

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14465-D

THERIAN CORNELIA WIMBUSH,

Petitioner-Appellant,

versus

GOVERNOR OF STATE OF GEORGIA, et al.,

Respondents,

WARDEN, PULASKI STATE PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

Therian Wimbush is a Georgia prisoner serving a 20-year sentence after being convicted in January 2017 of 3 counts of cruelty to children in the second degree, in violation of O.C.G.A. § 16-5-70(c). She seeks a certificate of appealability (“COA”) in order to appeal the district court’s dismissal of her 28 U.S.C. § 2254 habeas corpus petition for lack of exhaustion. Wimbush also has filed additional motions for leave to proceed *in forma pauperis* (“IFP”), to consolidate her appeal with her husband’s,¹ for bond pending appeal, and for a copy of the non-public docket.

¹ Recardo Wimbush, Therian’s husband, separately appeals the dismissal of his § 2254 petition in Appeal No. 18-14467.

To obtain a COA, a § 2254 petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court denies a habeas corpus petition on procedural grounds, the petitioner must show that jurists of reason would find debatable (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the petitioner fails to satisfy either prong, this Court should deny a COA. *Id.*

Before bringing a habeas action in federal court, a petitioner must exhaust all state court remedies that are available for challenging her conviction, either on direct appeal or in a state post-conviction motion. 28 U.S.C. § 2254(b), (c). To exhaust state remedies, the petitioner must fairly present every issue raised in her federal petition through “one complete round of the State’s established appellate review process,” either on direct appeal or on collateral review. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Presenting a federal claim in state court “in a procedural context in which its merits will not be considered” does not “constitute ‘fair presentation’” and, therefore, does not satisfy the exhaustion requirement. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). In Georgia, a court may not entertain a premature state habeas petition until the petitioner’s direct appellate review is complete and her conviction is final. *Horton v. Wilkes*, 302 S.E.2d 94, 96 (Ga. 1983). A state court’s delay in ruling on a petitioner’s claim does not allow that petitioner to avoid the exhaustion requirement. *See, e.g., Hughes v. Stafford*, 780 F.2d 1580 (11th Cir. 1986) (holding that an eight-year delay did not render the Georgia prisoner’s state remedies unavailable).

Here, reasonable jurists would not debate whether the district court correctly dismissed Wimbush’s § 2254 petition for her failure to exhaust her state court remedies. She did not raise the instant claims in her direct appeal. To the extent she raised these claims in her first state habeas

petition, the state court determined that her petition was premature, so she did not present her claims in a context where the state courts were empowered to decide them. Therefore, she had not yet exhausted her state court remedies at the time she filed her § 2254 petition. *See Castille*, 489 U.S. at 351; *Horton*, 302 S.E.2d at 96. Finally, the state court's delay in ruling on her state petition has not rendered the state post-conviction remedies or procedure ineffective. *See Hughes*, 780 F.2d 1580. Accordingly, Wimbush's motion for COA is DENIED. Wimbush's motions for leave to proceed IFP, to consolidate her appeal with her husband's, for bond pending appeal, and for a copy of the non-public docket are DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE