APPENDIX A

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW GUY MORET, Petitioner-Appellant, v. PAT GARRETT, Respondent-Appellee.	No. 17-36046 D.C. No. 3:17-cv-01688-BR District of Oregon, Portland ORDER

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 3 and 4) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Wilson v. Belleque*, 554 F.3d 816, 825-26 (9th Cir. 2009).

Any pending motions are denied as moot.

DENIED.

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APPENDIX B1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ANDREW GUY MORET,

Petitioner,

v.

PAT GARRETT, Sheriff,

Respondent.

Case No. 3:17-cv-01688-BR

ORDER

BROWN, Judge.

Petitioner, a pre-trial detainee housed at the Washington County Jail, brings this habeas corpus action *pro se*. On November 7, 2017, this Court issued an Order requiring Petitioner to show cause why his Petition for Writ of Habeas Corpus should not be summarily denied on the basis that this Court is barred from directly interfering with Petitioner's ongoing criminal proceedings under *Younger v. Harris*, 401 U.S. 37, (1971). Currently before the Court is Petitioner's response (ECF No. 8) to the Order to Show Cause.

Petitioner's response to the Order to Show Cause does not allege facts establishing that an exception to the *Younger* abstention doctrine applies in this case. Petitioner asserts that the prosecutor has engaged in "bad faith" practices and that the Washington County Sheriff's Department has "harassed" Petitioner and his family.

"Bad faith" in the context of *Younger* has been defined as any "prosecution [that] has been brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n. 6 (1975). If the state official prosecutes with knowledge that there is no lawful basis for the prosecution, then the prosecution is in bad faith. *See Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 88 (5th Cir. 1992) (full awareness that prosecution was invalid on the basis of judicial decision satisfied bad faith requirement).

The facts cited by Petitioner, however, do not rise to the level of "bad faith" sufficient to obviate this Court's duty to abstain. Instead, Petitioner describes circumstances common to the pre-trial detention and prosecution of one accused of a serious crime. Accordingly, Petitioner's habeas corpus petition must be summarily denied.

B3

CONCLUSION

For these reasons, the Court summarily DENIES the Petition for Writ of Habeas Corpus (ECF No. 1) and DISMISSES this action.

IT IS SO ORDERED.

DATED this 7th day of ~~November~~ December, 2017.

ANNA J. BROWN
United States District Judge
Senior

2/30

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 22 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANDREW GUY MORET, Petitioner-Appellant, v. PAT GARRETT, Respondent-Appellee.	No. 17-36046 D.C. No. 3:17-cv-01688-BR District of Oregon, Portland ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

The "petition for rehearing" (Docket Entry No. 8) is construed as a motion for reconsideration. So construed, the motion is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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APPENDIX D 1

698 P.2d 953

299 Or. 90

In the Matter of the Application of Stephen Collins for a Writ of Habeas Corpus
Stephen COLLINS, Plaintiff,
v.
Charles FOSTER, Marion County Sheriff, Defendant.

SC S31615.

Supreme Court of Oregon.

Argued and Submitted April 15, 1985.
Decided April 25, 1985.

Paul S. Petterson, Portland, argued the cause for plaintiff.

[299 Or. 91] Thomas H. Denney, Asst. Atty. Gen., Salem, argued the cause for defendant.

Before PETERSON, C.J., and LENT, CAMPBELL, ROBERTS, CARSON and JONES, JJ.

[299 Or. 92] CAMPBELL, Justice.

This is an original habeas corpus proceeding filed in this court by the plaintiff, an inmate of the Marion County Jail, seeking his release from the custody of defendant, the Sheriff of Marion County.

The issue in this case is: Can a criminal defendant charged with murder be held in custody pending trial more than 60 days after the time of his arrest when there is no finding that the proof of murder is evident or the presumption strong that the defendant is guilty?

The relevant Oregon Revised Statutes are:

136.290:

"(1) Except as provided in ORS 136.295, a defendant shall not remain in custody pending commencement of his trial more than 60 days after the time of his arrest unless the trial is continued with his express consent.

"(2) If a trial is not commenced within the period required by subsection (1) of this section, the court shall release the defendant on his own recognizance, or in the custody of a third party, or upon whatever additional reasonable terms and conditions the court deems just as provided in ORS 135.230 to 135.290." [1]

136.295:

"(1) ORS 136.290 does not apply to persons charged with crimes which are not releasable offenses under ORS 135.240 or to persons charged with conspiracy to commit murder, or charged with attempted murder, or to prisoners serving sentences resulting from prior convictions.

135.240:

"(1) Except as provided in subsection (2) of this section, a defendant shall be

released in accordance with ORS 135.230 to 135.290.

"(2) When the defendant is charged with murder or [299 Or. 93] treason, release shall be denied when the proof is evident or the presumption strong that the person is guilty." [2]

On December 29, 1983, Collins was indicted by the grand jury of Marion County charging him with murder and on the following day he was arrested at the Oregon State Penitentiary where he was serving a sentence on an unrelated matter.

D 2

On January 10, 1984, the Marion County Circuit Court set security on Collins in the amount of $100,000 on the murder charge.

Prior to the commencement of the trial on the murder charge, the circuit court entered an order excluding evidence of other crimes and on May 11, 1984, the State appealed that order to the Court of Appeals. [3]

On December 28, 1984, Collins was released from the Oregon State Penitentiary to the custody of Charles Foster, the Sheriff of Marion County and the defendant in this habeas corpus proceeding.

Later, Collins moved the circuit court for release pursuant to what he calls the "60 day rule." ORS 136.290. The order denying motion for release was entered on March 6, 1985, and the security for release was continued at $100,000.

Collins is and was indigent at all material times. Although there were previous release hearings, we only find it necessary to consider the trial court's order filed March 6, 1985, which denied the release of Collins and maintained the security amount at $100,000. [4] There has been no finding by [299 Or. 94] the trial court that "the proof is evident or the presumption strong" that Collins is guilty of murder. ORS 135.240(2).

Collins simply contends that he has been in "custody pending the commencement of his trial more than 60 days after the time of his arrest" and the court is required to "release him on his own recognizance, or in the custody of a third party, or upon whatever additional reasonable terms and conditions the court deems just as provided in ORS 135.230 to 135.290." ORS 136.290.

Foster, the Sheriff of Marion County, contends that Collins is not eligible for release because he is charged with murder. He argues that ORS 136.295(1) provides that ORS 136.290 does not apply to persons charged with crimes which are not "releasable offenses" under ORS 135.240, to-wit: murder and treason.

The trouble with the defendant sheriff's argument is that it fails to take into account that ORS 135.240 provides when a defendant charged with murder or treason can or cannot be released. When the relevant portions of ORS 136.290 and 135.240 are paraphrased and grafted into ORS 136.295(1), the effect of the latter statute is as follows:

The 60-day rule for the release of defendants does not apply to persons charged with murder or treason when the proof is evident or the presumption strong that the person is guilty.

If the legislature had intended to exclude murder and treason without qualification from the 60 day rule it could have said so instead of incorporating by the reference the exact language of ORS 135.240.

Thus, it appears that because Collins has been in custody for more than 60

days and there has been no finding as to evident proof or a strong presumption, he is not prohibited from being released by ORS 136.295(1). If a defendant is eligible for release under the statutory scheme, then the provision of ORS 136.290 requiring that the court "shall release" the defendant is mandatory and the court has no discretion. However, it does have latitude in ordering the "terms and conditions" of the release.

We recognize that ORS 136.295(1) creates an anomolous situation. The second part of the statute reads: [299 Or. 95] "ORS 136.290 does not apply to * * * persons charged with conspiracy to commit murder, or charged with attempted murder, * * *." The legislature without explanation or reason has provided that persons in custody and charged with conspiracy to commit murder or charged with attempted murder are not allowed release under the 60 day rule while persons charged with murder or treason are permitted release if the proof is not evident or the presumption is not strong that the person is guilty. All we can say is that we are not faced in this case with conspiracy to commit murder or attempted murder.

Under the present posture of this case, Collins is eligible for release under ORS 136.290. If there is no change in the status of the defendant, the trial court in the words of statute "shall release Collins on his own recognizance, or in the custody of a third party, or upon whatever additional reasonable terms and conditions the court deems just as provided in ORS 135.230 to 135.290."

One additional problem remains. ORS 135.230 to 135.290 includes ORS 135.265, 135.270 and 135.280 which provide a statutory scheme for security releases. We hold the terms in ORS 136.290 "shall release * * * upon whatever additional reasonable terms and conditions the court deems just" do not include the setting of a security amount which the person in custody cannot meet. To hold otherwise would allow the court to do indirectly that which it cannot do directly. [5]

Price v. Zarbano, 265 Or. 126, 508 P.2d 182 (1973), was an original petition in this court for a writ of habeas corpus involving an interpretation of ORS 136.290. At that time ORS 136.290(2) provided:

"If a trial is not commenced within the period required by subsection (1) of this section, the court shall release the defendant on his own recognizance, or in the custody of a [299 Or. 96] third party, or upon such bail as the defendant can afford, or upon whatever additional reasonable terms and conditions the court deems just."

The emphasized portion of the above statute was repealed in 1973 and the phrase "as provided in ORS 135.230 to 135.290" was added to the end of the section.

In Price v. Zarbano, supra, we held that if the person in custody was unable to make bail in any amount, the trial court was required to release him upon his own recognizance, or in the custody of a third party, or upon whatever additional reasonable terms and conditions the court deemed just.

It could be argued that the 1973 amendment to ORS 136.290 overruled Price v. Zarbano, supra. We disagree with that argument. The legislative history does not mention Price v. Zarbano. ORS 136.290 and its companion statutes enacting the 60 day rule were passed as Chapter 323 of the 1971 Session Laws. Two years later in 1973, ORS 135.230 to 135.290 enacting a different concept for release of criminal defendants were adopted as Chapter 836. It was that chapter which changed "bail" to "security release." The above mentioned amendment to ORS 136.290 was part of Chapter 836 of the 1973 Session Laws.

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It appears that the 1973 amendment to ORS 136.290 was merely a housekeeping procedure to replace the previous provision for "bail" with a wider range of options for the trial judge. The attorney for the defendant Sheriff of Marion County on oral argument to this court stated that Price v. Zarbano, supra, is still the law in Oregon.

ORS 135.240(3) in effect provides that when a person is charged with murder, the magistrate may conduct a hearing to determine if the "proof is evident, or the presumption strong" that the person is guilty. The State has the burden of proof by clear and convincing evidence. Haynes v. Burks, 290 Or. 75, 78, 619 P.2d 632 (1980). As far as we can tell from the record before us, the State has not requested the trial court hold this type of hearing.

The Sheriff of Marion County is directed to release Collins at 5:00 p.m. on April 26, 1985, either upon his own recognizance, or in the custody of a third party, or upon whatever terms and conditions which seem just as determined [299 Or. 97] by the trial court unless prior to that time, upon the application of the State, the trial court has determined in accordance with ORS 135.240 the proof is evident or the presumption strong that Collins is guilty of murder.

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1 ORS 135.230 to 135.290 has the general title "Release of Defendant." The individual statutes include the subjects of: Release Assistance Officer, Releasable Offenses, Release Decision, General Conditions of Release, Release Agreement, Conditional Release, Security Release, Taking of Security, Forfeiture and Apprehension, Release Decision Review and Release Upon Appeal.

2 ORS 135.240(2) is a codification of Article I section 14 of the Oregon Constitution:

"Offences [sic], except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong."

3 On April 17, 1985, two days after this case was argued in this court, the Court of Appeals issued an opinion affirming the trial court's order excluding the evidence of other crimes. 73 Or.App. 216, 698 P.2d 969 (1985).

4 Collins contends that he had been offered parole from the Oregon State Penitentiary on January 5, 1984, but turned it down to avoid immediate transfer to the Marion County Jail. Thereafter he was unsuccessful at release hearings held on January 10, May 3, and May 24, 1984. The State could argue during that period of time he was not eligible for release because he was serving a sentence for a prior conviction. ORS 136.295(1). We do not reach that question.

5 The 1973 "Release of Defendants" provisions passed by the legislature (Session Laws Chapter 836) were intended to create a presumption in favor of personal recognizance release and to conform Oregon Law with ABA Criminal Justice Standards. Criminal Law Revision Commission, Proposed Criminal Procedure Code Final Draft and Report (November, 1972). This intention was codified as ORS 135.245(6) as follows:

"This section shall be liberally construed to carry out the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the defendant."

APPENDIX E1

168 P.3d 310

215 Or. App. 15

STATE of Oregon, Plaintiff-Respondent,
v.
Gary Dennis LANG, Defendant-Appellant.

05020367.

A131189.

Court of Appeals of Oregon.

Submitted on Record and Briefs July 6, 2007.

Decided September 12, 2007.

Rankin Johnson IV filed the brief for appellant.

Hardy Myers, Attorney General, Mary H. Williams, Solicitor General, and Janet A. Klapstein, Senior Assistant Attorney General, filed the brief for respondent.

Before LANDAU, Presiding Judge, and SCHUMAN and ORTEGA, Judges.

LANDAU, P.J.

[215 Or. App. 17]

Defendant was charged with, among other things, one count of murder, ORS 163.115, and three counts of felon in possession of a firearm, ORS 166.270. He pleaded guilty to two counts of felon in possession, and the case went to trial on the remaining two counts. Defendant asserted a defense of self-defense to the murder charge. A jury convicted him on a lesser-included offense of first-degree manslaughter, ORS 163.118, and on the felon in possession charge. On appeal, he contends that the jury instruction on his defense of self-defense was erroneous. The state concedes the error. For the following reasons, we agree that the jury instruction was erroneous and, as a result, reverse and remand the manslaughter conviction, vacate the sentences on the remaining convictions and remand for resentencing, and otherwise affirm.

The charges arose out of an incident in which defendant returned to the residence that he shared with a woman and her three children, finding at the residence two armed intruders who had previously assaulted the woman. Defendant shot and killed one of the intruders. He contended at trial that he killed the victim in order to defend himself and the others with whom he lived.

At trial, the state requested the following instruction on defendant's asserted

defense to the murder charge:

"The danger justifying self-defense must be absolute, imminent, and unavoidable. The necessity of taking human life must be actual, present, urgent, and that the killing is absolutely or apparently absolutely necessary. There must be no reasonable opportunity to escape and to avoid [the affray] or no other means of avoiding or declining to combat."

Defendant argued that the instruction should not be given because "there is no Oregon duty of retreat" when a person finds armed

[168 P.3d 311]

individuals in his own home. The trial court delivered the instruction that the state requested. The instruction was based on *State v. Charles,* 293 Or. 273, 647 P.2d 897 (1982), in which the Supreme Court held that Oregon recognizes a "duty to retreat" as a predicate to the use of deadly force in self-defense. The trial court, in other words,

[215 Or. App. 18]

properly instructed the jury in accordance with the law that applied at the time of trial.

Following the trial, however, the Supreme Court decided *State v. Sandoval,* 342 Or. 506, 156 P.3d 60 (2007). In that case, the court concluded that a nearly identical instruction to the one given in this case was erroneous. The court acknowledged that the instruction had been drawn from its own opinion in *Charles,* but it concluded that *Charles* itself had been incorrectly decided in that regard. The court concluded that it was clear from the relevant statutes—which, it noted, *Charles* had neglected to consider—that "[t]he legislature did not intend to require a person to retreat before using deadly force to defend against the imminent use of deadly force by another." *Sandoval,* 342 Or. at 512-14, 156 P.3d 60. The court further concluded that the delivery of the instruction was not harmless error because the jury likely would have concluded that the instruction required it to find retreat from the conflict as a prerequisite to a lawful claim of self-defense. *Id.* at 514, 156 P.3d 60.

In this case, as the state concedes, *Sandoval* is controlling. In light of *Sandoval,* the instruction that the trial court delivered does not state correctly current Oregon law. Moreover, defendant expressly asserted that he was not required to retreat in order to employ deadly force in defense of himself and the others in his home. As in *Sandoval,* we cannot say in this case that the delivery of the erroneous instruction was harmless. That does not necessarily mean that defendant's conduct was justified. The state, for example, contests defendant's version of the events—in particular, his description of the nature of the threat that the intruders posed to him and the other occupants of the residence. The jury will be required to resolve those factual issues in a new trial.

E3

Conviction for first-degree manslaughter reversed and remanded; sentences on remaining convictions vacated and remanded for resentencing; otherwise affirmed.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF OREGON

ANDREW GUY MORET,
Plaintiff,

v.

PAT GARRETT, Washington County Sheriff,
Defendant.

S065107

ORDER DENYING MOTIONS FOR THE RELEASE OF RECORDS, TAKING JUDICIAL NOTICE OF TRIAL COURT FILE, GRANTING MOTION TO WAIVE FILING FEE, AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

Upon consideration by the court.

Plaintiff filed separate motions for the release of records to this court, namely: (1) the filing history in Washington County Circuit Court Case No. C15-2261CR; and (2) Washington County jail records pertaining to plaintiff, including all incident records, feeding schedules, history, and medical records. The motions are denied. However, the court has taken judicial notice of the trial court file in Washington County Circuit Court Case No. C15-2261CR.

Plaintiff's motion to waive the filing fee is granted. Plaintiff's petition for writ of habeas corpus is denied.

09/14/2017
8:59 AM

THOMAS A. BALMER
CHIEF JUSTICE, SUPREME COURT

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Defendant [X] No costs allowed

c: Benjamin Gutman
Carson L Whitehead
Andrew Guy Moret

asb

ORDER DENYING MOTIONS FOR THE RELEASE OF RECORDS, TAKING JUDICIAL NOTICE OF TRIAL COURT FILE, GRANTING MOTION TO WAIVE FILING FEE, AND DENYING PETITION FOR WRIT OF HABEAS CORPUS