Appendix A

No. 24-5420

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT SETH DENTON,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
CHRIS BRUN, Warden,)
)
Respondent-Appellee.)

Before: THAPAR, Circuit Judge.

Robert Seth Denton, a pro se Tennessee prisoner, appeals the dismissal of his 28 U.S.C. § 2254 petition. He moves for a certificate of appealability (COA), for leave to proceed in forma pauperis (IFP), and to have counsel appointed for him.

A jury found Denton guilty of three counts of first-degree murder, aggravated assault, reckless aggravated assault, and reckless endangerment. On March 7, 2019, the trial court sentenced him to life in prison. On March 19, 2019, Denton moved for a new trial, raising several grounds for relief. He reserved the right to amend the motion once he received the trial transcript, which had been requested. In July 2021, Denton's counsel moved for and obtained an extension of time to file an amended motion for a new trial. The state court docket sheet shows that the trial court conducted numerous hearings and granted numerous continuances over the following 28 months.

In January 2024, without a ruling on his motion for a new trial, Denton filed his § 2254 petition. He argued that he should be excused from § 2254(b)(1)(A)'s exhaustion requirement because of the inordinate delay in adjudicating his motion for a new trial that, in effect, denied him his right to a direct appeal. He contended that the first two years of delay resulted from the court

reporter's failure to produce a trial transcript and that the remaining three years of delay resulted from his counsel's failure to perfect his motion for a new trial.

On February 8, 2024, the day after Denton filed his amended motion for a new trial, the trial court denied it. Two months later, the district court dismissed Denton's § 2254 petition without prejudice and declined to issue a COA, concluding that he did not exhaust his state-court remedies and that he was not excused from doing so because most of the five-year delay in adjudicating his motion for a new trial was not attributable to the state.

Denton now moves for a COA. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court rejects a claim on procedural grounds, the petitioner must show both that jurists of reason would find the district court's procedural ruling debatable and that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Ordinarily, a federal habeas petitioner must exhaust his state remedies before pursuing relief under § 2254. *See* 28 U.S.C. § 2254(b)(1)(A); *Pudelski v. Wilson*, 576 F.3d 595, 605 (6th Cir. 2009). The exhaustion requirement may be excused, however, where the state courts have engaged in inordinate delay in adjudicating the petitioner's claims, particularly when the state is responsible for the delay. *See* 28 U.S.C. § 2254(b)(1)(B)(ii); *Phillips v. White*, 851 F.3d 567, 576 (6th Cir. 2017) (citing *Workman v. Tate*, 957 F.2d 1339, 1344 (6th Cir. 1992)).

Reasonable jurists would not debate the district court's refusal to excuse Denton's failure to exhaust his state-court remedies. The two-year delay caused by the court reporter's difficulties is not inordinate, particularly given that the trial court regularly conducted hearings during that time rather than sitting idle. *See Johnson v. Bauman*, 27 F.4th 384, 395 (6th Cir. 2022). And the remaining three-year delay caused by Denton's counsel's failure to perfect his amended motion for a new trial is attributable to Denton rather than the state. Denton did not show that he made affirmative efforts to get his motion resolved or that the trial court interfered with his ability to obtain that resolution. *See Vermont v. Brillon*, 556 U.S. 81, 90-93 (2009) (explaining that

counsel's delays should be attributed to the defendant rather than the state); *Turner v. Bagley*, 401 F.3d 718, 726 (6th Cir. 2005) (explaining that excusing the exhaustion requirement may be proper where a petitioner is without recourse in state court after making frequent but unavailing requests to have his case processed).

Accordingly, Denton's motions for a COA and to appoint counsel are **DENIED** and his IFP motion is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

ROBERT SETH DENTON, *Petitioner*, v. CHRIS BRUN, *Respondent.*	)	Case No. 3:24-cv-4 Judge Atchley Magistrate Judge McCook

JUDGMENT ORDER

In accordance with the accompanying Memorandum Opinion and Order, Respondent's motion to dismiss the petition due to Petitioner's failure to first exhaust his state court remedies [Doc. 10] is **GRANTED**, and this prisoner's pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is **DISMISSED WITHOUT PREJUDICE**. A certificate of appealability **SHALL NOT** issue. Because the Court **CERTIFIED** in the Memorandum Opinion and Order that any appeal from this order would not be taken in good faith, should Petitioner file a notice of appeal, he is **DENIED** leave to appeal *in forma pauperis*. Fed. R. App. P. 24(a). The Clerk is **DIRECTED** to close the file.

SO ORDERED.

/s/ Charles E. Atchley, Jr.
CHARLES E. ATCHLEY, JR.
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

/s/ LeAnna R. Wilson
LeAnna R. Wilson
CLERK OF COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

ROBERT SETH DENTON,	)	
	)	
Petitioner,	)	Case No. 3:24-cv-4
	)	
v.	)	Judge Atchley
	)	
CHRIS BRUN,	)	Magistrate Judge McCook
	)	
Respondent.	)	
	)	

MEMORANDUM OPINION AND ORDER

This is a pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 in which Petitioner, a state prisoner, seeks to challenge his underlying state court convictions for three counts of first-degree murder, one count of aggravated assault, one count of reckless aggravated assault, and one count of reckless endangerment. Petitioner filed this petition without first exhausting his state court remedies due to the state court's nearly five-year delay in addressing his motion for a new trial [Docs. 2, 2-1].

Respondent filed a motion to dismiss this action without prejudice due to Petitioner's failure to exhaust his state court remedies prior to filing this action [Doc. 10], and a memorandum and exhibits in support of this motion [Docs. 11, 11-1–11-7]. Petitioner filed a motion for extension of time [Doc. 13], a motion to strike [Doc. 14], and a response in opposition to Respondent's motion to dismiss [Doc. 16]. Respondent filed a reply [Doc. 17]. For the reasons set forth below, Petitioner's motion for extension of time and motion to strike [Docs. 13, 14] will be **DENIED AS MOOT**, Respondent's motion to dismiss [Doc. 10] will be **GRANTED**, and this action will be **DISMISSED WITHOUT PREJUDICE**.

I. PETITIONER'S MOTIONS

Petitioner filed both (1) a motion for extension of time to file a reply until fifteen days after his receipt of Respondent's answer [Doc. 13] and (2) a motion to strike any answer Respondent filed after February 10, 2024, as untimely [Doc. 14]. However, Petitioner subsequently filed a letter in which he (1) acknowledges that he had not seen Respondent's motion for extension of time to file his answer [Doc. 8] or the Court's Order granting that motion [Doc. 9] when he filed these motions; (2) notes that Respondent's motion for extension and the Court's order granting that motion render his motions [Docs. 13, 14] "premature"; and (3) states that he therefore withdraws those motions [Doc. 15 at 1].

Because the Court granted Respondent's motion for an extension [Docs. 9], and because Petitioner filed a timely response in opposition to Respondent's motion to dismiss [Doc. 16], Petitioner's motions [Docs. 13, 14] are **DENIED AS MOOT**.

II. MOTION TO DISMISS

As set forth above, Petitioner seeks to proceed herein without first exhausting his state court remedies [Doc. 2 at 5; Doc. 2-1 at 46–48]. Respondent filed a motion to dismiss the petition due to Petitioner's failure to exhaust his state court remedies prior to filing this action [Doc. 10], in support of which he filed a memorandum and state court documents [Docs. 11, 11-1–11-7]. Petitioner filed a response in opposition to this motion [Doc. 16], and Respondent filed a reply [Doc. 17].

While the Court acknowledges that the five-year delay in the trial court ruling on Petitioner's motion for a new trial was considerable and unfortunate, the record does not show that this delay was attributable to the state. Accordingly, Respondent's motion to dismiss the petition [Doc. 10] will be **GRANTED**, and this action will be **DISMISSED WITHOUT PREJUDICE**.

A. Background

In his memorandum in support of his petition, Petitioner sets forth, among other things, a summary of the evidence against him presented at trial, which included a dying declaration from one of the victims identifying Petitioner as the person who shot him [Doc. 2-1 at 85] and testimony from a child (who was present during the attack and found covered in blood and other bodily substances due to the attack) who also identified Petitioner, her brother, as the shooter [*Id.* at 30, 80–81].

In his petition, Petitioner notes that on August 29, 2015, he was arrested for the charges underlying the state court criminal proceeding against him, and on January 23, 2019, he was convicted [Doc. 2 at 5]. Petitioner further states that (1) his attorney filed a motion for a new trial shortly after his convictions that was still pending at the time he filed his habeas corpus petition in this case almost five years later; (2) two years of that delay was due to the trial court's failure to provide transcripts; and (3) the rest of the delay was due to both his counsel's "failure . . . to perfect this motion after transcripts were finally provided" and the trial court's "inability. . . to make a ruling," which he categorizes as a violation of due process that "effectively denied [him] [his] right to an appeal" [*Id.*]. Petitioner asserts that Tennessee has no remedy under which he can compel the state court judge to make a ruling on his motion for new trial, but he also cannot appeal until the trial judge rules on his motion for new trial [*Id.*]. Petitioner further points out that at his trial, he testified that his grandfather, Curtis Rose, killed the victims and tried to kill him [*Id.*]. He also claims that, even if he received a new trial today, he could not receive a fair trial because of the time that has passed, and that the state has deliberately attempted to deny him a fair trial to "cover" for mistakes made in both the investigation and prosecution of his case [*Id.*]. Petitioner additionally states that the case against him was not strong and that he is actually innocent [*Id.*].

Also, in his memorandum in support of his petition, Petitioner reiterates that he has experienced a five-year delay in receiving a ruling on his motion for a new trial, without which he cannot file an appeal [Doc. 2-1 at 46–47]. Petitioner again notes that he has been incarcerated for these charges since 2015 and asserts that this supports a presumption of his desire for a timely appeal [*Id.* at 47, 48 (citing *United States v. Smith*, 94 F.3d 204 (6th Cir. 1996) and *Doggett v. United States*, 505 U.S. 647 (1992))]. Petitioner further claims that (1) an "'inordinately delayed'" appeal is meaningless; (2) the Sixth Circuit has adopted the test the Supreme Court set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) for speedy appeal claims; (3) his "oppressive[] incarcerat[ion]" for almost his entire adult life has caused him "a great deal of anxiety and concern"; and (4) his ability to defend himself in any retrial has been significantly impaired by the passage of time because he cannot test the blood found on his grandfather Curtis Rose's "person at the time of the crime" and, if Curtis Rose dies, he cannot test his DNA [*Id.* at 47–48].

In his memorandum in support of his motion to dismiss this action due to Petitioner's failure to exhaust his state court remedies prior to filing his petition, Respondent first sets forth the statutory exhaustion requirement and emphasizes the exceptional circumstances historically required for habeas corpus petitioners to overcome the exhaustion requirement. Respondent further states that, as the trial court has now denied Petitioner's motion for new trial, Petitioner can file a direct appeal of his convictions, and his argument for federal habeas review of his petition without first exhausting his state remedies is moot [Doc. 11 at 3–5]. Respondent further notes that delay standing alone is not enough for a habeas petitioner to bypass the exhaustion requirement and relies on *Johnson v. Bauman*, 27 F.4th 384, 394–95 (6th Cir. 2022) to assert that, while the record shows delay, it does not show that the delay was due to circumstances outside Petitioner's control and attributable to the state, or that this is a "'rare case'" with "'peculiar urgency'" that would

allow the Court to excuse Petitioner's failure to exhaust his state court remedies prior to proceeding herein [*Id.* at 5–7].

In his response to Respondent's motion, Petitioner contends that the facts of his case mirror those of *Turner v. Bagley*, 401 F.3d 718 (6th Cir. 2005), which is a case in which the Sixth Circuit (1) reversed a district court's dismissal of a habeas corpus petition due to the petitioner's failure to first exhaust his state court remedies; and (2) granted an unconditional writ of habeas corpus because of the state court's eleven-year delay in addressing an appeal [Doc. 16 at 1–2]. Petitioner states that his case is similar to *Turner* because his attorney allowed a five-year delay in resolution of his motion for new trial and failed to raise an actual innocence claim [*Id.* at 2].

Petitioner also asserts that the trial court's decision to deny his motion for a new trial does not moot his request for this Court's review of his convictions, as it does not resolve the issues of whether the delay and/or ineffective assistance of his counsel deprived him of his right to an adequate and effective appeal [*Id.* at 3 (citing *Turner*, 401 F.3d at 726–27 (finding that a state court's resolution of an appeal after the petitioner filed a federal habeas corpus petition alleging delay in that appeal does not moot the habeas petition) (citations omitted))]. Petitioner additionally claims that his case is similar to *Turner* because the delayed appeal "undercut the foundation of the exhaustion requirement" [*Id.* at 4]. Petitioner points out that he did not receive a hearing on his motion for new trial until after he had filed the instant federal habeas corpus petition, and the trial court cited only the court reporter's illness as the reason for the delay in adjudication of the motion but did not address his counsel's three-year delay in filing an amended motion for new trial after receipt of the transcripts [*Id.*].

Petitioner categorizes both the court reporter's delay in preparing his trial transcripts and his court-appointed attorney's delay in filing an amended motion for new trial as attributable to

the state [*Id.* at 4–5 (citing *Turner*, 401 F.3d at 724 and *United States v. Howard*, 216 F. App'x 463, 477–78 (6th Cir. 2007))]. Petitioner further asserts that the delay in his state court proceeding has caused him prejudice because (1) he has been incarcerated almost his whole adult life for a crime he did not commit and therefore is "nearly a decade" behind his peers for education and work experience and "lost meaningful contact with every person" he knew prior to his incarceration; and (2) he was placed on suicide watch in county jail multiple times and spoke with mental health professionals due to his anxiety about his trial and appeal [*Id.* at 5–6]. He also reiterates that the Supreme Court has held that extreme delay could result in a presumption of prejudice [*Id.* at 6 (citing *Doggett*, 505 U.S. 647)].

Petitioner states that unless he is able to obtain Curtis Rose's DNA before Mr. Rose dies, he will be unable to prove that Mr. Rose's DNA is on the murder weapon, Petitioner's jacket, and other items at the scene [*Id.*]. Petitioner further asserts that the hearing on his motion for new trial was a meaningless ritual because the trial judge did not have the transcripts in front of him and did not specifically address Petitioner's claims for relief but instead only relied on the record, which was not in front of him and he could not have remembered, to deny the motion [*Id.* at 6–7]. Petitioner additionally states that his counsel's failure to raise various claims in the motion for new trial will result in a meaningless appeal that does not allow for consideration of his actual innocence [*Id.* at 7]. Petitioner attached his counsel's amended motion for trial, which was filed February 7, 2024 [*Id.* at 9–11], to his response.

In his reply, Respondent first states that Petitioner's assertion that his case is similar to *Turner* is misplaced due to various differences between this case and *Turner* [Doc. 17 p. 2–4]. Respondent further points out that while the Sixth Circuit in *Turner* attributed actions of the petitioner's court-appointed attorneys to the state by relying on a Ninth Circuit case, *Barker* does

not appear to support this premise, and intervening Supreme Court precedent establishes that errors of appointed counsel must be attributed to the defendant, rather than the state, under *Barker* [*Id.* at 4–5 (citing *Vermont v. Brillon*, 556 U.S. 81, 91–92 (2009))]. Respondent also asserts that "[t]o permit Petitioner to proceed herein without first exhausting state-court remedies would permit [a] petitioner[] to claim an entitlement to relief due to a circumstance in state court that he himself contributed to—either due to his own actions or those of his counsel who acts as his agent—because he failed to take actions available to [hi]m to minimize the injury he now presents as a basis for wavier of the exhaustion requirement" [*Id.* at 7]. Respondent attached a document to his reply establishing that Petitioner has now filed a notice of appeal of his convictions with the Tennessee Court of Criminal Appeals [Doc. 17-1].

The Court summarizes the relevant events in the record as follows:

(1) On March 9, 2019, Petitioner filed his initial motion for a new trial in which he reserved the right to file an amended motion for new trial upon receipt of the transcripts he had previously requested [Doc. 11-3 at 1–2];

(2) The docket sheet for Petitioner's underlying criminal matter has notations indicating that on July 25, 2019, a "Defendant Video Hearing" with a result of "Continuance Granted" occurred [Doc. 11-4 at 2];

(3) The docket sheet for Petitioner's underlying criminal matter has notations indicating that in 2020, eight "Defendant Video Hearing[s]" occurred with results of "Continuance Granted" or "Case Rescheduled" [*Id.* at 1–2];

(4) The docket sheet for Petitioner's underlying criminal matter has notations indicating that on February 26, 2021, a "Defendant Video Hearing" with a result of "Continuance Granted" occurred [*Id.* at 1];

(5) On July 20, 2021, Petitioner's counsel filed a motion seeking a continuance of the hearing on the motion for new trial due to his unfamiliarity with Petitioner's first attempted trial and his need to consult with Petitioner about that proceeding [Doc. 11-5 at 1];

(6) The docket sheet for Petitioner's underlying criminal matter has notations indicating that on July 22, 2021, a "Defendant Video Hearing" with a result of "Continuance Granted" occurred [*Id.* at 1];

(7) The docket sheet for Petitioner's underlying criminal matter has notations indicating that in the rest of 2021, the trial court held two more "Defendant Status" or "Defendant Video" hearings with results of "Continuance Granted" [*Id.* at 1];

(8) The docket sheet for Petitioner's underlying criminal matter has notations indicating that in 2022, the trial court held six "Defendant Status Hearing[s]" in Petitioner's case with results of "Continuance Granted" [*Id.*];

(9) The docket sheet for Petitioner's underlying criminal matter has notations indicating that in 2023, the trial court held four "Defendant Status" or "Defendant" hearings in Petitioner's case with results of "Continuance Granted" [*Id.*];

(10) On January 3, 2024, Petitioner filed the instant petition for federal habeas corpus relief seeking to proceed herein without first exhausting his state court remedies due to the trial court's delay in adjudicating his motion for new trial [Doc. 2 at 5, 8];

(11) On February 7, 2024, Petitioner's counsel filed an amended motion for new trial [Doc. 16 p. 9–11]; and

(12) On February 8, 2024, the trial court denied Petitioner's motion for new trial and, in doing so, acknowledged that Petitioner had filed this habeas corpus petition and cited the ill health and demise of the court reporter as the cause of the delay in the adjudication of that motion [Docs. 11-6, 11-7].

B. Standard

Before a federal court may grant habeas corpus relief, the petitioner must have first exhausted his available state remedies for the claim. 28 U.S.C. §2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion requires a petitioner to have "fairly presented" each federal claim to all levels of the state appellate system to ensure that states have a "full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990) (citing *Justices v. Boston Mun. Court v. Lydon*, 466 U.S. 294, 302–03 (1984)). In Tennessee, presentation of the claim to the Tennessee Court of Criminal Appeals satisfies this requirement. Tenn. S. Ct. R. 39. The requirement for habeas petitioners to exhaust their state court remedies prior to filing a federal habeas corpus action "is based on the presumption that states maintain adequate and effective remedies to vindicate federal constitutional rights." *Turner*,

401 F.3d at 724 ("[T]he principle that federal courts should defer to state courts in the interest of comity assumes that the state courts will give prompt consideration to claims of violation of constitutional rights." (citing *Workman v. Tate*, 957 F.2d 1339, 1344 (6th Cir. 1992))).

Historically, courts only allowed petitioners to pursue federal habeas corpus relief without first exhausting their claims with the state court where (1) "immediate habeas relief was necessary to vindicate an overriding federal interest," such as "when state authorities imprisoned federal officers for performing their federal duties"; (2) "a state prisoner's detention impeded the administration of justice in federal tribunals," such as "when the state court process was 'under the domination of a mob'"; and (3) "where a state prisoner's continued detention was detrimental to the federal government's relationship with a foreign nation." *Johnson v. Bauman*, 27 F.4th 384, 390 (6th Cir. 2022) (citations omitted). But federal courts, including the Sixth Circuit, also have excused the exhaustion requirement due to a state court's "inordinate delay" in adjudicating a criminal proceeding. *Id.* at 391–94. The Sixth Circuit has stated that this exception to the exhaustion rule exists because "inordinate delay or deprivation of access to the appellate process renders the appeal worthless such that a petition for *habeas corpus* may be unconditionally granted." *Turner*, 401 F.3d at 727 (citations omitted).

The Sixth Circuit has recently clarified that "inordinate delay" in adjudication of a criminal proceeding will excuse a petitioner's failure to exhaust his state court remedies prior to bringing a federal habeas corpus action only where "exceptional circumstances beyond the petitioner's control either (1) render the state court process incapable of vindicating federal interests or (2) functionally foreclose state court review." *Bauman*, 27 F.4th at 391–94 (citations omitted). Thus, the Sixth Circuit requires a habeas petitioner seeking to bypass the exhaustion requirement to show both (1) something "more than mere delay" and (2) "that the delay [is] attributable to the state."

Id. at 394. The purposes of these requirements are to limit application of this exception to (1) "historically 'rare cases where exceptional circumstances of peculiar urgency are shown to exist'" and (2) cases where the "failure to exhaust is due to 'circumstances' independent of [the petitioner's] own conduct that functionally foreclose state court review." *Id.* at 395.

III. ANALYSIS

As the record does not demonstrate that a problematic portion of the delay in the adjudication of Petitioner's motion for new trial is attributable to the state, the Court will not allow Petitioner to proceed herein without first exhausting his state court remedies on this ground.[1]

Specifically, as set forth above, Petitioner alleges that two years of the delay in adjudication of his motion for new trial were due to the court reporter's preparation of the transcripts of his trial, and he categorizes this delay as attributable to the state. In support of his assertion that this delay is attributable to the state, Petitioner cites *United States v. Howard*, 216 F. App'x 463, 477–78 (6th Cir. 2007). Notably, in *Howard*, (1) the government agreed that the delay in preparation of the transcripts weighed against it; (2) the Sixth Circuit noted that it appeared to have been difficult to communicate with the court reporter; and (3) the defendant asserted his right to a speedy appeal, requested transcripts soon after filing the appeal, attempted to follow up on that transcript request, and filed a motion to compel production of the transcripts. *Id.* at 477.

In this case, however, Respondent does not accept responsibility for the court reporter's delay and instead points out that the trial court found that this delay was "'unavoidable'" due to the court reporter's failing health, which led to her retirement and demise [Doc. 11 p. 6–7 (citing

[1] The Court will not reach Respondent's arguments that the trial court's denial of Petitioner's motion for a new trial after Petitioner filed this action, which allowed Petitioner to file a direct appeal of his convictions, mooted Petitioner's request to proceed herein before exhausting his state court remedies, or that this is not a case with particular urgency.

Doc. 6 p. 3)]. Also, the record does not contain any motions or filings from Petitioner indicating his intent to pursue a speedy appeal or seeking to compel production of his trial transcripts. Given the differing circumstances in this case compared to *Howard*, including most notably the failing health of the court reporter which appears to have been a much more insurmountable obstacle than the communication difficulty at issue in *Howard*, the Court finds that the two-year delay in preparation of Petitioner's trial transcripts is more akin to a delay that *Barker* categorizes as justifiable, "such as a missing witness." *Barker v. Wingo*, 407 U.S. 514, 531 (1972). At worst, it is a mostly neutral factor such as "negligence or overcrowded courts" that "should be weighted less heavily" against the government. *Id.* Thus, the Court weights this two-year transcript preparation delay only lightly, if at all, against the state.

The Court must now examine the remaining three years of delay in adjudication of Petitioner's motion for new trial. As set forth above, Petitioner attributes this three-year delay to both (1) his appointed trial counsel's failure to file an amended motion for new trial after receipt of the transcript and (2) the trial court's delay in ruling on the motion. However, it is apparent from (1) the fact that, in his original motion for new trial, Petitioner's counsel reserved the right to amend his motion for new trial after receipt of the trial transcripts [Doc. 11-3 at 1]; (2) the fact that on July 20, 2021, Petitioner's counsel filed a motion seeking continuance of the hearing on the motion for new trial due to his unfamiliarity with Petitioner's first attempted trial and his need to consult with Petitioner about that proceeding [Doc. 11-5 at 1]; and (3) the fact that the trial court denied Petitioner's motion for new trial the day after Petitioner's counsel filed his amended motion [Docs. 16 p. 9–11, 11-6, 11-7], that all but one day of this nearly three-year delay is due to the time it took Petitioner's counsel to file an amended motion for new trial. Thus, the Court will only

examine whether Petitioner's counsel's delay in filing an amended motion for new trial is attributable to the state. For the reasons set forth below, the Court finds that it is not.

Petitioner relies upon *Turner* for his assertion that his court-appointed attorney's delay is attributable to the state. And Petitioner is correct that, in *Turner*, the Sixth Circuit found that where the state court allowed four separate court-appointed attorneys to withdraw from representation of the petitioner without filing appellate briefs and also "allowed [the petitioner]'s appeal to remain on the docket for nearly eleven years without meaningful attention," that delay was attributable to the state. *Turner*, 401 F.3d at 726.

However, as Respondent points out, in *Turner*, the Sixth Circuit cites a Ninth Circuit case, specifically *Coe v. Thurman*, 922 F.2d 528, 531–32 (9th Cir. 1990), to support its finding that the delay resulting from the state court allowing the petitioner's numerous court-appointed attorneys to withdraw without filing briefs and without any consequence for the failure to file briefs was attributable to the state. *Turner*, 401 F.3d at 726 (citing *Coe*, 922 F.2d at 531–32). In the *Coe* holding on which the Sixth Circuit relies on in *Turner*, the Ninth Circuit cited *Barker's* statement that "the ultimate responsibility for such circumstances [as negligence or overcrowded courts] must rest with the government rather than with the defendant" to support its finding that "failures of court-appointed counsel and delays by the court are attributable to the state." *Coe*, 922 F.2d at 531 (citing *Barker*, 507 U.S. at 531).

But after *Coe* and *Turner*, the Supreme Court expressly held that actions by an attorney, including a court-appointed attorney, are attributable to the defendant, rather than the state. *Brillon*, 556 U.S. at 90–91 (reversing the judgment of the Vermont Supreme Court because it "erred in attributing to the State delays caused by 'the failure of several assigned counsel . . . to move the case forward,'" and finding that an appointed counsel's "'inability or unwillingness . . .

to move the case forward,' may not be attributed to the State simply because they are assigned counsel" (internal citations omitted)). This result is logical to the Court because, if a court-appointed attorney's delay was attributable to the state, this would incentivize defendants such as Petitioner to engage in dilatory practices in their interactions with those attorneys and then rely on that delay to pursue relief under the same or similar theories Petitioner relies on herein.

Thus, the Court finds that only two of the nearly five years of delay in adjudication of Petitioner's motion for a new trial is even somewhat attributable to the state. However, the Sixth Circuit has found that a similar delay length was "trivial" in light of the historical reasons that allowed petitioners to seek habeas relief without first exhausting state court remedies, as well as the petitioner's failure to identify any evidence that (1) the state court interfered with his ability to obtain relief; or (2) he had made substantial efforts toward obtaining a ruling from the state court prior to filing a federal habeas petition, among other things. *Bauman*, 27 F.4th at 395–97. Like the *Bauman* petitioner, Petitioner has not pointed to any evidence that the state court interfered with his ability to obtain relief. Also like the petitioner in *Bauman*, and unlike the petitioner in *Turner*, Petitioner rather conspicuously does not identify any efforts he took with his attorney or otherwise to expedite the filing of his amended motion for new trial to enable him to file an appeal.[2]

Accordingly, the Court will not allow Petitioner to proceed herein without first exhausting his state court remedies, Respondent's motion to dismiss this action without prejudice [Doc. 10] will be **GRANTED**, and this action will be **DISMISSED WITHOUT PREJUDICE**.

[2] In *Turner*, the record contained both letters the petitioner had sent to his counsel seeking to expedite his proceedings and pro se motions the petitioner filed when his efforts with his counsel were unsuccessful. *Turner*, 401 F.3d at 723.

IV. CERTIFICATE OF APPEALABILITY

The Court now must consider whether to issue a certificate of appealability ("COA"), should Petitioner file a notice of appeal. A petitioner may appeal a final order in a § 2254 case only if he is issued a COA, and a district court should issue a COA only where the petitioner has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c). To obtain a COA on a claim that has been rejected on procedural grounds, a petitioner must demonstrate "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). As reasonable jurists would not debate the Court's ruling that Petitioner should not be allowed to proceed herein without first exhausting his state court remedies, a COA will not issue.

V. CONCLUSION

For the reasons set forth above:

1. Petitioner's motions for extension of time and to strike [Docs. 13, 14] are **DENIED**;

2. Respondent's motion to dismiss the petition without prejudice due to Petitioner's failure to exhaust his state court remedies prior to filing this action [Doc. 10] will be **GRANTED**;

3. A COA will not issue;

4. The Court **CERTIFIES** that any appeal in this matter would not be taken in good faith. Fed. R. App. P. 24(a); and

5. This action will be **DISMISSED WITHOUT PREJUDICE**.

AN APPROPRIATE JUDGMENT ORDER WILL ENTER.

SO ORDERED.

/s/ Charles E. Atchley, Jr.
CHARLES E. ATCHLEY, JR.
UNITED STATES DISTRICT JUDGE