

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 17 2021

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

NATHAN B. BYERLY,

Petitioner-Appellant,

v.

STATE OF IDAHO; et al.,

Respondents-Appellees.

No. 21-35122

D.C. No. 1:17-cv-00454-BLW
District of Idaho,
Boise

ORDER

Before: CANBY and LEE, Circuit Judges.

The request for a certificate of appealability 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).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NATHAN B. BYERLY,

Petitioner,

v.

TYRELL DAVIS,

Respondent.

Case No. 1:17-cv-00454-BLW

ORDER OF DISMISSAL

On October 27, 2020, the Court reviewed Petitioner's Second Amended Petition and determined that it failed to comply with Rule 2(d) of the Rules Governing Section 2254 Cases ("Habeas Rules").¹ *Dkt. 64* at 5. The Court forwarded Petitioner the Court's form petition and ordered Petitioner to file a third amended petition within 28 days. The Court also notified Petitioner that this case would be dismissed, with prejudice and without further notice, if Petitioner did not file a timely third amended petition. *Id.*

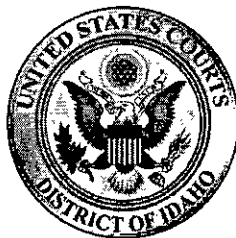
Petitioner failed to do so. Instead, Petitioner has filed a Motion for Temporary Stay of Suspension of Review and/or Proceedings. *Dkt. 65*. The Court has previously granted Petitioner multiple extensions of time and has warned him more than once about the necessity of complying with filing deadlines. For these reasons, the Court exercises its discretion to deny Petitioner's Motion and will dismiss this case with prejudice.

¹ The Court also noted that some of Petitioner's claims were not cognizable in federal habeas proceedings. *Dkt. 64* at 5 n.3.

ORDER

IT IS ORDERED:

1. Petitioner's Motion for Temporary Stay of Suspension of Review and/or Proceedings (Dkt. 65) is DENIED.
2. This entire action is DISMISSED with prejudice for failure to prosecute and for failure to comply with a Court order. *See* Fed. R. Civ. P. 41(b); Rule 12 of the Rules Governing Section 2254 Cases ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.").
3. The Court does not find its resolution of this habeas matter to be reasonably debatable, and a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c); Habeas Rule 11. If Petitioner intends to appeal, he must file a timely notice of appeal in this Court. Petitioner may seek a certificate of appealability from the Ninth Circuit by filing a request in that court.



DATED: February 1, 2021

B. Lynn Winmill

B. Lynn Winmill
U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NATHAN B. BYERLY,

Petitioner,

v.

TYRELL DAVIS,¹

Respondent.

Case No. 1:17-cv-00454-BLW

NOTICE OF INTENT TO DISMISS

Pending before the Court is Petitioner Nathan B. Byerly's First Amended Petition for Writ of Habeas Corpus. Dkt. 17. On May 9, 2018, the Court stayed this case pending the completion of Petitioner's state court proceedings. Dkt. 43. Petitioner was instructed to file a motion to reopen this case no later than 30 days after the state court proceedings concluded.

Respondent has now filed a Motion to Vacate the Stay and to Dismiss the First Amended Petition. Dkt. 47. According to the documents submitted by Respondent—which are subject to judicial notice, *see* Fed. R. Evid. 201—Petitioner's post-conviction proceedings in state court were completed in May 2020. However, Petitioner has not complied with the Court's order to move to reopen this case. Nor has Petitioner timely responded to Respondent's Motion to Vacate Stay and Dismiss.

¹ Respondent Tyrell Davis is substituted for his predecessor, Al Ramirez, as warden of the facility in which Petitioner is confined. *See* Rule 2(a) of the Rules Governing § 2254 Cases; Fed. R. Civ. P. 25(d).

Accordingly, the Court notifies Petitioner that the First Amended Petition is subject to dismissal for failure to prosecute or failure to comply with a court order. *See* Fed. R. of Civ. P. 41(b); Rule 12 of the Rules Governing Section 2254 Cases ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."). Dismissal in this manner would operate as an adjudication on the merits and would prevent Petitioner from re-filing a federal habeas corpus petition challenging the same conviction or sentence. If Petitioner intends to proceed with this case, he must respond to Respondent's pending Motion within 21 days after entry of this Order.

ORDER

IT IS ORDERED that, within 21 days after entry of this Order, Petitioner must file a response to Respondent's Motion to Vacate Stay and Dismiss. If Petitioner does not do so, this case may be dismissed without further notice under Federal Rule of Civil Procedure 41(b).



DATED: August 26, 2020

A handwritten signature in black ink, appearing to read "B. Lynn Winmill".

B. Lynn Winmill
U.S. District Court Judge

**Additional material
from this filing is
available in the
Clerk's Office.**