IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

DAMIEN WAYNE ECHOLS PETITIONER

5:04-CV-00391 WRW

LARRY NORRIS, Director of the
Arkansas Department of Correction RESPONDENT

ORDER

Pending is Respondent's Motion to Dismiss Petition for Writ of *Habeas Corpus* for Non-Exhaustion (Doc. No. 11). Petitioner has responded (Doc. No. 15) and Respondent has replied (Doc. No. 16).

I.

It is undisputed that Petitioner's DNA claim has not been exhausted in state court.[1]

The procedural history of this case is lengthy. A full summary can be found in one of the most recent state court opinions *Echols v. State*.[2] For purposes of Petitioner's *habeas* petition, the Arkansas Supreme Court entered a final order on October 30, 2003.[3] Under the Antiterrorism and

[1]*See* Respondent's Motion to Dismiss Petition for Writ of *Habeas Corpus* for Non Exhaustion, page 15; *see also* Petitioner's Response to Motion to Dismiss Amended Petition for Writ of *Habeas Corpus*, page 4.

Petitioner's Claim III is his DNA claim. The Court will refer to this claim as his "DNA claim."

[2] 2005 WL 107133 (January 20, 2005).

[3]*See Echols v. State,* 354 Ark. 530 (October 30, 2003).

Effective Death Penalty Act of 1996, 28 U.S.C.A. § 2254, Petitioner has one year from the state court's final order in which to file his *habeas* petition in federal court. Petitioner filed his *habeas* petition on October 28, 2004 and his Amended Petition on February 28, 2005. Petitioner concedes that when he filed both his original and amended petitions, his DNA claim had not been exhausted in state court. Specifically, under Arkansas Code Annotated §16-112-201, Petitioner's DNA claim was filed in Craighead County Circuit Court on July 25, 2002 and is currently pending.[4]

Although Petitioner was aware of the exhaustion requirements, he knowingly filed his *habeas* Petition because, even though his DNA claim was not exhausted, there was uncertainty as to whether the DNA claim would toll the AEDPA's one-year statute of limitations. "Accordingly, acting with an abundance of caution and in light of the sentence imposed in this matter, Echols submitted his original federal habeas petition prior to October 30, 2004. Again the claims in the instant amended petition relate back to the date of filing the original petition."[5] Petitioner has requested that the Court stay the case and hold it in abeyance pending resolution of his DNA claim in state court.

Respondent, on the other hand, claims that Petitioner's case is not ripe for review before the Court, and has requested that the Court dismiss the petition for failure to exhaust. Respondent also asserts that the Court should not hold the case in abeyance because that is not consistent with Supreme Court precedent.[6] Respondent claims that this Court must dismiss the entire petition; or

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[4]*See Echols v. State*, 350 Ark. 42 (2002).

[5]*See* First Amended Petition for a Writ of *Habeas Corpus* by a Person in State Custody, page 10.

[6]*See* Respondent's Reply to Petitioner's Response to Motion to Dismiss Petition for *Habeas Corpus*.

dismiss the unexhausted claim and allow Petitioner to amend his Petition once his unexhausted claim is exhausted at the state court level.

II.

Before a federal court may grant *habeas* relief to a state prisoner, the petitioner must exhaust state court remedies[7] State courts should have a proper opportunity to address a petitioner's claims of constitutional error before those claims are presented in federal court.[8] The requirement of exhaustion of remedies is satisfied if the petitioner has "fairly presented" a claim to the state court, thus preserving the claim for federal review by properly raising both the factual and legal bases of the claim in state court proceedings, affording that court "a fair opportunity to rule on the factual and theoretical substance of [the] claim."[9] "In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts."[10] Also, if it is unclear whether a state court would entertain the claim or whether it is procedurally defaulted, the federal court must either dismiss the petition without prejudice; or stay the claim until the claim is presented to the state court.[11]

III.

In *Rhines v. Weber*, the United States Supreme Court recently addressed the issue of "mixed

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[7]28 U.S.C.A. § 2254(b)(1)(A); *Krimmel v. Hopkins*, 56 F.3d 873 (8th Cir. 1995).

[8]*Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991).

[9]*Krimmel* 56 F.3d at 876.

[10]*McCall v. Benson*, 114 F.3d 754, 757 (8th Cir. 1997)(citations omitted).

[11]*See Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir.1995)(internal citations omitted).

petitions" petitions containing both exhausted and unexhausted claims and the "stay and abey procedure."[12] In *Rhines*, the United States Supreme Court recognized the delicate balance between reducing delays in *habeas* cases and affording petitioners full and fair adjudication. The Court held:

> The enactment of AEDPA in 1996 dramatically altered the landscape for federal *habeas corpus* petitions. AEDPA preserved *Lundy's* total exhaustion requirement, see 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"), but it also imposed a 1-year statute of limitations on the filing of federal petitions, § 2244(d). Although the limitations period is tolled during the pendency of a "properly filed application for State post-conviction or other collateral review," § 2244(d)(2), the filing of a petition for *habeas corpus* in federal court does not toll the statute of limitations, *Duncan*, *supra*, at 181-182, 121 S.Ct. 2120.
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> As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy's* dismissal requirement, petitioners who come to federal court with "mixed" petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review. For example, if the District Court in this case had dismissed the petition because it contained unexhausted claims, AEDPA's 1-year statute of limitations would have barred Rhines from returning to federal court after exhausting the previously unexhausted claims in state court. Similarly, if a district court dismisses a mixed petition close to the end of the 1-year period, the petitioner's chances of exhausting his claims in state court and refiling his petition in federal court before the limitations period runs are slim. The problem is not limited to petitioners who file close to the AEDPA deadline. Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.
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> We recognize the gravity of this problem and the difficulty it has posed for petitioners and federal district courts alike. In an attempt to solve the problem, some district courts have adopted a version of the "stay-and-abeyance" procedure employed by the District Court below. Under this procedure, rather than dismiss the mixed petition pursuant to *Lundy*, a district court might stay the petition and hold it

[12]*Rhines v. Weber*, 125 S.Ct. 1528 (2005).

in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims. Once the petitioner exhausts his state remedies, the district court will lift the stay and allow the petitioner to proceed in federal court.
District courts do ordinarily have authority to issue stays, *see Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936), where such a stay would be a proper exercise of discretion, *see Clinton v. Jones*, 520 U.S. 681, 706, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997). AEDPA does not deprive district courts of that authority, cf. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus ... shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State" (emphasis added)), but it does circumscribe their discretion. Any solution to this problem must therefore be compatible with AEDPA's purposes.

One of the statute's purposes is to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003). *See also Duncan*, 533 U.S., at 179, 121 S.Ct. 2120. AEDPA's 1-year limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments." *Ibid*. It "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Ibid*.

Moreover, Congress enacted AEDPA against the backdrop of *Lundy's* total exhaustion requirement. The tolling provision in § 2244(d)(2) "balances the interests served by the exhaustion requirement and the limitation period," "by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Duncan*, *supra*, at 179, 121 S.Ct. 2120. AEDPA thus encourages petitioners to seek relief from state courts in the first instance by tolling the 1-year limitations period while a "properly filed application for State post-conviction or other collateral review" is pending. 28 U.S.C. § 2244(d)(2). This scheme reinforces the importance of *Lundy's* "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." 455 U.S. at 520, 102 S.Ct. 1198.

Stay and abeyance, if employed too frequently, has the potential to undermine these twin purposes. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition. *Cf. Duncan*, supra, at 180, 121 S.Ct. 2120 ("[D]iminution of statutory incentives to proceed first in state court would ... increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce").

For these reasons, stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. Though, generally, a prisoner's "principal interest ... is in obtaining speedy federal relief on his claims," *Lundy*, supra, at 520, 102 S.Ct. 1198 (plurality opinion), not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. *See, e.g.*, *Zarvela*, 254 F.3d, at 381 ("[District courts] should explicitly condition the stay on the prisoner's pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed"). And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all. *See id.*, at 380-381.

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition. *See Lundy*, 455 U.S. at 522, 102 S.Ct. 1198 (the total exhaustion requirement was not intended to "unreasonably impair the prisoner's right to relief"). In such a case, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions. For the same reason, if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief. *See id.*, at 520, 102 S.Ct. 1198 (plurality opinion) ("[A petitioner] can

always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims").[13]

Clearly, it would be a miscarriage of justice if Petitioner were not afforded federal review of his *habeas* petition. However, Petitioner's claim first must be fully exhausted at the state level before the Court can review all of his claims.[14] Petitioner has not been able to exhaust his claims in state court and must be afforded the opportunity to do so. Petitioner has demonstrated that there is good cause to hold his *habeas* petition in abeyance while his DNA claim is litigated. His claim was filed correctly under Arkansas Code Annotated § 16-112-201; and Petitioner is awaiting the results so that he may litigate his claim in state court. There is no evidence that Petitioner has engaged in abusive litigation tactics or intentional delay. As Justice O'Connor stated in *Rhines*, "the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions."[15] Absent delaying tactics on petitioner's part, Justice O'Connor's admonition must, and should be, heeded.

THEREFORE, after careful consideration, Respondent's Motion to Dismiss Petition for Writ of *Habeas Corpus* for Non Exhaustion is DENIED (Doc. No. 11). Based on *Rhines v. Weber*, Petitioner's Petition and Amended Petition for Writ of *Habeas Corpus* both will be stayed and held in abeyance until Petitioner's DNA claim is exhausted in the state court. Petitioner must continue to pursue his DNA claim in state court with diligence, and file his Amended Petition with the Court within ninety (90) days after the state court's disposition. Nothing in this Order may be considered

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[13]*Rhines* 125 S.Ct. at1533 **(emphasis added**).

[14]*Coleman* 501 U.S. at 729.

[15]*Rhines* 125 S.Ct. at1535.

a dismissal or disposition of this matter.

IT IS SO ORDERED this 18th day of August, 2005.

/s/ Wm. R.Wilson,Jr.
UNITED STATES DISTRICT JUDGE