

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANDREW OWENS,	:	
Petitioner,	:	
	:	PRISONER
v.	:	Case No. 3:01cv1480 (SRU)
	:	
COMMISSIONER OF CORRECTIONS	:	
BRIAN MURPHY,	:	
Respondents.	:	

RULING ON MOTION TO DISMISS

The petitioner, Andrew Owens, is currently confined at the MacDougall Correctional Institution in Suffield, Connecticut. He brings this action pro se for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his conviction on the charge of first-degree manslaughter. Pending before the court is a motion to dismiss filed by the respondents. For the reasons set forth below, the respondents' motion to dismiss is granted as to the unexhausted claim and the petition is stayed as to the exhausted claims.

I. PROCEDURAL BACKGROUND

In March 1994, in the Connecticut Superior Court for the Judicial District of Waterbury, a jury convicted the petitioner of one count of manslaughter in the first degree. The judge sentenced the petitioner to a total term of imprisonment of twenty years. (See Pet. Writ Habeas Corpus at 1.) On August 22, 1995, the Connecticut Appellate Court affirmed the conviction. See State v. Owens, 38 Conn. App. 802, 663 A.2d 1094 (1995). The petitioner filed a petition for certification to appeal from the decision of the Connecticut Appellate Court. On September 28, 1995, the Connecticut Supreme

Court denied certification to appeal from the decision of the Connecticut Appellate Court. See State v. Owens, 235 Conn. 912, 665 A.2d 609 (1995).

On February 9, 1996, the petitioner filed a habeas petition in this court. On October 15, 1996, the court denied the petition without prejudice because it contained unexhausted claims and informed the petitioner that he could re-file his petition after he had exhausted his state court remedies. See Owens v. State of Connecticut, 3:96cv231 (JBA), slip op. at 2-3 (D. Conn. Oct. 15, 1996)¹. The court entered judgment for the respondent on October 23, 1996. On January 14, 1997, the petitioner filed a petition for writ of habeas corpus in state court challenging his conviction on the ground that he was not afforded effective assistance of counsel at trial. (See Pet. Writ Habeas Corpus at 3.) On May 3, 1999, the state habeas court dismissed the petition. See Owens v. Warden, No. CV 970567684, 1999 WL 335949 (Conn. Super. Ct. May 3, 1999). On January 9, 2001, the Connecticut Appellate Court affirmed the decision of the habeas court. See Owens v. Commissioner of Correction, 61 Conn. App. 347, 763 A.2d 1086 (2001). On February 28, 2001, the Connecticut Supreme Court denied the petitioner's petition for certification to appeal the decision of the habeas court. See Owens v. Commissioner of Correction, 255 Conn. 944, 769 A.2d 58 (2001).

On June 9, 1999, the petitioner commenced a second petition for writ of habeas corpus in this

¹ The court takes judicial notice of cases filed in this court and in state court as well as rulings and pleadings filed in those cases. See Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991) (noting that "courts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings. See, e.g., United States v. Walters, 510 F.2d 887, 890 n.4 (3d Cir. 1975) (on review of denial of habeas corpus, judicial notice of briefs and petitions filed in state courts to determine whether petitioner had exhausted his state remedies).").

court. On June 20, 2000, the petitioner voluntarily withdrew the petition. See Owens v. Armstrong, Case no. 3:99cv1084 (RNC) (D. Conn. June 20, 2000). On January 23, 2001, the petitioner commenced a third petition for writ of habeas corpus in this court. On February 7, 2001, the court dismissed the petition without prejudice for failure to completely exhaust state court remedies. See Owens v. Armstrong, Case no. 3:01cv121 (DJS), slip op. (D. Conn. Feb. 7, 2001). Judgment entered for the respondent on February 15, 2001. In May 2001, the petitioner attempted to reopen the case on the ground that he had finished exhausting his state court remedies. On May 16, 2001, the court denied the petitioner's motion to reopen and directed him to file a new action. See Owens v. Armstrong, Case no. 3:01cv121 (DJS) (D. Conn. May 16, 2001) (ruling denying motion to reopen).

On June 20, 2001, the petitioner filed the present federal habeas petition.² In the amended petition filed on April 17, 2002, the petitioner raises two grounds for relief: (1) trial counsel failed to investigate or obtain statements from critical witnesses or call them to testify at trial, and (2) trial counsel failed to withdraw from the case after he found out he had previously represented the victim in another matter.

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), significantly amended 28 U.S.C. §§ 2244, 2253, 2254, and 2255.

² Although the petition was received and docketed by the court on August 7, 2001, the court deems the petition filed as of the date it was notarized and presumably handed to correctional officials for mailing to the court. See Houston v. Lack, 487 U.S. 266, 270-71, 274 (1988) (holding that prisoner motions are deemed filed at the time they are delivered to prison officials for mailing). The Second Circuit has applied this "mailbox rule" to pro se federal habeas corpus petitions. See Noble v. Kelly, 246 F.3d 93, 97-98 (2d. Cir.), cert. denied, 534 U.S. 886 (2001). Here, the petition includes an affidavit notarized on June 20, 2001.

Specifically, the AEDPA amended § 2244(d)(1) to impose a one-year statute of limitations on federal petitions for a writ of habeas corpus challenging a judgment of conviction imposed by a state court:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244(d).

A conviction becomes final at "the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). See Smith v. McGinnis, 208 F.3d 13, 16 (2d Cir. 2000). The Second Circuit has held that the limitations period does not begin until the completion of direct appellate review in the state courts and either the denial of a petition for certiorari by the United States Supreme Court or the expiration of the time within which to file a petition for a writ of certiorari. See Williams v. Artuz, 237 F.3d 147, 151 (2d Cir. 2001). The limitations period is tolled by the filing of a state habeas petition, but not by the filing of a federal habeas petition. See 28 U.S.C. § 2244(d)(2)(statute of limitations is tolled when "a properly filed application for State post-conviction or

other collateral review with respect to the pertinent judgment or claim in pending"); Duncan v. Walker, 533 U.S. 167, 181-82 (2001) (pending federal habeas petition does not toll statute of limitations under 28 U.S.C. § 2244(d)(2)). Where a petitioner's conviction became final before the AEDPA's effective date of April 24, 1996, and there is no pending petition for collateral relief that would toll the statute of limitations, the Second Circuit has held that the petitioner must file his federal habeas corpus petition within one year after the enactment of the AEDPA, or on or before April 24, 1997. See Ross v. Artuz, 150 F.3d 97, 102-03 (2d Cir. 1998).

A petitioner must also exhaust all available state remedies prior to filing a habeas petition in federal court. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982); Daye v. Attorney General of the State of New York, 696 F.2d 186, 190 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1982); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a matter of federal-state comity. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors that may have crept into the state criminal process. See id. Ordinarily, the exhaustion requirement has been satisfied if the federal issue has been properly and fairly presented to the highest state court either by collateral attack or direct appeal. See O'Sullivan, 526 U.S. at 843 (citing Brown v. Allen, 344 U.S. 443, 447 (1953)). "[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition." Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990).

The Second Circuit requires the district court to conduct a two-part inquiry. First, the

petitioner must have raised before an appropriate state court any claim that he asserts in a federal habeas petition. Second, he must "utilize[] all available mechanisms to secure appellate review of the denial of that claim." Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)). A petitioner must present his federal constitutional claims to the highest state court before a federal court may consider the merits of the claims. See Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process." O'Sullivan, 526 U.S. at 845.

III. DISCUSSION

The respondents argue that the amended petition is barred by the statute of limitations. In addition, the respondents argue that the petition should be dismissed because it contains one unexhausted claim.

A. Statute of Limitations

The petitioner was convicted and sentenced in 1994. The Connecticut Appellate Court affirmed his conviction and sentence in August 1995 and the Connecticut Supreme Court denied the petitioner's request for certification to appeal the decision of the Connecticut Appellate Court in September 1995. Because the petitioner's conviction became final before the enactment of the AEDPA, he is entitled to the one-year grace period within which to file a federal habeas petition. Accordingly, his petition must have been filed on or before April 24, 1997.

On February 9, 1996, the petitioner filed a habeas petition in this court. See Owens v. State of Connecticut, 3:96cv231 (JBA). That petition remained pending until October 15, 1996, when the

court denied it without prejudice for failure to exhaust state court remedies. See Owens, slip op. at 2-3 (D. Conn. Oct. 15, 1996). Judgment entered on October 23, 1996. On January 14, 1997, the petitioner commenced a state habeas petition in the Connecticut Superior Court for the Judicial District of Hartford at Hartford. A superior court judge denied the petition in May 1999. See Owens v. Warden, No. CV 970567684, 1999 WL 335949 (Conn. Super. Ct. May 3, 1999). The petitioner subsequently appealed the decision to the Connecticut Appellate Court, and on February 28, 2001, the Connecticut Supreme Court denied petitioner's petition for certification to appeal the decision of the Connecticut Appellate Court. See Owens v. Commissioner of Correction, 61 Conn. App. 347, 763 A.2d 1086, cert. denied, 255 Conn. 944, 769 A.2d 58 (2001). The petitioner filed the present petition on June 20, 2001.

Because the filing of a federal petition does not toll the statute of limitations, 264 days expired before the petitioner filed his state habeas petition in January 1997. See Duncan 533 U.S. at 181-82 (pending federal habeas petition did not toll one-year statute of limitations under 28 U.S.C. § 2244(d)). The limitations period was tolled during the pendency of the state habeas petition and began to run again at the conclusion of the state habeas petition. Thus, the statute of limitations period began to run again on March 1, 2001. The 101 days remaining in the statute of limitations period expired on June 9, 2001. Thus, the respondent argues that the present petition filed on June 20, 2001, is untimely.

The Second Circuit has held that the limitations period set forth in 28 U.S.C. 2244(d) and the one-year grace period may be equitably tolled. See Rodriguez v. Bennett, 303 F.3d 435, 438 (2d Cir. 2002) ("the fact that § 2244(d)(2) does not cause exclusion of the federal petition's time of pendency does not necessarily exclude the possibility of discretionary tolling on equitable grounds."); Smith v.

McGinnis, 208 F.3d 13, 15-17 (2d Cir.) (adopting the position that "the one-year period is a statute of limitations rather than a jurisdictional bar so that courts may equitably toll the period"), cert. denied, 531 U.S. 840 (2000). Equitable tolling, however, is available only in "rare and exceptional circumstances.'" Id. at 17 (quoting Turner v. Johnson, 177 F.3d 390, 391-92 (5th Cir.), cert. denied, ___ U.S. ___ (1999)). It requires petitioner to "demonstrate that he acted with 'reasonable diligence' during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances 'beyond his control' prevented successful filing [of his petition] during that time." Smaldone v. Senkowski, 273 F.3d 133, 138 (2d Cir. 2001) (quoting Smith, 208 F.3d at 17; Sanvick v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999)). The burden is on the petitioner to demonstrate that "extraordinary circumstances prevented him from filing his [habeas] petition" within the limitations period. Smith, 208 F.3d at 17 (citing Johnson v. Nyack Hospital, 86 F.3d 8, 12 (2d Cir. 1996)).

The petitioner attempts to argue that the one-year limitations period or grace period should be equitably tolled because his first federal petition was denied without prejudice to re-filing. He also claims that he attempted to re-file the present petition in May 2001, but was unable to mail it to the court because he was moved to a different prison facility and could not get funds from his prison account to pay the filing fee. The Court concludes that extraordinary circumstances warrant tolling of the statute of limitations.

At the time the court dismissed the petitioner's first federal petition without prejudice for failure to exhaust remedies, neither the court nor the petitioner could have foreseen that four years later, the Supreme Court would issue its decision in Duncan v. Walker, 533 U.S. 167, 181-82 (2001), rendering the present petition untimely. "[T]he fact that Duncan transformed the dismissal of the [petitioner's first

federal petition] without prejudice into a dismissal with prejudice by rendering the [present] petition time-barred presents extraordinary circumstances that warrant equitable tolling of the AEDPA statute of limitations." Jimenez v. Walker, 166 F. Supp. 2d 765, 772 (E.D.N.Y. 2001).

In addition, the petitioner exercised due diligence in pursuing his unexhausted claims after this court denied his first petition for writ of habeas corpus without prejudice to re-filing. See Zarvela v. Artuz, 254 F.3d 374, 381-82 (2d Cir. 2001) ("prompt action by the petitioner to initiate exhaustion" by presenting the unexhausted claims to the state court "and return to federal court after its completion serves as the functional equivalent of 'reasonable diligence'"). In less than ninety days after judgment entered in this court, the petitioner filed his state court habeas petition. Although the petition was file-stamped in state court on January 14, 1997, the court notes that it is dated November 28, 1996. (See Mem. Opp'n Pet. Writ Habeas Corpus, App. D.) Thus, the petitioner attempted to begin the process of exhausting his claims in state court approximately one month after judgment entered in the first federal petition.

Two weeks after the Connecticut Appellate Court affirmed the trial court's denial of the state habeas petition, the petitioner commenced a third petition for writ of habeas corpus in this court. Because the claims in the petition had not been fully exhausted, this court dismissed the petition again without prejudice to re-filing upon the complete exhaustion of all claims. Just two weeks after the dismissal, the Connecticut Supreme Court denied the petition for certification to appeal the January 2001 decision of the Connecticut Appellate Court. Within thirty-five days of the Connecticut Supreme Court's decision, the petitioner filed a motion to reopen the third federal petition. On May 9, 2001, this court denied the motion and directed the petitioner to file a new habeas petition. Had the court granted

the petitioner's motion to reopen, the petitioner's claims would not have been barred by the statute of limitations. The petitioner then commenced this action on June 20, 2001.

In view of the extraordinary circumstances presented by this case, the decision of the Supreme Court in Duncan and the reasonable diligence with which the petitioner pursued his state court remedies, this court concludes the petitioner is entitled to equitable tolling for the portion of the one-year grace period that the first federal petition remained pending, i.e., from April 25, 1996 through October 23, 1996. See Jimenez, 166 F. Supp. 2d at 771-72 (period when first petition pending should be equitably tolled because Duncan had not been anticipated and petitioner had been diligent in exhausting his state court remedies); DeJesus v. Miller, 215 F. Supp. 2d 410 (S.D.N.Y. 2002) (same). Thus, the limitations period began to run on October 24, 1996, and ran for eighty-two days until the petitioner filed his state habeas petition on January 14, 1997. The limitations period was tolled until the resolution of the state habeas petition on February 28, 2001. It then ran for another 101 days until June 20, 2001, when the petitioner filed the present petition. Because only 183 days of the one-year statute of limitations expired before the filing of the present petition, the petition was timely filed. Accordingly, the motion to dismiss is denied on the ground that the petition is barred by the statute of limitations.

B. Exhaustion of State Court Remedies

The respondent argues that the petition should be dismissed because the first claim is not exhausted. The petitioner describes his first claim as an ineffective assistance of counsel claim. He contends that his trial attorney failed to investigate or obtain statements from crucial witnesses and also failed to call those witnesses to testify at trial. The petitioner concedes that the first claim is not

exhausted. He states that the claim was in the original petition but the attorney who was appointed by the court to represent him in the state habeas matter amended the petition and left the claim out. The court notes that the claim is included in the original petition filed by the petitioner in state court on January 14, 1997. (See Mem. Opp'n Pet. Writ Habeas Corpus, App. D at 4-12.) On January 29, 1999, counsel for the petitioner filed a second amended petition including a claim that trial counsel failed to present the testimony of the petitioner's sister at trial. The second amended petition does not include a claim concerning the investigation of other witnesses or the failure to present other witness testimony at trial. (See id. at 19-23.) In addition, the claims raised by the petitioner on appeal of the habeas court's denial of the habeas petition do not include any claims concerning the presentation of witness testimony. Thus, it is clear that the first ground of the present petition has not been exhausted.

In the second ground of the present petition, the petitioner contends that his trial counsel failed to withdraw as his attorney despite a conflict of interest. The petitioner claims that trial counsel had previously represented the victim. This claim was raised in the state habeas and was appealed to the Connecticut Supreme Court. Thus, the second claim has been fully exhausted.

Because the petitioner did not raise the first claim in his amended state habeas petition or on appeal of the denial of the amended state habeas petition, the petitioner presents a mixed petition containing both exhausted and unexhausted claims.

Traditionally, a mixed petition was dismissed without prejudice to refile after all of the claims had been exhausted. See Slack v. McDaniel, 529 U.S. 473, 486 (2000) (citing Rose v. Lundy, 455 U.S. at 510). Recently, however, the United States Court of Appeals for the Second Circuit cautioned the district courts not to dismiss a mixed petition containing exhausted and unexhausted claims where an

outright dismissal would preclude the petitioner from having all of his claims addressed by the federal court. The Second Circuit advised the district court to stay the petition to permit the petitioner to complete the exhaustion process and return to federal court. See Zarvela, 254 F.3d 374, 380-83 (recommending that the district court stay exhausted claims and dismiss unexhausted claims with direction to timely complete the exhaustion process and return to federal court “where an outright dismissal ‘could jeopardize the timeliness of a collateral attack.’”).

Because the present petition has been pending since June 2001, and the filing of a federal habeas petition does not toll the running of the one-year limitations period, were this court to dismiss the petition in its entirety, the petitioner would be time-barred from raising ground one in a federal habeas petition. Thus, in accordance with the recommendations set forth in Zarvela, the respondents’ motion to dismiss is granted as to the unexhausted ground for relief, ground one. The case is stayed as to ground two. The petitioner is directed to commence exhausting his state court remedies within thirty days of the date of this ruling and to file a notice in this case documenting his efforts to commence the exhaustion process. If the notice is not received by the court within forty days from the date of this ruling, the court will vacate this order dismissing the unexhausted ground and staying the action as to the exhausted ground and dismiss the petition nunc pro tunc in its entirety for failure to exhaust state court remedies. See Zarvela, 254 F.3d at 381 (noting that if petitioner failed to timely commence a state court action or timely return to federal court upon the conclusion of the state action, the stay may “be vacated nunc pro tunc as of the date the stay was entered, and the petition may be dismissed”).

Conclusion

The respondents’ Motion to Dismiss [**doc. #24**] is **DENIED** as to the exhausted ground for

relief and **GRANTED** as to the unexhausted ground for relief. Ground one is **DISMISSED**. The case is **STAYED** as to ground two. The petitioner's Motion for Hearing [**doc. # 26**] is **DENIED** as moot.

The petitioner is directed to commence exhausting his state court remedies as to ground one within **thirty** days of the date of this ruling and to file a notice in this case documenting his efforts to commence the exhaustion process within **forty** days from the date of this ruling. If a notice documenting the exhaustion efforts has not been received by the court within forty days from the date of this order, the court will vacate this order dismissing the unexhausted grounds and staying the action as to the exhausted grounds and the court will dismiss the petition nunc pro tunc for failure to exhaust state court remedies.

SO ORDERED this 4th day of September 2003, at Bridgeport, Connecticut.

Stefan R. Underhill
United States District Judge