UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MITCHELL HENDERSON,	**:**	
Petitioner,	**:**	
	:	
v.	**:**	**Case No. 3:98cv1031(SRU)(HBF)**
	:	
JOHN ARMSTRONG,	**:**	
Respondent.	**:**	

RULING AND ORDER

The petitioner, Mitchell Henderson ("Henderson"), currently confined at the MacDougall Correctional Institution in Suffield, Connecticut, commenced this action pursuant to 28 U.S.C. § 2254. He seeks retrial or immediate release, claiming that the state court failed to rule in a timely manner on his petition for certification to appeal the denial of his state habeas petition.

The original petition in this case was dismissed for failure to exhaust state court remedies. (See Doc. # 14.) Henderson exhausted his state court remedies by attempting to file a late appeal and, on January 28, 2000, filed a motion seeking to renew his petition. (See Doc. # 16.) On February 16, 2000, the court observed that the only ground for relief raised by Henderson was an inordinate delay in ruling on his petition for certification to appeal. The court ordered Henderson to file an amended petition containing all of his claims for relief and directed the Clerk to reopen the case after the amended petition was filed. (See Doc. # 17.) On March 3, 2000, Henderson filed an amended petition. The respondent, John Armstrong ("Armstrong"), filed his response to the amended petition on May 15, 2000.

As the respondent indicates, the amended petition is a duplicate of the original petition with the exception of four paragraphs in the prayer for relief. Henderson does not challenge his conviction on any of the grounds raised on direct appeal or in his state habeas petition. The sole

ground raised is the alleged inordinate and inexcusable delay in ruling on the petition for certification to appeal.

Habeas corpus relief is available only when an inmate can demonstrate that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Inexcusable delay has been considered an independent ground for habeas corpus relief in the context of a direct appeal. See, e.g., Heiser v. Ryan, 813 F. Supp. 388, 393 (W.D. Pa. 1993); Wheeler v. Kelly, 639 F. Supp. 1374, 1378 (E.D.N.Y. 1986), aff'd, 811 F.2d 133 (2d Cir. 1987). In determining whether a petitioner such as Henderson has been deprived of due process because of delay, courts consider the factors set forth in Barker v. Wingo, 407 U.S. 514 (1972). See, e.g., United States v. Mohawk, 20 F.3d 1480, 1485 (9th Cir. 1994); Cody v. Henderson, 936 F.2d 715, 717-18 (2d Cir. 1991). Those factors include the length of the delay, the reason for the delay, whether Henderson asserted his rights, and whether Henderson will suffer any prejudice as a result of the delay. See Barker v. Wingo, 407 U.S. at 530. "In determining whether a delay of a prisoner's appeal violates due process . . . no one factor is dispositive and all are considered together with the relevant circumstances." Simmons v. Reynolds, 898 F.2d 865, 868 (2d Cir. 1990). In cases concerning delay of post-trial proceedings, courts also consider the interests of federal-state comity. See, e.g., Brooks v. Johnson, 875 F.2d 30, 32 (2d Cir. 1989).

The first factor that the court must consider is the length of the delay. The state court denied Henderson's habeas petition on June 23, 1997, and denied his petition for certification to appeal the denial on August 6, 1997. (See Resp't's Mem. Opp. Pet. App. C & D.) Six weeks is not an inordinate delay.

Even assuming Henderson did not receive the state court's ruling until he received a copy

of the denial attached as Exhibit D to the defendant's May 21, 1999 Memorandum of Opposition to Petition for a Writ of Habeas Corpus, Henderson's claim of delay fails.[1] In light of other decisions within this circuit, a delay of approximately twenty-one-months cannot be considered excessive or inordinate. See Ralls v. Manson, 503 F.2d 491, 493-94 (2d Cir. 1974) (three-and-one-half-year delay in processing criminal appeal "not the equivalent of a complete absence of effective state appellate process"); Mims v. Leblanc, No. CIV. A. 97-3935, 1998 WL 118130, at *2 (E.D. La. Mar. 13, 1998) (holding that fourteen-month delay in processing of late appeal was "unfortunate, but not so extreme or unreasonable as to violate due process"). But see, e.g., Muwwakkil v. Hoke, 968 F.2d 284, 285-86 (2d Cir.) (holding that thirteen-year delay in appeal violated due process), cert. denied, 506 U.S. 1024 (1992); Mathis v. Hood, 937 F.2d 790 (2d Cir. 1991) (six-year delay of direct appeal excessive); Diaz v. Henderson, 905 F.2d 652 (2d Cir. 1990) (seven-year delay of direct appeal excessive). Because this circuit has held that the three-and-one-half-year delay in the appeal in Ralls did not violate due process, the approximately twenty-one-month delay in Henderson's receipt of the court's ruling in his state habeas corpus action cannot be said to violate his right to due process.

Another factor is whether Henderson asserted his right in state court. Henderson's position would be stronger if he had made some attempt to expedite the proceedings. See Osden

[1] Henderson argues that his state court petition was never denied and suggests improprieties in the handling of the matter by the state court. Henderson bases these allegations on the fact that the copy of the state court's denial submitted by Armstrong, which shows that Henderson's petition was denied on August 6, 1997), conflicts with a copy of a computer printout submitted by Henderson, which shows that the petition was docketed by the state court as having been denied on June 23, 1997, the same day it was filed by Henderson. The court declines Henderson's invitation to infer wrongdoing from what appears to be no more than a clerical error in the docketing of the denial.

v. Moore, 445 F.2d 806, 807 (1st Cir. 1971) (petitioner repeatedly attempted to expedite court action by letters to court and counsel). Henderson does not argue that he made any attempt to contact the state court to ascertain the status of his petition for certification to appeal.

The court also considers whether Henderson suffered any prejudice as a result of the delay. In Cousart v. Hammock, 580 F. Supp. 259, 268-69 (E.D.N.Y. 1984), aff'd, 745 F.2d 776 (2d Cir. 1984), the court indicated that an impaired ability to defend at retrial because of lost witnesses or lost evidence demonstrated prejudice as a result of delay in perfecting the appeal. Henderson alleges only that the delay has caused him to suffer anxiety. Henderson has not, therefore, identified sufficient prejudice created by the delay in his receipt of the court's denial of certification to appeal.

Applying the Barker v. Wingo factors to the facts of this case, Henderson has not been denied due process because of the delay. Thus, he fails to demonstrate that his conviction is in violation of the Constitution or federal law.

The amended petition for a writ of habeas corpus [**doc. #18**] is **DENIED**. The Clerk is directed to enter judgment in favor of the respondent and close this case. In addition, the court determines that the petition presents no question of substance for appellate review, and that Henderson has failed to make a "substantial showing" of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2) (2000). Accordingly, a certificate of appealability will not issue.

SO ORDERED this ___ day of November 2000, at Bridgeport, Connecticut.

_____

Stefan R. Underhill
United States District Judge