

APPENDIX - A

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 18-3814

STATE OF DELAWARE

v.

CHRISTOPHER R. DESMOND,
Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 1-18-cv-01283)
District Judge: Honorable Maryellen Noreika

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 6, 2020

Before: SHWARTZ, RESTREPO, and RENDELL, Circuit Judges

13-18-3814
Opinion filed February 7, 2020

(Opinion filed: February 7, 2020)

13-18-3814

O P I N I O N*

PER CURIAM

Pro se appellant Christopher Desmond appeals from the District Court's order summarily remanding his case to state court. For the reasons that follow, we will affirm.

Desmond filed a notice of removal with the United States District Court for the District of Delaware seeking removal of one or more criminal actions from Delaware state court. After reviewing Desmond's removal petition, the District Court determined that it appeared Desmond was attempting to remove his case pursuant to 28 U.S.C. § 1443 and the removal procedures set forth in 28 U.S.C. § 1455. The District Court then held that the allegations in Desmond's notice were insufficient to support removal under § 1443, denied the petition, and summarily remanded the case to the state court from which it was removed. See 28 U.S.C. § 1455(b)(4) ("If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand."). Desmond timely appealed.

This Court may review a remand order in a case which was removed pursuant to 28 U.S.C. § 1443. See 28 U.S.C. § 1447(d). We exercise plenary review here. See *Lazorko v. Pa. Hosp.*, 237 F.3d 242, 247 (3d Cir. 2000). As explained by the District

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Court, the removal permitted by 28 U.S.C. § 1443 is narrow. Section 1443(1) authorizes the removal of a state law action “[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.” 28 U.S.C. § 1443. For this provision to apply, “a state court defendant must demonstrate both (1) that he is being deprived of rights guaranteed by a federal law ‘providing for . . . equal civil rights’; and (2) that he is ‘denied or cannot enforce that right in the courts’ of the state.” Davis v. Glanton, 107 F.3d 1044, 1047 (3d Cir. 1997) (quoting Georgia v. Rachel, 384 U.S. 780, 788 (1966)). Under the first requirement, the defendant must allege a deprivation of rights guaranteed by a federal law “providing for specific civil rights stated in terms of racial equality.” Id. (internal citations and quotations omitted). Under the second requirement, removal is available where the defendant’s federal civil rights would “inevitably be denied by the very act of being brought to trial in state court.” Id. at 1050. (internal citations and quotations omitted).

The District Court correctly determined that Desmond did not allege in his petition that the state court litigation involves issues of racial inequality, and he offers no argument on appeal to dispute that determination. Thus, there does not appear to have been a valid basis for the removal, particularly at the post-conviction stage. See Johnson v. Mississippi, 421 U.S. 213, 219 (1975) (“Claims that prosecution and conviction will violate rights under constitutional or statutory provisions of general applicability or under statutes not protecting against racial discrimination, will not suffice” for removal of a criminal prosecution). Desmond likewise failed to allege anything that might permit

removal under § 1443(2). Subparagraph (2) applies only to “federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights,” City of Greenwood v. Peacock, 384 U.S. 808, 824 (1966), and state officers who refuse to do an act on the ground that it would be inconsistent with civil rights laws. See Greenberg v. Veteran, 889 F.2d 418, 421 (2d Cir. 1989) (“The purpose of ‘refusal clause’ is to provide a federal forum for suits against state officers who uphold equal protection in the face of strong public disapproval.”). Desmond is neither a federal nor state officer.

We further agree with the District Court’s conclusion that Desmond’s reliance on Adams v. Governor of Delaware, 922 F.3d 166 (3d Cir. 2019), cert. granted, 2019 WL 6647103 (U.S. Dec. 6, 2019) (No. 19-309), is misplaced. In Adams, this Court held that sections of the Delaware Constitution that required the number of judges to be balanced between the two major political parties violated the First Amendment right to freedom of association. See id. at 184–85. Desmond appears to argue that this means he has been convicted in a proceeding presided over by a judge who had been unconstitutionally appointed. However, there is no language in Adams that implies that the judges previously appointed under Delaware’s political balance requirement are unqualified to serve as judicial officers, nor did the Court give any indication that its decision was intended to support an argument that all prior Delaware convictions be vacated. Cf. Adams, 922 F.3d at 186 (McKee, J., concurring) (“Praise for the Delaware judiciary is nearly universal, and it is well deserved.”). As such, Desmond’s Adams argument does not provide a valid basis for removal under § 1443.

Accordingly, the District Court correctly determined that removal under § 1443 would not be proper and appropriately remanded Desmond's case to the state court. See 28 U.S.C. § 1455(b)(4).¹ We will thus affirm the judgment of the District Court.

¹ Moreover, we agree with the District Court's observation that the removal petition was not timely filed. See id. at § 1455(b)(1).

APPENDIX - B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF DELAWARE,)
Plaintiff/Respondent,)
v.)
CHRISTOPHER R. DESMOND,)
Defendants/Petitioner.)
C.A. No. 18-1283 (MN)
Delaware Supreme Court No. 383, 2018
Superior Court of the State of Delaware in
and for New Castle County
Crim.A. No. 91009844D1

MEMORANDUM OPINION

Christopher R. Desmond, Defendant/Petitioner, James T. Vaughn Correctional Center, Smyrna, Delaware. *Pro se* Plaintiff.

December 11, 2018
Wilmington, Delaware


Mawelle Noreika
NOREIKA, U.S. District Judge:

Defendant/Petitioner Christopher R. Desmond (“Defendant”) filed a notice of removal on August 21, 2018 of *State v. Desmond*, Delaware Supreme Court Case No. 282, 2018 and Delaware Superior Court Crim. ID No. 91009844DI. (D.I. 3). He removed the matter pursuant to 28 U.S.C. § 1455 which sets forth the procedure for removal of criminal prosecutions. Defendant appears *pro se* and has been granted leave to proceed *in forma pauperis*, but he paid the filing fee. The Court proceeds to screen the case pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). For the reasons discussed below, the Court will summarily remand the matter to the Delaware Supreme Court and/or the Superior Court of the State of Delaware in and for New Castle County.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following are the facts set forth in the Superior Court’s July 10, 2018 Order denying Defendant’s eleventh motion for postconviction relief. *See State v. Desmond*, 2018 WL 3409916, at *1 (Del. Super. July 10, 2018) (footnotes omitted):

1. Defendant was convicted in November 1992 of Robbery First Degree and related crimes. The factual and procedural history of both the case and the “plethora” of subsequent postconviction actions are incorporated by reference from the Court’s opinion issued January 5, 2011. For an overview of Defendant’s first six motions for postconviction relief, see *State v. Desmond*, 2011 WL 91984 (Del. Super. Ct. Jan. 5, 2011). In that opinion, the Court procedurally barred Defendant’s seventh motion for postconviction relief by determining that Defendant’s claims were not asserted in prior proceedings or were previously adjudicated.

2. Subsequently, this Court summarily dismissed Defendant’s eighth motion for postconviction relief on March 7, 2012, finding that Defendant’s eighth motion was procedurally barred. The Delaware Supreme Court affirmed that decision on August 9, 2012.

3. On February 26, 2013, this Court denied Defendant’s ninth motion for postconviction relief as procedurally barred as untimely and repetitive. As a consequence, Defendant’s motion for appointment of counsel was denied as moot.

4. In 2014, this Court deemed three filings listed below to be “subsequent motions pursuant to Superior Court Criminal Rule 61 for Postconviction Relief.”

1. October 7, 2013: Motion to Amend Defendant’s Correction of Illegal Sentence.
2. October 14, 2013: Motion to Amend Original Dismissal Motion DI 29, DI 31 Pursuant [sic] Superior Court Civil Rule 15(c), (d) and Superior Court Criminal Rules of Procedure Rule 57(d).
3. October 14, 2013: Motion to Amend Pursuant to the Superior Court Criminal Rule 61(e) and 61(b)(6) Appointment of Counsel for the Unresolved D.I. 64.

As a result, this Court denied the motions (interpreted as the tenth motion for postconviction relief) as repetitive pursuant to Rule 61(i)(2) and procedurally defaulted pursuant to Rule 61(i)(3).

5. On August 21, 2017, Defendant filed a “Motion for Clarification of Ambiguous Interpretation of Superior Court Criminal Rule 35(a) and the Delaware Rules of Evidence 609(c) 11 Del. C. § 4214(a) and 11 Del. C. § 6502.” This Court denied the motion on the basis that it “lack[ed] any factual or legal merit.”

6. On May 18, 2018, Defendant filed this motion, which is his eleventh motion for postconviction relief. In this motion, Defendant challenges his sentences “because they were imposed consecutively with respect to other sentences, and because [Defendant] remains confined in state prison under the non-aggregated terms of these sentences.” As a result, Defendant alleges that this motion satisfies the jurisdictional prerequisite under Rule 61(a)(i). On June 4, 2018, Defendant filed a motion to amend to include an additional claim in which Defendant alleges he was denied his sixth amendment right to counsel during the plea offer. Consequently, Defendant’s lack of counsel made Defendant “unable to obtain the benefits of a lesser sentence of twenty years.” On June 12, 2018, Defendant filed a “Motion for Recuse.”

On July 10, 2016, the Superior Court summarily denied the motion for postconviction relief and denied Defendant’s motion to amend and motion to recuse. (D.I. 3-1 at 6). Defendant next filed a “Certified Questions of Law to the Delaware Supreme Court” and it was stricken by Delaware Supreme Court on August 2, 2018. (*Id.* at 7).

On August 21, 2018, Defendant filed a petition for “removal of all criminal proceedings pursuant to 28 U.S.C. § 1455.” (D.I. 3). The gist of the removal is that the presiding criminal

judge was appointed “pursuant to an unconstitutional selection process.” (D.I. 3 at 2). Defendant acknowledges that this issue is stayed pending an appeal to the United States Court of Appeals to the Third Circuit in *Adams v. Carney*, but “regardless the court must still remove [Defendant’s] criminal proceedings” to this court based upon his right to an unbiased tribunal. (*Id.*). See *Adams v. Carney*, C.A. No. 17-181-MPT at D.I. 69 (D. Del.) In *Adams*, on February 21, 2017, James R. Adams, filed a Declaratory Judgment and Injunctive Relief action under 42 U.S.C. § 1983, in relation to Article IV, § 3 of the Constitution of the State of Delaware, against John Carney, Governor of the State of Delaware, seeking review of the constitutionality of the provision, commonly referred to as the “Political Balance Requirement,” which prohibits any political party to comprise more than a “bare majority” of the seats in the Supreme Court or Superior Court, or in the Supreme Court, Superior Court, and Court of Chancery combined. *Adams v. Carney*, 2018 WL 2411219 (D. Del. May 23, 2018).

For relief, Defendant seeks to vacate all state court criminal proceedings. (D.I. 3 at 13). He also moves to vacate the filing fee order and seeks class certification. (D.I. 6, 7).

II. LEGAL STANDARDS

Removal of state criminal matters is permitted in limited instances under 28 U.S.C. § 1443. Pursuant to § 1443(1), a criminal prosecution commenced in a State court may be removed to the district court of the United States for the district and division embracing the place wherein it is pending against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof. 28 U.S.C. 1443(1). A state court defendant who seeks removal of a criminal prosecution to federal court under 28 U.S.C. § 1443(1) “must demonstrate both (1) that he is being deprived of rights guaranteed by a federal law ‘providing for . . . equal civil rights’;

and (2) that he is ‘denied or cannot enforce that right in the courts’ of the state.” *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997) (quoting *Georgia v. Rachel*, 384 U.S. 780, 788 (1966)). With respect to the first prong, “the phrase ‘any law providing for . . . equal civil rights’ must be construed to mean any law providing for specific civil rights stated in terms of racial equality.” *Rachel*, 384 at 792 (quoting 28 U.S.C. § 1443(a)). Second, it must appear, in accordance with the provisions of § 1443(1), that the removal petitioner is denied or cannot enforce the specified federal rights in the courts of the State. *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975) (citations omitted).

III. DISCUSSION

Here, the notice of removal refers to potential bias by State Court judges. Without more, the notice does not meet the first prong under § 1443(1). Even if the first prong had been met, Defendant must also show that he cannot enforce his asserted rights in state court. *In re Weddington*, 2008 WL 686381 (E.D. Pa. Mar. 12, 2008); *see also State v. Haws*, 131 F.3d 1205, 1209 (7th Cir. 1997). The notice of removal does not lead to the conclusion that Defendant cannot enforce any asserted rights in state court. Defendant has sought to enforce his right on multiple occasions. The issues he raises are rights that are certainly enforceable in state court. Indeed, it is generally presumed that “the protection of federal constitutional or statutory rights [can] be effected in the pending state proceedings, civil or criminal.” *Johnson*, 421 U.S. at 219-20.

Finally, while Defendant frames the issue as one arising under the *Adams* case, *supra*, it is evident this is merely another attempt to gain release from prison. Notably, for relief Defendant asks the Court to “vacate all the state court criminal proceedings in *State v. Desmond*, Cr.A.No.

91009844ID. For the above reasons, the Court will summarily remand the case to the Delaware Supreme Court and/or the Superior Court of the State of Delaware in and for New Castle County.

IV. CONCLUSION

For the above reasons the Court will summarily remand the case to the Delaware Supreme Court and/or the Superior Court of the State of Delaware in and for New Castle County.¹

An appropriate order will be entered.

¹ The Court also observes that the notice of removal was not timely filed. *See* 28 U.S.C. § 1455(b)(1) (A notice of removal of a criminal prosecution shall be filed not later than 30 days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.).