

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30221

ERIC GROS,

Petitioner-Appellant

v.

JASON KENT, WARDEN, DIXON CORRECTIONAL INSTITUTE,

Respondent-Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana

ORDER:

Eric Gros, Louisiana prisoner # 442257, moves for a certificate of appealability (COA) from the dismissal without prejudice of his 28 U.S.C. § 2254 petition. Gros is serving a 15-year sentence for forcible rape. Gros's petition was deemed a mixed petition because it contained an unexhausted claim of ineffective assistance of counsel. Gros does not show that reasonable jurists would debate the district court's procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His motion for a COA is DENIED. *See* 28 U.S.C. § 2253(c)(2). His motion to proceed in forma pauperis on appeal is also DENIED.



A True Copy
Certified order issued Oct 03, 2018

Stacy W. Cayer
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ Priscilla R. Owen
PRISCILLA R. OWEN
UNITED STATES CIRCUIT JUDGE

ERIC GROS VERSUS JASON KENT, WARDEN
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
2018 U.S. Dist. LEXIS 11881
CIVIL ACTION NO. 16-8727 SECTION "G"(1)

January 25, 2018, Decided

January 25, 2018, Filed

Editorial Information: Prior History

Gros v. Kent, 2017 U.S. Dist. LEXIS 119318 (E.D. La., July 28, 2017)

Counsel Eric Gros, Plaintiff, Pro se, Jackson, LA.

Judges: NANNETTE JOLIVETTE BROWN, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: NANNETTE JOLIVETTE BROWN

Opinion

ORDER

Before the Court is Petitioner Eric Gros's ("Petitioner") "Petition for Rehearing,"¹ wherein he requests relief from the Court's July 28, 2017 Order and Judgment, dismissing his petition for federal habeas corpus relief without prejudice for failure to exhaust state court remedies.² Having considered the motion, the record, and the applicable law, for the reasons that follow, the Court will deny the motion.

I. Background

On March 17, 2010, Petitioner was indicted by a grand jury in the 29th Judicial District Court, St. Charles Parish on two counts of aggravated rape, one count of aggravated kidnapping, and one count of possession of a firearm by a convicted felon.³ On June 13, 2013, Petitioner pleaded guilty to forcible rape in the 29th Judicial District Court, St. Charles Parish.⁴ The same day, the state trial court sentenced Petitioner to fifteen years imprisonment, which was the sentence the parties had agreed to in the plea agreement.⁵

Petitioner subsequently appealed his conviction and sentence, but on appeal Petitioner's counsel filed a brief pursuant to *Anders v. California*, asserting that he had thoroughly reviewed the record and found no non-frivolous issues to raise on appeal.⁶ On March 26, 2014, the Louisiana Fifth Circuit Court of Appeal affirmed Petitioner's conviction and remanded the case to the trial court for the correction of a patent error regarding Petitioner's sentence.⁷ Specifically, the Louisiana Fifth Circuit found that the trial court had failed to impose any statutory restrictions on Petitioner's sentence in accordance with Louisiana Revised Statute 14:42.1, which provides that "[a]t least two years of the sentence imposed shall be without benefit of probation, parole, or

suspension of sentence."⁸ Petitioner did not seek review of that judgment by the Louisiana Supreme Court.

On March 5, 2015, Petitioner filed an application for post-conviction relief with the state trial court.⁹ In the post-conviction relief application, Petitioner argued that his Fourteenth Amendment right to due process was violated when the state trial court allowed a third party to request that the judge recuse herself, which Petitioner argued caused him to lose a previously agreed upon plea bargain.¹⁰ The trial court denied the post-conviction relief application on April 17, 2015.¹¹ On May 27, 2015, the Louisiana Fifth Circuit denied Petitioner's related writ application, finding that "[i]t is well settled under both state and federal jurisprudence that an unqualified plea of guilty waives all non-jurisdictional defects occurring prior thereto."¹² On May 20, 2016, the Louisiana Supreme Court denied Petitioner's related writ application.¹³

On June 1, 2016, Petitioner filed a petition for writ of habeas corpus in this Court, arguing that he received ineffective assistance of counsel when his trial counsel advised him to enter a guilty plea because his attorney promised him that he would receive a sentence of eight years imprisonment.¹⁴ The State filed an opposition, arguing, *inter alia*, that Petitioner failed to exhaust his state court remedies.¹⁵

On November 4, 2016, the Magistrate Judge assigned to the case issued a Report and Recommendation, recommending that the Court dismiss the petition without prejudice for failure to exhaust state court remedies.¹⁶ On November 18, 2016, Petitioner filed an objection to the Report and Recommendation, titled "Memorandum in Support of Amended 2254 Petition and Objection to Report and Recommendation of Magistrate."¹⁷ On July 28, 2017, this Court overruled Petitioner's objection, adopted the Report and Recommendation, and dismissed the petition without prejudice.¹⁸

On August 7, 2017, Petitioner filed the instant motion for reconsideration.¹⁹ The State did not file a response to Petitioner's motion.

II. Parties' Arguments

A. Petitioner's Arguments in Support of Motion for Reconsideration

Petitioner argues that the Court erred in dismissing the petition without prejudice for failure to exhaust state court remedies.²⁰ Petitioner asserts that his objection to the Report and Recommendation was also an amendment to the petition, in which he withdrew his unexhausted ineffective assistance of counsel claim.²¹ Therefore, because he no longer wishes to pursue the unexhausted ineffective assistance of counsel claim, he contends that the Court should reconsider his amended petition and consider only the exhausted due process claim.²²

B. State's Opposition

The State of Louisiana did not file a brief in opposition to Petitioner's motion, despite receiving electronic notice of the filing.

III. Legal Standard

The Fifth Circuit has noted that while the Federal Rules "do not recognize a 'motion for reconsideration' *in haec verba*," it has consistently recognized that such a motion may challenge a judgment under Federal Rules of Civil Procedure 59(e) or 60(b), depending on the time of the filing.²³ If such a motion is filed within 28 days after entry of the judgment from which relief is being sought, the motion will be treated as a motion to reconsider under Rule 59(e).²⁴ Here,

Petitioner's motion was brought within 28 days after entry of the August 15, 2017 Judgment.²⁵ Accordingly, the Court considers the motion under Federal Rule of Civil Procedure 59(e).

"A Rule 59(e) motion is a motion that calls into question the correctness of a judgment."²⁶ District courts have "considerable discretion in deciding whether to reopen a case under Rule 59(e)."²⁷ In exercising this discretion, courts must carefully balance the interests of justice with the need for finality.²⁸ This Court generally consider four factors in deciding motions for reconsideration under the Rule 59(e) standard:

- (1) the motion is necessary to correct a manifest error of law or fact upon which the judgment is based;
- (2) the movant presents newly discovered or previously unavailable evidence;
- (3) the motion is necessary in order to prevent manifest injustice; or
- (4) the motion is justified by an intervening change in controlling law.²⁹

A motion for reconsideration "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment."³⁰ Instead, such motions "serve the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence."³¹

Rule 59(e) has been used to reopen a judgment in a habeas corpus proceeding.³² However, in the habeas context a court must evaluate the motion carefully to determine whether it actually is a successive habeas corpus application governed by the special procedures of 28 U.S.C. 2244 rather than a Rule 59(e) motion. As explained by the Supreme Court in *Gonzalez v. Crosby*, the difference lies in the relief the petitioner is seeking.³³ Relief from the federal habeas judgment should be based on arguments relating to the conduct of the federal action, whereas relief premised on arguments relating to flaws in the underlying state-law conviction falls under 28 U.S.C. 2244.³⁴

IV. Analysis

In the instant motion, Petitioner has not presented any newly discovered or previously unavailable evidence. Petitioner appears to argue that a manifest error of law or fact warrants reconsideration because the Court dismissed the petition without prejudice for failure to exhaust

state court remedies rather than allowing petitioner to amend his petition and proceed only on his exhausted due process claim.

As the Court stated in its prior Order, exhaustion of all claims is a fundamental prerequisite for federal habeas relief.³⁵ The Supreme Court has held that a federal habeas corpus petition should typically be dismissed without prejudice if the petitioner has failed to exhaust all available state remedies.³⁶ However, dismissal without prejudice of a "mixed petition," which raises both exhausted and unexhausted claims, may result in a subsequent petition being barred by the oneyear statute of limitations set forth in 28 U.S.C. 2244(d).³⁷ Because of this dilemma, federal courts are authorized to stay a habeas petition and hold it in abeyance while a petitioner exhausts claims in state court.³⁸ The United States Supreme Court has noted that a "stay and abeyance should be available only in limited circumstances."³⁹ A district court should stay federal habeas proceedings to allow a petitioner to exhaust state remedies only when the district court finds: "(1) the petitioner has good cause for failure to exhaust his claim, (2) the claim is not plainly meritless, and (3) the petitioner has not engaged in intentional delay."⁴⁰ In cases where the district court finds that a stay is not warranted, the United States Supreme Court has suggested that district courts "should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain habeas relief."⁴¹

In the July 28, 2017 Order, the Court determined that Petitioner was not entitled to a stay because he failed to demonstrate good cause to excuse his failure to exhaust.⁴² Moreover, the Court found that habeas relief on Petitioner's exhausted claim would not be warranted because Petitioner entered an unconditional guilty plea thereby waiving his exhausted due process claim.⁴³ In the instant motion, Petitioner argues that the Court erred in dismissing his claims without prejudice rather than allowing him to amend his petition to proceed only on the exhausted due process claim. However, because Petitioner would not be entitled to relief on his exhausted claim, allowing Petitioner to proceed only on the exhausted claim would have resulted in a dismissal of that claim with prejudice. Therefore, as the Court determined in its prior Order, allowing Petitioner to delete the unexhausted claim and proceed on the exhausted claim is not warranted here because Petitioner would not prevail on the exhausted claim, and therefore, dismissal of the entire petition would not unreasonably impair Petitioner's right to obtain habeas relief.⁴⁴

As stated supra, the Court has considerable discretion when determining if arguments presented in a motion for reconsideration merit reversing the Court's prior decision.⁴⁵ Petitioner has not identified any evidence that merits reconsideration, nor presented any argument that reconsideration is necessary to prevent a manifest injustice or correct a manifest error of fact or law. Additionally, no independent reason exists to warrant reconsideration of Petitioner's claims. Therefore, Petitioner has not established entitlement to relief from the Court's July 28, 2017 Order and Judgment dismissing his claims without prejudice.

V. Conclusion

For the reasons stated above, the Court concludes that Petitioner has not established entitlement to relief from the Court's July 28, 2017 Order and Judgment dismissing his claims without prejudice. Accordingly,

IT IS HEREBY ORDERED that Petitioner's "Petition for Rehearing"⁴⁶ is DENIED.

NEW ORLEANS, LOUISIANA, this 25th day of January, 2018.

/s/ Nannette Jolivette Brown

NANNETTE JOLIVETTE BROWN

UNITED STATES DISTRICT JUDGE

ERIC GROS VERSUS JASON KENT, WARDEN
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
2017 U.S. Dist. LEXIS 119318
CIVIL ACTION NO. 16-8727 SECTION "G"(1)

July 28, 2017, Decided

July 28, 2017, Filed

Editorial Information: Subsequent History

Rehearing denied by Gros v. Kent, 2018 U.S. Dist. LEXIS 11881 (E.D. La., Jan. 25, 2018)

Editorial Information: Prior History

Gros v. Kent, 2016 U.S. Dist. LEXIS 188745 (E.D. La., Nov. 4, 2016)

Counsel Eric Gros, Plaintiff, Pro se, Jackson, LA.
For Attorney General State of Louisiana, Respondent: Terri Russo Lacy, LEAD
ATTORNEY, Office of Attorney General State of Louisiana, Baton Rouge, LA.

Judges: NANNETTE JOLIVETTE BROWN, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: NANNETTE JOLIVETTE BROWN

Opinion

ORDER

Before the Court are Petitioner Eric Gros's ("Petitioner") objections to the Report and Recommendation of the United States Magistrate Judge assigned to the case.¹ Petitioner, a state prisoner incarcerated at the Dixon Correctional Institute in Jackson, Louisiana, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. 2254.² On November 4, 2016, the Magistrate Judge recommended that the Court dismiss the petition without prejudice for failure to exhaust state court remedies.³ Petitioner objects to the Magistrate Judge's recommendation.⁴ After reviewing the petition, the Magistrate Judge's Report and Recommendation, Petitioner's objections, the record, and the applicable law, the Court will overrule Petitioner's objections, adopt the Magistrate Judge's Report and Recommendation, and dismiss the petition without prejudice.

I. Background

A. Factual Background

On March 17, 2010, Petitioner was indicted by a grand jury in the 29th Judicial District Court, St. Charles Parish on two counts of aggravated rape, one count of aggravated kidnapping, and one count of possession of a firearm by a convicted felon.⁵ Petitioner's case was originally allotted to Division "E" of the 29th Judicial District Court, the Honorable Michele Morel presiding.⁶ On February 14, 2013, the St. Charles Parish District Attorney's Office filed a motion

to recuse itself from the case due to a potential conflict of interest, and requested that the Louisiana Department of Justice, Office of the Attorney General be appointed to handle the case.⁷ The motion to recuse the St. Charles Parish District Attorney's Office was granted on February 14, 2013.⁸ On February 15, 2013, a potential witness for the State, Errol Falcon, Jr. ("Falcon") filed a motion requesting that the trial court judge recuse herself from the case because Falcon was also involved in an investigation concerning Harry Morel, the judge's father.⁹ The trial court denied Falcon's motion on February 19, 2013, reasoning that Falcon did not have standing to bring a motion to recuse.¹⁰ On February 19, 2013, the State filed a motion requesting that the trial court judge recuse herself from the case.¹¹ The State also argued that the judge should recuse herself because Falcon was involved in an investigation concerning Harry Morel.¹² On February 20, 2013, the trial court granted the State's motion and recused herself from Petitioner's case.¹³

Following Judge Morel's recusal, Petitioner's case was ultimately re-allotted to Division "C" of the 29th Judicial District Court, the Honorable Emile R. St. Pierre presiding.¹⁴ On June 13, 2013, Petitioner pleaded guilty to forcible rape in the 29th Judicial District Court, St. Charles Parish.¹⁵ The same day, the state trial court sentenced Petitioner to fifteen years imprisonment, which was the sentence the parties had agreed to in the plea agreement.¹⁶

Petitioner subsequently appealed his conviction and sentence, but on appeal Petitioner's counsel filed a brief pursuant to *Anders v. California*, asserting that he had thoroughly reviewed the record and found no non-frivolous issues to raise on appeal.¹⁷ On March 26, 2014, the Louisiana Fifth Circuit Court of Appeal affirmed Petitioner's conviction and remanded the case to the trial court for the correction of a patent error regarding Petitioner's sentence.¹⁸ Specifically, the Louisiana Fifth Circuit found that the trial court had failed to impose any statutory restrictions on Petitioner's sentence in accordance with Louisiana Revised Statute 14:42.1, which provides that "[a]t least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence."¹⁹ Petitioner did not seek review of that judgment by the Louisiana Supreme Court.

On March 5, 2015, Petitioner filed an application for post-conviction relief with the state trial court.²⁰ In the post-conviction relief application, Petitioner argued that his Fourteenth Amendment right to due process was violated when the state trial court allowed a third party to request that the judge recuse herself, which Petitioner argued caused him to lose a previously agreed upon plea bargain.²¹ The trial court denied the post-conviction relief application on April 17, 2015.²² On May 27, 2015, the Louisiana Fifth Circuit denied Petitioner's related writ application, finding that "[i]t is well settled under both state and federal jurisprudence that an unqualified plea of guilty waives all non-jurisdictional defects occurring prior thereto."²³ On May 20, 2016, the Louisiana Supreme Court denied Petitioner's related writ application.²⁴

On June 1, 2016, Petitioner filed the instant federal habeas corpus petition, arguing that he received ineffective assistance of counsel when his trial counsel advised him to enter a guilty plea because his attorney promised him that he would receive a sentence of eight years imprisonment.²⁵ The State filed an opposition, arguing that the petition is untimely and that Petitioner failed to exhaust his state court remedies.²⁶

B. Report and Recommendation Findings

On November 4, 2016, the Magistrate Judge issued a Report and Recommendation, recommending that the petition be dismissed without prejudice for failure to exhaust state court remedies.²⁷ The Magistrate Judge rejected the State's argument that Petitioner's federal application is untimely.²⁸ Specifically, the Magistrate Judge found that Petitioner's conviction became final on April 25, 2014, when the deadline to seek review before the Louisiana Supreme Court expired, and so Petitioner would have until April 25, 2015, to file a federal habeas petition unless that deadline was extended through tolling.²⁹ The Magistrate Judge noted that Petitioner filed a post-conviction application with the state trial court on March 4, 2015, and so Petitioner was entitled to statutory tolling from March 4, 2015, until May 20, 2016, the date on which the Louisiana Supreme Court denied relief.³⁰ Therefore, the Magistrate Judge concluded that Petitioner had until July 12, 2016, to file his federal petition, making the June 1, 2016 petition timely.³¹

Next, the Magistrate Judge addressed the State's argument that Petitioner failed to exhaust his remedies in state court.³² The Magistrate Judge reviewed the state court record, noting that Petitioner filed a direct appeal following entry of his guilty plea, but on appeal, Petitioner's counsel filed an *Anders* brief, asserting that he had thoroughly reviewed the trial record and could not find any non-frivolous issues to raise on appeal.³³ Therefore, the Magistrate Judge concluded that no claims were exhausted on direct appellate review.³⁴ The Magistrate Judge noted that on state post-conviction review Petitioner had only raised one claim that his right to due process was violated when a third party was allowed to file a motion to recuse the trial judge.³⁵ The Magistrate Judge found that Petitioner's federal claim, while based on the same underlying event regarding the recusal of the trial judge, was founded on a new legal theory that Petitioner's Sixth Amendment right to effective assistance of counsel was violated.³⁶ Because Petitioner failed to present his ineffective assistance of counsel claim to the state courts, the Magistrate Judge determined that the petition is unexhausted.³⁷

To the extent that Petitioner raises a claim that the trial court violated his due process rights, the Magistrate Judge found that this claim is unavailing.³⁸ Specifically, the Magistrate Judge noted that the Louisiana Fifth Circuit denied relief on this claim because Petitioner had pleaded guilty to the instant offense and "an unqualified plea of guilty waives all non-jurisdictional defects occurring prior thereto, and precludes review thereof by appeal."³⁹ Therefore, because a plea of guilty waives all non-jurisdictional defects preceding entry of the plea, the Magistrate Judge determined that, even if the petition is broadly construed to include the exhausted claim, federal habeas relief would not be warranted.⁴⁰ Accordingly, the Magistrate Judge recommends that the petition be dismissed without prejudice for failure to exhaust state court remedies.⁴¹

II. Objections

A. Petitioner's Objections

Petitioner objects to the Magistrate Judge's Report and Recommendation.⁴² Petitioner argues that his guilty plea "is constitutionally defective because it was not made with full knowledge

and understanding."43 Petitioner asserts that he was told he would receive a sentence of not more than eight years imprisonment if he pled guilty to the forcible rape charge, and his decision to plead guilty was based entirely upon assurances that he would receive such a sentence.44 Additionally, Petitioner argues that his due process rights were violated when a third party, Errol Falcon, filed a motion to have the state trial judge recused, which Petitioner argues ultimately sabotaged his original plea deal.45 Petitioner also contends that the District Attorney, Harry Morel, was biased against Petitioner due to Petitioner rejecting the deal that Morel originally offered.46 According to Petitioner, Errol Falcon had a vested interest in sabotaging Petitioner's plea deal because Falcon was attempting to negotiate a reduced sentence in exchange for testifying against Petitioner.47 Therefore, Petitioner asserts that an evidentiary hearing is necessary to resolve the issue of whether his due process rights were violated.48

B. State's Opposition

The State of Louisiana did not file a brief in opposition to Petitioner's objections, despite receiving electronic notice of the filing.

III. Standard of Review

In accordance with Local Rule 73.2, this case was referred to the Magistrate Judge to provide a Report and Recommendation. A district judge "may accept, reject, or modify the recommended disposition" of a magistrate judge on a dispositive matter.49 A district judge must "determine *de novo* any part of the [Report and Recommendation] that has been properly objected to."50 A district court's review is limited to plain error for parts of the report which are not properly objected to.51

IV. Law and Analysis

Petitioner objects to the Magistrate Judge's Report and Recommendation, arguing that he is entitled to relief on his due process claim.52 However, Petitioner does not object to the Magistrate Judge's determination that his ineffective assistance of counsel claim was not exhausted before the state courts.53 "A fundamental prerequisite for federal habeas relief under 2254 is the exhaustion of all claims in state court prior to requesting federal collateral relief."54 The Fifth Circuit has recognized that "habeas corpus jurisprudence consistently underscores the central importance of comity, of cooperation and of rapport between the parallel systems of state and federal courts."55 "These concerns animate [the court's] strict adherence to the doctrine of exhaustion-i.e., the notion that federal courts will not consider a claim on habeas review if it has not been considered and finally rejected by the state courts."56 Here, Petitioner's ineffective assistance of counsel claim is not exhausted because he did not raise it in the state courts.

A federal habeas corpus petition should typically be dismissed without prejudice if the petitioner has failed to exhaust all available state remedies.57 However, dismissal without prejudice of a "mixed petition," which raises both exhausted and unexhausted claims, may result in a subsequent petition being barred by the one-year statute of limitations set forth in 28 U.S.C. 2244(d).58 Because of this dilemma, federal courts are authorized to stay a habeas petition and

hold it in abeyance while a petitioner exhausts claims in state court.⁵⁹ The United States Supreme Court has noted that a "stay and abeyance should be available only in limited circumstances."⁶⁰ A district court should stay federal habeas proceedings to allow a petitioner to exhaust state remedies only when the district court finds: "(1) the petitioner has good cause for failure to exhaust his claim, (2) the claim is not plainly meritless, and (3) the petitioner has not engaged in intentional delay."⁶¹ In cases where the district court finds that a stay is not warranted, the United States Supreme Court has suggested that district courts "should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain habeas relief."⁶²

As noted above, Petitioner has failed to exhaust his state court remedies on his ineffective assistance of counsel claim. Petitioner also claims that the recusal of the original trial court judge violated his due process rights.⁶³ This claim was raised before the state courts and is exhausted.

Therefore, the petition is a mixed petition raising both exhausted and unexhausted claims.

Accordingly, the Court must either: (1) stay the case to allow Petitioner to return to the state courts to fully exhaust his claims;⁶⁴ (2) allow Petitioner "to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain habeas relief;"⁶⁵ or (3) dismiss the entire petition without prejudice for failure to exhaust.⁶⁶

Petitioner has provided no explanation for his failure to exhaust his ineffective assistance of counsel claim, and so the Court finds that a stay is not warranted because Petitioner has failed to demonstrate good cause to excuse his failure to exhaust.⁶⁷ Moreover, as noted by the Magistrate Judge, habeas relief on Petitioner's exhausted claim would not be warranted because Petitioner entered an unconditional guilty plea thereby waiving his exhausted due process claim.⁶⁸ Therefore, allowing Petitioner to delete the unexhausted claim and proceed on the exhausted claim is not warranted here because dismissal of the entire petition would not unreasonably impair Petitioner's right to obtain habeas relief.⁶⁹ Accordingly, the Court finds that the entire mixed petition must be dismissed without prejudice for Petitioner's failure to exhaust his remedies in the state courts.

V. Conclusion

For the reasons stated above, the Court concludes that the petition must be dismissed without prejudice for Petitioner's failure to exhaust state court remedies. Accordingly,

IT IS HEREBY ORDERED that Petitioner's objections are OVERRULED;
IT IS FURTHER ORDERED that the Court ADOPTS the Magistrate Judge's recommendation and Petitioner Eric Gros's petition for issuance of a writ of habeas corpus, pursuant to 28 U.S.C. 2254 is DISMISSED WITHOUT PREJUDICE because he failed to exhaust his remedies in the state courts.

NEW ORLEANS, LOUISIANA, this 28th day of July, 2017.

/s/Nannette Jolivet Brown

NANNETTE JOLIVETTE BROWN

UNITED STATES DISTRICT JUDGE

ERIC GROS VERSUS JASON KENT, WARDEN
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
2016 U.S. Dist. LEXIS 188745
CIVIL ACTION NO. 16-8727 SECTION: "G"(1)
November 4, 2016, Decided
November 4, 2016, Filed

Editorial Information: Subsequent History

Adopted by, Objection overruled by, Writ of habeas corpus dismissed, Without prejudice Gros v. Kent, 2017 U.S. Dist. LEXIS 119318 (E.D. La., July 28, 2017)

Editorial Information: Prior History

State v. Gros, 138 So. 3d 763, 2014 La. App. LEXIS 822 (La.App. 5 Cir., Mar. 26, 2014)

Counsel Eric Gros, Plaintiff, Pro se, Jackson, LA.
For Attorney General State of Louisiana, Respondent: Terri Russo Lacy, LEAD
ATTORNEY, Office of Attorney General State of Louisiana, Baton Rouge, LA.

Judges: JANIS VAN MEERVELD, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: JANIS VAN MEERVELD

Opinion

REPORT AND RECOMMENDATION

This matter was referred to this United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Upon review of the record, the Court has determined that this matter can be disposed of without an evidentiary hearing. See 28 U.S.C. 2254(e)(2). Therefore, for all of the following reasons, IT IS RECOMMENDED that the petition be DISMISSED WITHOUT PREJUDICE.

Petitioner, Eric Gros, is a state prisoner incarcerated at the Dixon Correctional Institute in Jackson, Louisiana. On June 13, 2013, he pleaded guilty to forcible rape under Louisiana law and was sentenced to a term of fifteen years imprisonment.¹ He thereafter filed motions to reconsider sentence,² and those motions were denied on August 13, 2013.³ On March 26, 2014, the Louisiana Fifth Circuit Court of Appeal affirmed his conviction and remanded the matter for the correction of a patent error concerning his sentence.⁴ He did not seek review of that judgment by the Louisiana Supreme Court.⁵

On March 4, 2015, petitioner filed an application for post-conviction relief with the state district court.⁶ That application was denied on April 17, 2015,⁷ and his related writ applications were likewise denied by the Louisiana Fifth Circuit Court of Appeal on May 27, 2015,⁸ and by the Louisiana Supreme Court on May 20, 2016.⁹

On June 1, 2016, petitioner filed the instant federal application seeking habeas corpus relief.¹⁰ The state has opposed the application.¹¹

Timeliness

The state argues that petitioner's federal application is untimely. For the following reasons, the undersigned finds otherwise.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") generally requires that a petitioner bring his Section 2254 claims within one (1) year of the date on which his underlying criminal judgment becomes "final." 28 U.S.C. 2244(d)(1)(A).¹² On that point, the United States Fifth Circuit Court of Appeals has explained:

The statute of limitations for bringing a federal habeas petition challenging a state conviction begins to run on "the date on which the [state] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). When a habeas petitioner has pursued relief on direct appeal through his state's highest court, his conviction becomes final ninety days after the highest court's judgment is entered, upon the expiration of time for filing an application for writ of certiorari with the United States Supreme Court. Roberts v. Cockrell, 319 F.3d 690, 693 (5th Cir. 2003). However, "[i]f the defendant stops the appeal process before that point," ... "the conviction becomes final when the time for seeking further direct review in the state court expires." Id. at 694; see also Foreman v. Dretke, 383 F.3d 336, 338 (5th Cir. 2004) (Section 2244(d)(1)(A) gives alternative routes for finalizing a conviction: either direct review is completed or the time to pursue direct review expires).

Although federal, not state, law determines when a judgment is final for federal habeas purposes, a necessary part of the finality inquiry is determining whether the petitioner is still able to seek further direct review. See Foreman, 383 F.3d at 338-39. As a result, this court looks to state law in determining how long a prisoner has to file a direct appeal. See Causey v. Cain, 450 F.3d 601, 606 (5th Cir. 2006); Roberts, 319 F.3d at 693. Louisiana Supreme Court Rule X, 5(a) states that an application "to review a judgment of the court of appeal either after an appeal to that court ... or after a denial of an application, shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal." Butler v. Cain, 533 F.3d 314, 317 (5th Cir. 2008).

In the instant case, the Louisiana Fifth Circuit Court of Appeal affirmed petitioner's conviction on March 26, 2014, and it mailed notice of that judgment on that same date.¹³ As a result, petitioner had until April 25, 2014, to seek review of that judgment in the Louisiana Supreme Court. Because he failed to file a writ application with that court by that deadline, his state criminal judgment became final for the purposes of the AEDPA, and his federal limitations period therefore commenced, on April 25, 2014. See Id. at 317-18.¹⁴ The federal limitations period then expired one year later, unless that deadline was extended through tolling.

Regarding the statute of limitations, the AEDPA expressly provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2). Therefore, after three hundred twelve (312) days elapsed, petitioner tolled his federal limitations period by filing a post-conviction application with the state district court on March 4, 2015. Tolling then continued uninterrupted for the duration of the post-conviction proceedings, so long as he sought supervisory review in a timely manner. Grillette v. Warden, Winn Correctional Center, 372 F.3d 765, 769-71 (5th Cir. 2004).

Here, the state does not argue that petitioner's related writ applications were untimely. Accordingly, the undersigned finds that tolling continued until May 20, 2016, the date on which the Louisiana Supreme Court denied relief.¹⁵

When the limitations period then resumed running at that point, petitioner had fifty-three (53) days of the one-year limitations period remaining. Therefore, he had until July 12, 2016, to file his federal application. Because he filed it on June 1, 2016, it was timely.

Exhaustion

The state next argues that petitioner failed to exhaust his remedies in the state courts. The undersigned agrees, although not for the reasons argued by the state.¹⁶

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) (quotation marks omitted). The United States Supreme Court has explained:

The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Under our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution. Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. Rose v. Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982) (citations, footnote, quotation marks, and brackets omitted).

"To exhaust, a petitioner must have fairly presented the substance of his claim to the state courts." Wilder v. Cockrell, 274 F.3d 255, 259 (5th Cir. 2001) (quotation marks omitted). That requirement applies to all levels of review in the state court system, meaning that a petitioner's federal claim must have been fairly presented to "each appropriate state court (including a state supreme court with powers of discretionary review)." Baldwin, 541 U.S. at 29. As noted, petitioner pleaded guilty in the instant case. He thereafter filed an appeal; however, on appeal, his appellate counsel filed an Anders brief, asserting that he had thoroughly reviewed the

trial record and could not find any non-frivolous issues to raise on appeal.¹⁷ The Court of Appeal then informed petitioner that an Anders brief had been filed and further notified him that he could file a supplemental brief if he desired. He did not do so, and he did not seek review of the Court of Appeal's subsequent decision by filing a writ application with the Louisiana Supreme Court. Therefore, no claims were exhausted on direct review.

On post-conviction review, petitioner then asserted only one claim, i.e. that his right to *due process* was violated when a third party was allowed to file a motion to recuse the trial judge, an event which petitioner argues ultimately resulted in him losing the opportunity to enter a more favorable plea bargain before the recused judge. Petitioner pursued that claim, *and only that claim*, through the three levels of the state-court system.

In his federal application, petitioner references that underlying same event; however, he reframes his claim as one proceeding on a different legal theory. Whereas his state post-conviction claim was founded on a purported *due process* violation, his federal claim is presented as a violation of his *Sixth Amendment right to the effective assistance of counsel*. Specifically, he argues that counsel promised him that he would receive a sentence of no more than eight years and that he pleaded guilty based on that misrepresentation. He further argues that counsel was ineffective for "allowing" the third party to file the motion to recuse. Because petitioner has failed to present his ineffective assistance claim to all three levels of the state courts, the claim is unexhausted.¹⁸ Therefore, if the instant petition is construed as asserting only the unexhausted ineffective assistance of counsel claim, then his petition is wholly unexhausted.

However, out of an abundance of caution, the undersigned makes an additional observation. As noted, like his state post-conviction application, petitioner's federal application references his belief that his rights were violated when a third party was allowed to file a motion to recuse the trial judge. Therefore, arguably, petitioner's federal application could be liberally construed to also assert not only his unexhausted ineffective assistance claim but to also incorporate his separate and distinct claim that the trial court's action violated his right to due process. Nevertheless, even under that scenario, petitioner cannot proceed with both his exhausted due process claim and his unexhausted ineffective assistance claim, because it is beyond cavil that "[a] habeas petition containing both exhausted and unexhausted claims is a 'mixed' petition which should be dismissed without prejudice." Alexander v. Johnson, 163 F.3d 906, 908 (5th Cir. 1998); accord Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982) ("[B]ecause a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.").

However, it must be noted that *if* his petition is so construed, petitioner could at least salvage federal review for his exhausted due process claim by withdrawing his unexhausted ineffective assistance claim. See Neslo v. Cain, No. 97-31025, 1998 U.S. App. LEXIS 39812, 1998 WL 546499 (5th Cir. Aug. 10, 1998); Walker v. Vannoy, Civ. Action No. 15-6809, 2016 WL 1705085, at *2 (E.D. La. Apr. 4, 2016); Williams v. Tanner, Civ. Action No. 14-2963, 2015 U.S. Dist. LEXIS 120677, 2015 WL 5307730 (E.D. La. Spt. 10, 2015). Nevertheless, in actuality, he would gain little by proceeding in this fashion - *even if* the District Judge construes petitioner's federal application to also incorporate his exhausted due process claim *and even if* petitioner

moves to amend his federal application to assert *only* that exhausted claim, that claim still would not warrant federal relief for the following reasons.

In denying relief in the post-conviction proceedings, the Louisiana Fifth Circuit Court of Appeal denied the due process claim, holding:

In this application, relator asserted that he, the assistant district attorney, and the district judge had reached agreement to a plea bargain, subject to approval by the assistant district attorney's supervisor at the St. Charles Parish District Attorney's Office. However, both the district judge and the District Attorney's Office were recused before the agreement was approved. The case was then re-allotted to another division and the Louisiana Attorney General's Office was appointed to prosecute the case.

Thereafter, defendant pled guilty to forcible rape, which this Court upheld on appeal. See State v. Gros, 13-0879 (La. App. 5 Cir. 3/26/14), 138 So.3d 763, 767-68. On March 11, 2015, relator filed an application for post-conviction relief, claiming that he was prevented from accepting a more generous plea bargain by the improper recusal of the first district judge and the subsequent re-allotment of the case.

It is well settled under both state and federal jurisprudence that an unqualified plea of guilty waives all non-jurisdictional defects occurring prior thereto, and precludes review thereof by appeal. State v. Johnson, 08-0449 (La. App. 5 Cir. 12/16/08), 3 So.3d 17, 19, writ denied, 09-0787 (La. 12/18/09), 23 So.3d 932. In the instant case, relator entered an unqualified guilty plea. Consequently, relator waived any non-jurisdictional defects prior to his guilty plea, including the claim alleged in his application for post-conviction relief. See State v. Sede, 08-0547 (La. App. 5 Cir. 2/10/09), 8 So.3d 702, 706, writ denied, 09-1023 (La. 3/5/10), 28 So.3d 1006 (finding the issue of the district judge's failure to recuse is a non-jurisdictional defect that is waived by an unqualified guilty plea).

Accordingly, we find relator is not entitled to relief and see no reason to disturb the district court's ruling. This writ application is therefore denied.¹⁹The Louisiana Supreme Court then similarly denied relief, holding: "Denied. Relator does not demonstrate that he preserved any issues for appellate review when he entered his guilty plea. See State v. Crosby, 338 So.2d 584 (La. 1976)."²⁰

As the state courts correctly noted, a plea of guilty normally waives all non-jurisdictional defects in the proceeding prior to the entry of the plea. See, e.g., United States v. Owens, 996 F.2d 59, 60 (5th Cir. 1993) ("By pleading guilty to an offense, ... a criminal defendant waives all non-jurisdictional defects preceding the plea."). As the United States Supreme Court has explained:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann [v.

Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)] Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).²¹

Here, there is no question that petitioner entered an unconditional guilty plea; by doing so, he waived his due process claim. Therefore, even if petitioner were to elect to withdraw his unexhausted ineffective assistance of counsel claim and pursue only this claim, federal habeas corpus relief still would not be warranted.

RECOMMENDATION

It is therefore RECOMMENDED that the federal application for habeas corpus relief filed by Eric Gros be DISMISSED WITHOUT PREJUDICE because he failed to exhaust his remedies in the state courts.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. 636(b)(1); Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).²²

New Orleans, Louisiana, this fourth day of November, 2016.

/s/ Janis Van Meerveld

JANIS VAN MEERVELD

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

State Rec., Vol. 1 of 2, transcript of June 13, 2013; State Rec., Vol. 1 of 2, minute entry dated June 13, 2013; State Rec., Vol. 1 of 2, guilty plea form.

2

State Rec., Vol. 1 of 2.

3

State Rec., Vol. 1 of 2, transcript of August 13, 2013; State Rec., Vol. 1 of 2, minute entry dated August 13, 2013.

4

State v. Gros, 138 So.3d 763 (La. App. 5th Cir. 2014); State Rec., Vol. 2 of 2. Regarding petitioner's sentence, the Court of Appeal held:

Finally, pursuant to La.C.Cr.P. art. 920, we have reviewed the record and discovered an error that requires correction. La. R.S. 14:42.1 provides that "[a]t least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence." Defendant was advised in the guilty plea form and during the colloquy that at least two years of his sentence had to be served without benefit of probation, parole, or suspension of sentence. However, the transcript reflects that the trial judge failed to impose any statutory restrictions when sentencing defendant.

Although such conditions are deemed to exist by operation of law under La. R.S. 15:301,14 the language of La. R.S. 14:42.1 reads, "at least two years," which suggests that the trial judge has discretion in determining the length of time that benefits are to be withheld. Accordingly, we remand this case for amendment of defendant's sentence to comply with La. R.S. 14:42.1(B). State v. Tapps, 02-0547 (La.App. 5 Cir. 10/29/02), 832 So.2d 995, 1004, writ denied, 02-2921 (La. 4/21/03), 841 So.2d 789.Gros, 138 So.3d at 768-69; State Rec., Vol. 2 of 2.

5

See Rec. Doc. 4, p. 2.

6

State Rec., Vol. 2 of 2. Federal habeas courts must apply Louisiana's "mailbox rule" when determining the filing date of a Louisiana state court filing, and therefore such a document is considered "filed" as of the moment the prisoner "placed it in the prison mail system." Causey v. Cain, 450 F.3d 601, 607 (5th Cir. 2006). The date on which that occurred here is not apparent from the record. However, the undersigned will simply use the signature date of the application as the filing date, in that the application could not have been placed in the prison mailing system prior the date on which it was signed.

7

State Rec., Vol. 2 of 2, Order dated April 17, 2015.

8

State v. Gros, No. 15-KH-309 (La. App. 5th Cir. May 27, 2015); State Rec., Vol. 2 of 2.

9

State ex rel. Gros v. State, 191 So.3d 576 (La. 2016); State Rec., Vol. 2 of 2.

10

Rec. Doc. 4. "A prisoner's habeas application is considered 'filed' when delivered to the prison authorities for mailing to the district court." Roberts v. Cockrell, 319 F.3d 690, 691 n.2 (5th Cir. 2003). Here, petitioner has declared under penalty of perjury that his federal application was placed in the prison mailing system on June 1, 2016. Rec. Doc. 4, p. 5.

11

Rec. Doc. 10.

12

Although 28 U.S.C. 2244(d)(1) has alternative provisions providing for other events which can trigger the commencement of the statute of limitations, those alternative provisions are not applicable in the instant case.

13

State Rec., Vol. 2 of 2, Notice of Judgment and Certificate of Delivery.

14

The state argues that petitioner's conviction became final even earlier because his motion for appeal was untimely. However, the district court granted that motion, and the Court of Appeal opted to address the appeal in order to "avoid further useless delay." State v. Gros, 138 So.3d 763, 765 n.2 (La. App. 5th Cir. 2014) (quotation marks omitted). Arguably, therefore, the state courts' actions were tantamount to granting petitioner an out-of-time appeal, and it is clear that the granting of an out-of-time appeal resets the date a conviction becomes final for AEDPA purposes. Accordingly, under 28 U.S.C. 2244(d)(1)(A), "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" must reflect the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal." Jimenez v. Quarterman, 555 U.S. 113, 121, 129 S. Ct. 681, 172 L. Ed. 2d 475 (2009).

15

A petitioner receives no additional tolling credit for the period during which he could have sought review by the United States Supreme Court with respect to the denial of post-conviction relief. Lawrence v. Florida, 549 U.S. 327, 332, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007); Ott v. Johnson, 192 F.3d 510, 512-13 (5th Cir. 1999).

16

The state argues that petitioner's claim is unexhausted because the state courts found that it had been waived by his guilty plea. However, that argument is inapposite:

To satisfy the exhaustion requirement, a claim need not be actually decided by the state courts. Instead, a claim is exhausted if it was "fairly presented" to the state courts. This merely requires that the federal claim is the "substantial equivalent" of the claim brought in state court. As the

Third Circuit has repeatedly explained, in deciding whether a claim was fairly presented, a district court should look to the substance of the claim presented to the state courts, rather than its technical designation. *Even if the state court refuses to hear the claim presented because it is time-barred or waived, the claim is still exhausted as long as the state court is given the opportunity to address it.* Pursell v. Horn, 187 F. Supp. 2d 260, 288 (W.D. Pa. 2002) (citations and quotation marks omitted; emphasis added); Swanger v. Zimmerman, 750 F.2d 291, 295 (3rd Cir. 1984).

17

See Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

18

"An ineffective assistance claim, which proceeds on a separate legal theory and is governed by a different legal analysis, is obviously distinct from a claim asserting an underlying substantive violation on which the ineffective assistance claim is based." Cammatte v. Cain, Civ. Action No. 14-926, 2015 U.S. Dist. LEXIS 177669, 2015 WL 10714601, at *2 (E.D. La. Dec. 21, 2015), adopted, 2016 U.S. Dist. LEXIS 53553, 2016 WL 1598522 (E.D. La. Apr. 21, 2016); accord Sam v. Louisiana, 409 Fed. App'x 758, 765 (5th Cir. 2011); Willis v. Vaughn, 48 Fed. App'x 402, 406 (3rd Cir. 2002) ("Willis' ineffective assistance of counsel claims and underlying due process claims are distinct, and exhaustion of one does not constitute exhaustion of the other.").

19

State v. Gros, No. 15-KH-309 (La. App. 5th Cir. May 27, 2015); State Rec., Vol. 2 of 2.

20

State ex rel. Gros v. State, 191 So.3d 576 (La. 2016); State Rec., Vol. 2 of 2.

21

It is therefore true that a limited exception to this general waiver exists with respect to certain claims of ineffective assistance of counsel. Specifically, as the United States Fifth Circuit Court of Appeals has explained: "[O]nce a guilty plea has been entered, all nonjurisdictional defects in the proceedings against a defendant are waived. This includes all claims of ineffective assistance of counsel, *except* insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea." Smith v. Estelle, 711 F.2d 677, 682 (5th Cir. 1983) (citations omitted).

However, this limited exception does not aid petitioner, because, as explained herein, his ineffective assistance claim is *unexhausted* even if it would be otherwise cognizable.

22

Douglass referenced the previously applicable ten-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. 636(b)(1) was amended to extend that period to fourteen days.