

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 2, 2019

Before

DIANE S. SYKES, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 18-3399

PHILLIP L. HORRELL,
Petitioner-Appellant,

Appeal from the United States District
Court for the Central District of Illinois

No. 2:17-CV-2306

v.

MICHAEL D. DOWNEY,
Respondent-Appellee.

Colin S. Bruce,
Judge.

ORDER

On consideration of the petition for rehearing, filed on March 28, 2019, the judges on the original panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted February 28, 2019

Decided March 11, 2019

Before

DIANE S. SYKES, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 18-3399

PHILLIP L. HORRELL,
Petitioner-Appellant,

Appeal from the United States District
Court for the Central District of Illinois.

v.

No. 17-2306

MICHAEL D. DOWNEY,
Respondent-Appellee.

Colin Stirling Bruce,
Judge.

ORDER

Phillip Horrell has filed a notice of appeal from the dismissal without prejudice of his motion under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. All pending motions are DENIED.

UNITED STATES DISTRICT COURT
for the
Central District of Illinois

Phillip Lee Horrell

Plaintiff,

vs.

Michael D. Downey

Defendant.

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Case Number: 17-2306

JUDGMENT IN A CIVIL CASE

☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **DECISION BY THE COURT.** This action came before the Court, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition for habeas corpus relief is **DENIED.**

Dated: 10/16/2018

s/ Shig Yasunaga
Shig Yasunaga
Clerk, U.S. District Court

PHILLIP LEE HORRELL,)	
)	
Petitioner,)	
v.)	Case No. 17-cv-02306-CSB
)	
MICHAEL D. DOWNEY,)	
)	
Defendant.)	

Petitioner filed a Petition for Writ of Habeas Corpus (#1) on December 8, 2017, and an Amended Petition for Writ of Habeas Corpus (#14) on March 7, 2018. Petitioner filed a Motion for Stay of State Court Proceedings and Motion for Order for Continued Housing at the Jerome Combs Detention Center (hereinafter "JCDC") (#16) on April 26, 2018, to which Respondent did not file a response.

On May 14, 2018, with leave of court, Respondent filed a Motion to Dismiss (#22). Petitioner filed his Response (#23) on May 30, 2018. Also pending is Petitioner's Motion to Seal Previously Filed Medical Records (#25) to which Respondent has not filed a response.

This court has carefully and thoroughly reviewed the above documents and supporting exhibits. Following this careful consideration, Petitioner's Motion to Stay State Court Proceedings (#16) is DENIED, Respondent's Motion to Dismiss (#22) is GRANTED, and Petitioner's Motion to Seal (#25) is GRANTED.

BACKGROUND

Petitioner entered a plea of guilty but mentally ill to one count of felony murder and one count of attempted murder in 2013. Petitioner was sentenced to life in prison for murder plus thirty years' imprisonment for attempted murder. The trial court denied Petitioner's Motion to Reconsider Sentence. Petitioner appealed. On November 1, 2015, the Illinois Appellate Court vacated all prior post-sentencing trial court proceedings and remanded the case to the trial court because Petitioner's trial counsel failed to comply with Illinois Supreme Court Rule 604(d) when presenting Petitioner's post-sentencing motions. Petitioner has now filed a Motion to Withdraw Guilty Plea which is pending in the Circuit Court of Kankakee County, Illinois, at this time.

Petitioner's 259-page Amended Petition alleges 21 grounds for relief including (1) "Due Process/14th Amendment violation — conviction obtained by use of false evidence of my criminal responsibility," (2) "due process pursuant to the U.S. Supreme Court's holding in *Ake v. Oklahoma* (to psychiatric assistance, etc.) was denied," (3) "6th and 14th amendment right to effective assistance of counsel denied — ineffective under Cronin standard also (guilt phase)," (4) "due process (procedural)/14th amendment right to an adequate process to implement the right to an inquiry as to my fitness to stand trial or plead was denied," (5) "6th and 14th amendment right to a complete defense were denied me," (6) "6th amendment and 14th amendment right to a fair trial was denied by misrepresentation + deceit," (7) "my guilty plea didn't satisfy due process and the 14th amendment," (8) "My due process right (6th and 14th amendment) to a knowing waiver of a right to Jury trial was violated," (9) "The court failed to

properly advise me pursuant to Supreme Court Rule 605(b) – due process violation,”

(10) “‘Gateway’ actual innocence claim – not guilty beyond a reasonable doubt for felony murder/attempt murder,” (11) “denial of due process due to prosecutorial misconduct of Bill Dickenson,” (12) “14th amendment right to equal protection due process was violated by the courts failure to follow GBMI plea requirements under [725 ILL. COMP. STAT. 5/]115-6,” (13) “ ‘Gateway’ actual innocence claim – not guilty by reason of insanity – legally insane at time of offense,” (14) “My (substantive) due process right to be fit to stand trial or plead was violated as I was unfit throughout the case (and until 2016),” (15) “Due process/14th Amendment violation occurred by prosecutor Dickenson’s presentation of false evidence at the plea and sentencing regarding Betty Goldsteins [sic] injuries,” (16) “Prosecutorial misconduct violated due process and the 14th amendment as the prosecutors used knowingly false evidence, false legal factors and standards to convict a criminally irresponsible man w/o due process,” (17) “Prosecutorial misconduct (failure to correct false stmts [sic] at the plea) caused a wrongful conviction in violation of due process and the 14th Amendment,” (18) “due process was violated by my conviction as it was entered upon insufficient evidence,” (19) “the inordinate delay in my constitutional claims being heard by the trial and appellate court is a deprivation of due process of my post-plea and direct appeal right,” (emphasis in original) (20) “My 6th and 14th amendment right to be physically present all all [sic] critical stages of the case was denied,” (21) “My 5th Amendment privilege was violated as my unwarned statements in a fitness evaluation resulted in me being the ‘deluded instrument of my own conviction.’”

ANALYSIS

1. *Motion to Seal*

Petitioner moves the court to seal various records that he filed in this case, mistakenly believing those records would not be publicly accessible. Respondent has not objected to Petitioner's motion. The court has undertaken a review of the multitude of documents Petitioner has filed.¹ Because they include HIPAA- and Illinois Mental Health and Developmental Disabilities Confidentiality Act-protected information, the clerk is directed to seal the following documents: #1-5, #1-6, #1-7, #1-8, #2-8, #2-9, #5, #5-1, #5-2, #14-2, #17-1, #17-2, #23-1, #24-1, #24-4, #24-5, #24-6, #24-7, #24-8, and #24-9.

2. *Motion to Stay*

Petitioner moves the court to stay his state court proceedings pursuant to 28 U.S.C. § 2251, and to order that he be detained in the JCDC rather than the Illinois Department of Corrections (hereinafter "IDOC").

Absent "extraordinary circumstances," a federal court should abstain from enjoining ongoing state criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 45 (1971); see also *Nommensen v. Lundquist*, 630 F. Supp. 2d 994, 999 (E.D. Wis. 2009) (dismissing habeas petition pursuant to *Younger* due to pending direct appeal).

The threshold requirement for *Younger* abstention – avoiding interference with ongoing state court proceedings – is satisfied in the instant case. Thus, this court must abstain if Petitioner's pending state court case is: (1) judicial in nature, (2) involves important state interests, and (3) provides an adequate opportunity to raise the federal

¹ Petitioner's filings herein number roughly 2400 pages.

claims, as long as (4) no exceptional circumstances exist that would make abstention inappropriate. *See Stroman Realty, Inc. v. Martinez*, 505 F.3d 658, 662 (7th Cir. 2007); *Nommensen*, 630 F. Supp. 2d at 998-99.

The “extraordinary circumstances” contemplated in *Younger* include “proven harassment or prosecutions taken in bad faith.” *Perez v. Ledesma*, 401 U.S. 82, 85 (1971); *see also Younger*, 401 U.S. at 46-47 (extraordinary circumstances must be more than the circumstances “incidental to every criminal proceeding brought lawfully and in good faith”). A petitioner may also avoid *Younger* abstention if “immediate federal intervention is necessary to prevent the challenge from becoming moot,” such as when a petitioner seeks to compel a speedy trial or avoid double jeopardy. *Sweeney v. Bartow*, 612 F.3d 571, 573 (7th Cir. 2010); *see also Levine v. Torvik*, 986 F.2d 1506, 1518 (6th Cir. 1993) (extraordinary circumstances existed where state court proceedings threatened to moot already-granted federal writ of habeas corpus).

The pending Kankakee County Illinois Circuit Court proceedings here clearly meet the first and second elements articulated in *Stroman*. The proceeding is judicial in nature, and protecting the safety of citizens through prosecution of those who commit criminal acts is an important state interest.

The ongoing state court proceedings here also meet the third element from *Stroman*. Petitioner is represented by an experienced criminal defense attorney, and no such constitutional arguments have been barred, nor have they been waived or procedurally defaulted, either in the trial court (where the case is currently) or in the Illinois Appellate Court (which has yet to consider the merits of Petitioner’s arguments).

There is no indication those courts do not provide an adequate opportunity for Petitioner to raise his federal claims.

Petitioner argues that, under the fourth element articulated above,² extraordinary circumstances exist here. The court disagrees. Here, there is no concern that Petitioner's speedy trial or double jeopardy rights have been violated, or are now at imminent risk of being violated. There is also no risk that his claims will become moot if this court does not enjoin the state proceedings, unlike the circumstances in *Levine*.

Petitioner argues the delay in adjudication of his case is so severe as to constitute extraordinary circumstances. He argues that all delay in his case thus far is attributable to the state. The record does not support his assertion. The Illinois Appellate Court mandate was filed with the state trial court on January 6, 2016, nullifying all post-sentencing proceedings due to error by Petitioner's counsel.

On January 11, 2016, the trial court docket sheet includes the following minute entry by the presiding judge "Court notes all prior post-sentencing proceedings are a nullity. Defense counsel must start anew and comply with the requirements of Supreme Court rule 604(d) ... Case is continued to 2-11-16 at 9:30 for status of filing a motion to reconsider and or motion to withdraw guilty plea."

After a series of continuances and status hearings regarding the filing of post-sentencing motions, all at the request of Petitioner's counsel, Petitioner's Motion to Withdraw Guilty Plea was filed on August 11, 2016. On October 31, 2016, new counsel

² Petitioner cites *Levine v. Torvik*, 986 F.2d 1506, 1518 (6th Cir. 1993); the analysis in that case focuses on the same question: whether there are extraordinary circumstances present that warrant a stay of the state court proceeding.

was appointed for Petitioner from within the Public Defender's office. Post-sentencing motions remained pending. The case was again continued several times, all on Petitioner's counsel's motion, until Petitioner's current state court counsel filed an appearance in the case on January 30, 2018.

Although Petitioner's post-sentencing motions have taken a long time, the amount of time is not extraordinary considering the gravity of the crimes he plead guilty to, changes of counsel, and the complexity of the issues he now wishes to raise before the trial court.

Petitioner also asks that this court order that he continue to be held in the JCDC as he prefers the medical care he is afforded there over that available to him in IDOC facilities. A motion requesting similar relief is also pending in Kankakee County, Illinois, Circuit Court. For all the reasons stated above, this court abstains from enjoining the state process in this regard as well.

Further, federal courts typically consider *habeas* pleadings to ensure that individuals are not imprisoned in violation of the United States Constitution. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Habeas petitions, therefore, are not the correct tool to deal with the conditions of a prisoner's confinement. *See Montgomery v. Anderson*, 262 F.3d 641, 643-44 (7th Cir. 2001). Instead, a claim relating to the conditions of confinement must be made under 42 U.S.C. § 1983. *Id.* Here, Petitioner's request to be confined at the JCDC relates solely to the conditions of his confinement. As such, that "claim" is not cognizable in this federal habeas proceeding. If Petitioner wishes to advance this request, he should explore his options under 42 U.S.C. § 1983. The court

admonishes Petitioner to make himself aware of the law regarding limits on civil filings by prisoners under 28 U.S.C. § 1915(g) before filing such a suit.

Petitioner has not persuaded the court that the circumstances of his case are of an extraordinary nature that would require this court to stay proceedings in his state court case. His request regarding the location of his confinement is not cognizable in this habeas action. His motion to stay is DENIED.

2. *Motion to Dismiss*

Respondent argues that the Petition and Amended Petition should be dismissed under *Younger* abstention principles, and because Petitioner has failed to exhaust his available state court remedies. Petitioner responds that though his state court remedies are not exhausted, the circumstances of his case provide for this court to excuse his failure to exhaust and to consider the merits of his asserted grounds for relief.

“Before seeking a writ of habeas corpus in federal court, a petitioner must first exhaust the remedies available to him in state court.” *Perruquet v. Briley*, 390 F.3d 505, 513 (7th Cir. 2004); 28 U.S.C. § 2254(b)(1)(A). “Exhaustion serves an interest in federal-state comity by giving state courts the first opportunity to address and correct potential violations of a prisoner’s federal rights.” *Perruquet*, 390 F.3d at 513. “Where state remedies remain available to a habeas petitioner who has not fairly presented his constitutional claim to the state courts, the exhaustion doctrine precludes a federal court from granting him relief on that claim.” *Id.* at 514.

Petitioner concedes that he has not yet exhausted his state court remedies. A petitioner can avoid the exhaustion requirement only if “there is an absence of available

State corrective process” or “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(i-ii).

State proceedings may be ineffective where the petitioner demonstrates an inordinate and unjustifiable delay. *Sceifers v. Trigg*, 46 F.3d 701, 703 (7th Cir. 1995). But only an ongoing delay warrants excusing the exhaustion requirement. *See, e.g., Monegain v. Carlton*, 576 F. App'x 598, 602 (7th Cir. 2014) (affirming dismissal for failure to exhaust where delay had ended); *Layne v. Gunter*, 559 F.2d 850, 851 (1st Cir. 1977) (affirming dismissal for failure to exhaust where state court proceedings were “back on track” after delay).

Here, there is an available state court corrective process, both post-sentencing relief in the trial court, and potentially direct appellate review. Petitioner has not yet presented the merits of his federal constitutional claims to the Illinois Appellate Court on direct review, and there is no indication he will be unable to do so after the conclusion of his post-sentencing motions before the trial court.

Finally, this court disagrees with Petitioner’s argument that the delay he has experienced in the adjudication of his post-sentencing motions is a valid excuse to the exhaustion requirement. The court’s discussion of the reasons for delay above applies with equal force here; just as the delay Petitioner has experienced is not extraordinary, neither is it inordinate or unjustifiable. Further, there is no ongoing delay – Petitioner acknowledges there has been no delay since the appointment of his current counsel.

Docket #17 at 14. The exhaustion requirement is not excused.³ Respondent's motion to dismiss is GRANTED.

Dismissal of the Petition and Amended Petition is without prejudice. This order is not a ruling on the merits of Petitioner's federal constitutional arguments. Upon exhaustion of his state court remedies, if those efforts prove unsuccessful, this order does not construct a barrier to Petitioner filing a new § 2254 petition in the district court.

CERTIFICATE OF APPEALABILITY

In *Slack v. McDaniel*, the United States Supreme Court held that "when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability (COA) should issue when the prisoner shows, at least, 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). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the

³ In addition to arguing failure to exhaust is excused due to delay, Petitioner argues he is excused by the "*Schlup* gateway." Petitioner cites *Schlup v. Delo*, 513 U.S. 298, 316, 327-28 (1995), *Britz v. Cowan*, 192 F.3d 1101, 1103 (7th Cir. 1999), *Rozzelle v. Sec'y, Fla. Dep't of Corr*, 672 F.3d 1000, 1014 (11th Cir. 2012), and *Jones v. Calloway*, 842 F.3d 454, 462 (7th Cir. 2016) as the legal basis for this argument. However, *Schlup* and the other cases Petitioner cites establish and define a narrow exception to excuse *procedural default*, based on actual innocence, rather than to excuse the exhaustion requirement. In each of these cases, the habeas petitioner had already exhausted state court appellate review of the underlying conviction, and in the process had procedurally defaulted their actual innocence claims. Here, Petitioner has not yet presented his federal constitutional arguments for a full round of state court review, let alone procedurally defaulted any such claim. The doctrine established under *Schlup* is inapplicable here.

case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.*

Here, it is clear that the claims raised in Petitioner’s petition have not been exhausted in the state courts. It is further clear that to the extent Petitioner’s claims could be construed to challenge the medical treatment available to him in the IDOC, those claims are noncognizable in federal habeas proceedings. The facts before this court would not allow any reasonable jurist to conclude that the court has erred in denying the petition. Therefore, a Certificate of Appealability is DENIED.

IT IS THEREFORE ORDERED THAT:

- (1) Respondent’s Motion to Dismiss (#22) is GRANTED. Petitioner’s Petition (#1) and Amended Petition (#14) under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody are DISMISSED without prejudice.
- (2) Petitioner’s Motion to Stay State Court Proceedings (#16) is DENIED.
- (3) Petitioner’s Motion to Seal (#25) is GRANTED.
- (4) A Certificate of Appealability is DENIED.
- (5) This case is terminated.

ENTERED this 16th day of October, 2018.

s/ Colin Stirling Bruce

COLIN S. BRUCE
U.S. DISTRICT JUDGE