a petition for a writ of habeas corpus following the exhaustion of his claim in the state courts.

The U.S. Supreme Court has suggested that a habeas petitioner who is concerned about the possible effects of his state post-conviction filings on the AEDPA's statute of limitations could file a "protective" petition in federal court and then ask for the petition to be held in abeyance pending the exhaustion of state post-conviction remedies. *See Pace v. DiGuglielmo,* 544 U.S. 408, 416 (2005)(citing *Rhines v. Weber,* 544 U.S. 269 (2005)). A federal court may stay a federal habeas petition and hold further proceedings in abeyance pending resolution of state court post-conviction proceedings, provided there is good cause for failure to exhaust claims and that the unexhausted claims are not "plainly

meritless." *Rhines,* 544 U.S. at 278.[3]

In the present case, petitioner's ineffective assistance of appellate counsel claim does not appear to be "plainly meritless." Petitioner also has good cause for failing to raise his ineffective assistance of appellate counsel claim earlier because state post-conviction review would be the first opportunity that he had to raise this claim in the Michigan courts. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010).

A federal district court is authorized to stay fully exhausted federal habeas petitions pending the exhaustion of other claims in the state courts. *See Nowaczyk v. Warden, New Hampshire State Prison,* 299 F.3d 69, 77-79 (1st Cir. 2002)(holding that district courts should "take seriously any request for a stay."); *Anthony v. Cambra*, 236 F.3d 568, 575 (9th Cir. 2000); *see also Bowling v. Haeberline,* 246 F.App'x. 303, 306 (6th Cir. 2007)(a habeas court is entitled to delay a decision in a habeas petition that contains only exhausted claims "when considerations of comity and judicial economy would be served")(quoting *Nowaczyk*, 299 F.3d at 83); see also *Thomas v. Stoddard,* 89 F. Supp. 3d 937, 943 (E.D. Mich. 2015). Although there is no bright-line rule that a district court can never dismiss a fully-exhausted habeas petition because of the pendency of unexhausted claims in state court, in order for a federal court to justify departing from the "heavy obligation to exercise jurisdiction," there must be some compelling reason to prefer a dismissal over a stay. *Nowaczyk*, 299 F.3d at 82 (internal quotation omitted); *see also Bowling,* 246 F.App'x. at 306 (district court erred in dismissing petition containing only exhausted claims, as opposed to exercising its

[3]This Court has the discretion to stay the petition and hold it in abeyance even though petitioner did not specifically request this Court to do so. *See e.g. Banks v. Jackson,* 149 F.App'x. 414, 422, n. 7 (6th Cir. 2005).

jurisdiction over petition, merely because petitioner had independent proceeding pending in state court involving other claims).

However, even where a district court determines that a stay is appropriate pending exhaustion, the district court "should place reasonable time limits on a petitioner's trip to state court and back." *Rhines v. Weber*, 544 U.S. at 278. To ensure that there are no delays by petitioner in exhausting state court remedies, this Court imposes time limits within which petitioner must proceed with his state court post-conviction proceedings. *See Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002).

The Court holds the petition in abeyance to allow petitioner to initiate post-conviction proceedings in the state courts. This tolling is conditioned upon petitioner initiating his state post-conviction remedies within ninety days of receiving this Court's order and returning to federal court within ninety days of completing the exhaustion of state court post-conviction remedies. *See Geeter v. Bouchard,* 293 F. Supp. 2d 773, 775 (E.D. Mich. 2003).

Petitioner's method of properly exhausting his claim in the state courts would be through filing a motion for relief from judgment with the Oakland County Circuit Court under M.C.R. 6.502. *See Wagner v. Smith,* 581 F.3d 410, 419 (6th Cir. 2009); *see also Mikko v. Davis,* 342 F. Supp. 2d 643, 646 (E.D. Mich. 2004). A trial court is authorized to appoint counsel for petitioner, seek a response from the prosecutor, expand the record, permit oral argument, and hold an evidentiary hearing. M.C.R. 6.505-6.507, 6.508 (B) and (C). Denial of a motion for relief from judgment is reviewable by the Michigan Court of Appeals and the Michigan Supreme Court upon the filing of an application for leave to appeal. M.C.R. 6.509; M.C.R. 7.203; M.C.R. 7.302. *Nasr v. Stegall,* 978 F. Supp. 714, 717 (E.D. Mich. 1997). Petitioner is required to appeal the denial of his post-conviction motion to the Michigan

Court of Appeals and the Michigan Supreme Court in order to properly exhaust the claims that he would raise in his post-conviction motion. *See e.g. Mohn v. Bock,* 208 F. Supp. 2d 796, 800 (E.D. Mich. 2002).

III. ORDER

IT IS HEREBY ORDERED that the proceedings are **STAYED** and the Court will hold the habeas petition in abeyance. Petitioner must file a motion for relief from judgment in state court within ninety days of receipt of this order. He shall notify this Court in writing that such motion papers have been filed in state court. If he fails to file a motion or notify the Court that he has done so, the Court will lift the stay and will reinstate the original petition for a writ of habeas corpus to the Court's active docket and will proceed to adjudicate only those claims that were raised in the original petition. After petitioner fully exhausts his new claims, he shall file an amended petition that includes the new claims within ninety days after the conclusion of his state court post-conviction proceedings, along with a motion to lift the stay. Failure to do so will result in the Court lifting the stay and adjudicating the merits of the claims raised in petitioner's original habeas petition.

To avoid administrative difficulties, the Court **ORDERS** the Clerk of Court to **CLOSE** this case for statistical purposes only. Nothing in this order or in the related docket entry shall be considered a dismissal or disposition of this matter. *See Thomas,* 89 F. Supp. 3d at 943-944.

It is further **ORDERED** that upon receipt of a motion to reinstate the habeas petition following exhaustion of state remedies, the Court may order the Clerk to reopen this case for statistical purposes.

s/ Nancy G. Edmunds
HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

DATED: January 20, 2017

CERTIFICATION

I hereby certify that a copy of this order was served upon the parties/counsel of record on this 20th day of January, 2017 by regular mail and/or CM/ECF.

s/ Carol J. Bethel
Case Manager

Date: 1/20/17

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