

UNITED STATES COURT OF APPEALS

**FILED**

FOR THE NINTH CIRCUIT

SEP 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. 21-35328

D.C. No. 1:21-cv-00048-BLW  
District of Idaho,  
Boise

ORDER

Before: HAWKINS, WATFORD, and LEE, Circuit Judges.

This appeal is dismissed as unnecessary and duplicative of docket No. 21-35399. Appellant's appeal from the final judgment entered in the district court on April 26, 2021 proceeded in this court as a request for a certificate of appealability in docket No. 21-35399. On August 13, 2021, this court denied a request for a certificate of appealability in docket No. 21-35399.

All pending motions are denied.

This order served on the district court shall, 21 days after the date of the order, act as and for the mandate of this court for appeal No. 21-35328.

**DISMISSED.**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

NATHAN BYERLY,

Petitioner,

v.

STATE OF IDAHO; ADA COUNTY;  
IDAHO BOARD OF CORRECTION;  
IDAHO DEPARTMENT OF  
CORRECTION; ADA COUNTY  
PUBLIC DEFENDER; NEIL PRICE;  
and JOHN DOE HOAGLAND,

Respondents.

Case No. 1:21-cv-00048-BLW

**INITIAL REVIEW ORDER**

Petitioner Nathan Byerly is a prisoner in the custody of the Idaho Department of Correction. Petitioner has filed a Petition for Writ of Habeas Corpus that appears to challenge pending state court criminal charges against Petitioner for battery on a correctional officer. *See* Dkt. 1 at 1–3. Because Petitioner seems to be contesting his ongoing state criminal proceedings, the Court construes the Petition under 28 U.S.C. § 2241.<sup>1</sup>

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<sup>1</sup> The Court's construction of the Petition as challenging an ongoing criminal proceeding, rather than a criminal conviction, is based on the following: (1) Petitioner's discussion of an October 29, 2020 state court hearing that "was scheduled ... for entry of plea," but that Petitioner was unable to attend; (2) the Petition's failure to clearly state whether Petitioner has appealed any conviction; (3) Petitioner's claim that the state has "faile[d] to prosecute in a timely manner"; and (4) Petitioner's request that the Court "dismiss" the state criminal case against him. *See* Dkt. 1 at 3–4, 23. If the Court's construction is incorrect and Plaintiff has actually been convicted of the battery charge, he must file any amended petition under 28 U.S.C. § 2254, not § 2241. Form petitions are available at the prison resource center.

In its discretion, the Court may apply the Rules Governing Section 2254 Cases (“Habeas Rules”) to habeas petitions filed pursuant to § 2241. *See* Habeas Rule 1(b). Therefore, the Court now reviews the Petition to determine whether it is subject to summary dismissal pursuant to 28 U.S.C. § 2243 and Habeas Rule 4.

### **REVIEW OF PETITION**

Title 28 U.S.C. § 2241 gives federal courts jurisdiction to issue pretrial writs of habeas corpus to state criminal defendants in appropriate cases. *Braden v. 30<sup>th</sup> Judicial Circuit Court of Kentucky*, 410 U.S. 484, 489-93 (1973). A pre-requisite to bringing a federal habeas corpus petition under 28 U.S.C. § 2241 is exhausting one’s federal claims in state court. *Carden v. Montana*, 626 F.2d 82, 83 (9th Cir. 1980).

The exhaustion doctrine requires that a petitioner give the state courts, through the designated appellate process, “a full and fair opportunity to resolve federal constitutional claims” before bringing those claims to federal court. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (explaining exhaustion in the context of habeas petitions brought pursuant to 28 U.S.C. § 2254). To do so, the petitioner must invoke one complete round of the state’s established appellate review process, fairly presenting all constitutional claims to the state courts so that they have a full and fair opportunity to correct alleged constitutional errors at each level of appellate review. *Id.* If the petitioner is not granted relief after exhausting all state court remedies through the highest state court, he may then file a petition for writ of habeas corpus in federal court. “Where a petitioner seeks pre-conviction habeas relief, this exhaustion prerequisite serves two purposes: (1) to avoid isolating state courts from federal constitutional issues by assuring those courts an

ample opportunity to consider constitutional claims; and (2) to prevent federal interference with state adjudication, especially state criminal trials.” *Carden*, 626 F.2d at 83.

This exhaustion rule has a very limited exception with respect to pretrial habeas petitions. A federal district court may issue a pretrial writ under § 2241 without a showing of exhaustion of state remedies “only in the most unusual circumstances”—that is, if a petitioner can show “special circumstances” that particularly warrant federal intervention. *Id.* at 83-84 (internal quotation marks omitted). For example, special circumstances include “cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction,” or cases “where irreparable injury can be shown.” *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

The federal courts are not permitted to “supervise the administration of state criminal proceedings at every interlocutory stage.” *New York ex rel. Epps v. Nenna*, 214 F. Supp. 102, 105 (S.D.N.Y. 1963). If they were, such supervision “would erase the exhaustion principle from among the canons of habeas corpus adjudication.” *Id.* Though alleged constitutional violations are of utmost concern to the federal district courts, the state courts must be given the first opportunity to correct constitutional violations, so as to preserve the principles of comity and federalism. If a defendant is seeking to “derail a pending state criminal proceeding, and ... may be acquitted at trial,” it is appropriate for a federal district court to postpone adjudication of the petitioner’s constitutional claims “until a time when federal jurisdiction will not seriously disrupt state judicial processes.”

*Neville v. Cavanagh*, 611 F.2d 673, 676 (7th Cir. 1979) (internal quotation marks omitted).

The Petition here does not establish the type of special circumstances that would warrant pretrial habeas relief.<sup>2</sup> Within 28 days after entry of this Order, Petitioner may attempt to show such circumstances by filing an amended petition.

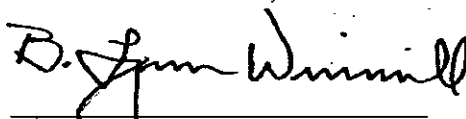
### ORDER

#### IT IS ORDERED:

1. Within 28 days after entry of this Order, Petitioner may file an amended petition setting forth the reasons why Petitioner believes this habeas corpus case is not subject to dismissal.
2. If Petitioner does not file an amended petition, or if the amended petition does not plausibly allege special circumstances sufficient to warrant a pretrial writ, this case may be dismissed without further notice.



DATED: March 18, 2021

  
B. Lynn Winmill  
U.S. District Court Judge

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<sup>2</sup> Some of Petitioner's claims appear subject to summary dismissal for the additional reason that they challenge the conditions of Petitioner's confinement. The remedy for the violations asserted in such claims would not be an immediate or speedier release from confinement, *see Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973), but instead an award of monetary damages and/or an order requiring the cessation of unconstitutional activities. Because such claims "do[] not lie at the core of habeas corpus," these claims "may not be brought in habeas corpus but must be brought, if at all," pursuant to 42 U.S.C. § 1983, the civil rights statute. *Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016) (en banc) (internal quotation marks and citations omitted). If Petitioner intends to assert conditions-of-confinement claims that do not call into question the very fact or duration of Petitioner's confinement, he may file a separate civil rights lawsuit under 42 U.S.C. § 1983.

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PUBLIC DEFENDER; NEIL PRICE;  
and JOHN DOE HOAGLAND,

Respondents.

Case No. 1:21-cv-00048-BLW

**JUDGMENT**

In accordance with the Order filed on this date, IT IS ORDERED, ADJUDGED, and DECREED that this case is DISMISSED without prejudice. In addition, this case is hereby ordered closed.



DATED: April 26, 2021

*B. Lynn Winmill*

B. Lynn Winmill  
U.S. District Court Judge

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

AUG 13 2021

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STATE OF IDAHO; et al.,

Respondents-Appellees.

No. 21-35399

D.C. No. 1:21-cv-00048-BLW  
District of Idaho,  
Boise

ORDER

Before: M. SMITH and HURWITZ, 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); *Wilson v. Belleque*, 554 F.3d

816, 825-26 (9th Cir. 2009).

Any pending motions are denied as moot.

**DENIED.**

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Case No. 1:21-cv-00048-BLW

**ORDER OF DISMISSAL FOR  
FAILURE TO EXHAUST**

The instant habeas case is brought under 28 U.S.C. § 2241. On March 18, 2021, the Court issued its Initial Review Order, concluding that Petitioner's claims challenging his pending criminal charges were unexhausted and, therefore, subject to summary dismissal. *See* Dkt. 7. The Court gave Petitioner 28 days to file an amended petition "setting forth the reasons why Petitioner believes" that the failure to exhaust should be excused. *Id.* at 4.

Petitioner has now filed an Objection to Assignment and Motion for Reassignment, which the Court construes as a motion for recusal or disqualification of the undersigned judge. *See* Dkt. 9. The objection includes a request for an extension of time to file an amended petition. *Id.* at 6.



Petitioner has also filed a Motion to Rescind the March 18, 2021 Order and Objection, which the Court construes as a motion for reconsideration of the Court's Initial Review Order. *See* Dkt. 8.

Finally, Petitioner has complied with the Initial Review Order by filing an Amended Petition and a Motion to Introduce a Special Circumstance, in which Petitioner argues that he should be excused from the exhaustion requirement. *See* Dkts. 11, 12.

The Court will address Petitioner's motions in turn.

**1. Motion for Disqualification**

Disqualification, or recusal, of judges is governed by 28 U.S.C. §§ 144<sup>1</sup> and 455.<sup>2</sup> Petitioner has not shown that either section—or any case interpreting those sections—

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<sup>1</sup> Section 144 provides that a judge must recuse himself or herself from a case “[w]henever a party to any proceeding ... makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party.”

<sup>2</sup> Section 455 provides as follows:

- (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
  - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
  - (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
  - (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to

applies in this case. Disqualification is not required where only vague allegations of bias and prejudice are asserted, or where those allegations arise from the adjudication of claims or cases by the court during the course of litigation. Such alleged errors are “the basis for appeal, not recusal.” *Focus Media, Inc. v. Nat’l Broadcasting Co. (In re Focus Media, Inc.)*, 378 F.3d 916, 930 (9th Cir. 2004).

Petitioner contends that the Court is biased against him and corrupt. However, Petitioner’s assertions appear to be based on the Court’s rulings in another of Petitioner’s cases and, therefore, are not an appropriate basis for recusal. Nor has Petitioner made a showing that the Court’s decisions in this case were the “products of deep-seated favoritism or antagonism that made fair judgment impossible.” *Id.* (internal quotation marks and alteration omitted). Therefore, Petitioner’s motion for disqualification will be denied for lack of a viable legal theory and lack of supporting evidence.

## **2. Motion for Reconsideration of the Initial Review Order**

The Court has the “inherent procedural power to reconsider, rescind, or modify an interlocutory order”—which is an order in a case that is still pending rather than a case in

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the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge’s knowledge likely to be a material witness in the proceeding.

which final judgment has been entered—if the moving party establishes sufficient cause. *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (internal quotation marks and emphasis omitted); Fed. R. Civ. P. 54(b) (“[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.”). “[C]ourts have distilled various grounds for reconsideration of prior rulings into three major grounds for justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence or an expanded factual record; and (3) need to correct a clear error or to prevent manifest injustice.” *Gray v. Carlin*, No. 3:11-CV-00275-EJL, 2015 WL 75263, at \*2 (D. Idaho Jan. 6, 2015) (internal quotation marks omitted).

The Court does not find sufficient cause to reconsider the Initial Review Order. Petitioner’s motion appears to be merely a disagreement with the Court’s legal analysis that his § 2241 claims are unexhausted. Petitioner has not shown that the Court’s Initial Review Order was clearly erroneous or that it will work a manifest injustice. Thus, the motion to reconsider will be denied.

### **3. Review of Amended Petition and Allegation of Special Circumstances**

Petitioner argues that he should be excused from the exhaustion requirement because special circumstances exist in his ongoing criminal case. He alleges fraud on the part of Respondents because he did not receive adequate notice of his state court hearing date and that there have been “hearing schedule violation[s]” in his state criminal case.

The Court does not find that these circumstances constitute the type of special circumstances that would justify excusing Petitioner's failure to exhaust. Petitioner has not established that this is a case of "proven harassment," a prosecution "undertaken by state officials in bad faith without hope of obtaining a valid conviction," or a case in which "where irreparable injury can be shown." *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

**ACCORDINGLY, IT IS ORDERED:**

1. Petitioner's Objection to Assignment and Motion for Reassignment (Dkt. 9), construed as a motion for disqualification, is GRANTED IN PART with respect to Petitioner's request for an extension of time to file an amended petition. It is DENIED in all other respects.
2. Petitioner's Amended Petition (Dkt. 11) is deemed timely.
3. Petitioner's Motion to Rescind the March 18, 2021 Order and Objection (Dkt. 8), construed as a motion to reconsider the Court's Initial Review Order, is DENIED.
4. Because Petitioner has not shown that he should be excused from exhaustion, Petitioner's Motion to Introduce a Special Circumstance (Dkt. 12) is DENIED.
5. Petitioner's claims under 28 U.S.C. § 2241 are DISMISSED without prejudice as unexhausted. Petitioner's remaining claims—all of which appear to be civil rights claims alleging unconstitutional conditions of confinement—are DISMISSED without prejudice because such claims do

not lie at the core of habeas corpus and, therefore, must be brought, if at all, under 42 U.S.C. § 1983. *See Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016) (en banc).

6. To the extent that a certificate of appealability is required to appeal this decision, the Court declines to issue one because the resolution of this habeas matter is not reasonably debatable. *See* 28 U.S.C. § 2253(c); Rules 1(b) and 11 of the Rules Governing Section 2254 Cases.



DATED: April 26, 2021

*B. Lynn Winmill*

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U.S. District Court Judge

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**JUDGMENT**

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DATED: April 26, 2021

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