

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>PATRICK DOYON,</b>	)	
	)	
<i>Petitioner</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 00-4-P-C</i></b>
	)	
<b>SUPERINTENDENT, MAINE</b>	)	
<b>CORRECTIONAL CENTER,</b>	)	
	)	
<i>Respondent</i>	)	

**RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS**

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction in the Maine Superior Court (Kennebec County) on a charge of aggravated assault. The petition alleges that he received ineffective assistance of counsel during his trial and appeal. The respondent contends that the petitioner has failed to exhaust his post-conviction review remedies in state court, as required by 28 U.S.C. § 2254(b). I recommend that the petition be dismissed.

On January 26, 1999 the petitioner was convicted of aggravated assault, a violation of 17-A M.R.S.A. § 208. Docket, *State of Maine v. Patrick Doyon*, Docket No. AUGSC-CR-1998-00086, Maine Superior Court (Kennebec County), at 1, 9. He was sentenced on March 26, 1999. *Id.* at 10. His appeal from this conviction, *id.* at 11, was denied by the Law Court. *State v. Doyon*, 745 A.2d 365, 368 (Me. 1999).

The petitioner states that he is “filing post conv [sic] review (Superior Court) same time as this petition,” Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State

Custody (“Petition”) (Docket No. 2) at 4, and indeed *Patrick Doyon v. State of Maine*, Docket No. AUGSC-CR-2000-00002, Maine Superior Court (Kennebec County), a petition seeking post-conviction review, was filed on January 5, 2000, the same day the instant action was filed.

The statute governing the writ of habeas corpus for those in state custody provides, in relevant part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). An applicant has not exhausted the remedies available in state court “if he has the right under the law of the State to raise, by any available procedure, the question presented.”

28 U.S.C. § 2254(c). To exhaust a federal constitutional claim, like the claim of ineffective assistance of counsel presented by the petitioner here, a petitioner must present its “substance” in state court before seeking a second opinion through habeas corpus proceedings in federal court.

*Picard v. Connor*, 404 U.S. 270, 278 (1971). “A habeas petitioner must have presented both the factual and legal underpinnings of his claim to the state courts in order for us to find it exhausted.”

*Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) (citations omitted). The habeas petitioner “bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim.” *Adelson v. DiPaola*, 131 F.3d 259, 262 (1st Cir. 1997).

To the extent that the claims presented in the petition before this court are presented in the

petitioner's post-conviction review proceeding presently pending in state court, there can be no exhaustion of those claims until the state courts have had the opportunity to rule on them. *See, e.g., Phoenix v. Matesanz*, 189 F.3d 20, 27 n.5 (1st Cir. 1999) (a claim is not exhausted for habeas purposes until it has been presented to highest available state court so that state had first chance to correct claimed error). To the extent that the claims presented in the petition here have not been presented to the state court at all, there can be no exhaustion.

Because the state of Maine provides post-conviction review, section 2254(b)(1)(B)(i) is not implicated. There is a suggestion in the petition that Doyon claims that the state procedure is ineffective to protect his rights, which would be the only other means available by which he could avoid the application of the exhaustion requirement. After noting that the state post-conviction review petition was filed on the same day as the instant action, the petitioner, in response to a request for a reason why he did not appeal from any adverse action on the state petition has written "post conv [sic] 'Superior Court' is low priority, takes forever." Petition at 4. Of course, there had not yet been any adverse action on the state petition from which the petitioner could appeal when he filled out that portion of the 2254 petition form, but the remark could be interpreted as a claim that he should not have to wait for the outcome of the state action before proceeding under section 2254. So interpreted, however, the argument is insufficient to exempt the petitioner from the exhaustion requirement.

It is true that "extreme" or "unusual" delays in the state courts can justify a decision to conduct an immediate federal review. However, those holdings are limited to cases where the delay is attributable to the state rather than the individual.

\* \* \*

The delay in this case [six years] was not extreme, unusual or attributable to the ineffectiveness of the state courts. It differs from that in

*Phillips [v. Vasquez*, 56 F.3d 1030 (9th Cir. 1995)] and is insufficient to constitute grounds for immediate federal review, particularly in light of the longstanding principles underlying the Supreme Court decision in *Younger v. Harris*, 401 U.S. 37, 43-45 . . . (1971). As *Younger* makes clear, our federal judiciary, “anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” *Id.* at 44 . . . . Under these circumstances, the principles of comity strongly suggest that the courts of [the state] be given the opportunity to determine the proper sentence to be imposed upon the petitioner.

*Edelbacher v. Calderon*, 160 F.3d 582, 586-87 (9th Cir. 1998). The petitioner does not suggest, nor can he when his state petition was filed on the same day as his federal petition, that extreme or unusual delay in the resolution of his state petition will necessarily occur. The petitioner’s opinion that resolution of state post-conviction review proceedings in Maine “takes forever,” in addition to lacking the degree of specificity to allow this court to deal with alleged delay as a factor permitting the petitioner’s exemption from section 2254’s exhaustion requirement, is insufficient evidence upon which to justify immediate relief in this court. If it were enough, no Maine prisoner would have to exhaust his state-court remedies before obtaining this court’s review of a petition based on section 2254.

The petitioner has demonstrated no prejudice that he will suffer from having to exhaust his state remedies beyond that suffered by every habeas petitioner, nor has he shown that any miscarriage of justice will result if he is required to exhaust his state remedies. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Whitten v. Allen*, 727 F. Supp. 28, 30 (D. Me. 1989). Accordingly, his failure to exhaust his remedies in state court means that this action must be dismissed.

I recommend that the petition for a writ of habeas corpus be **DISMISSED** without a hearing.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 21st day of March, 2000.*

---

*David M. Cohen  
United States Magistrate Judge*

DOYON v. MCC, SUPT Filed: 01/05/00 Assigned to: JUDGE GENE CARTER Referred to: MAG. JUDGE DAVID M. COHEN Demand: \$0,000 Nature of Suit: 530 Lead Docket: None Jurisdiction: Federal Question Dkt# in other court: None Cause: 28:2254 Petition for Writ of Habeas Corpus (State) PATRICK DOYON PATRICK DOYON plaintiff [COR LD NTC pse] [PRO SE] MAINE CORRECTIONAL CENTER P.O. BOX 250 SOUTH WINDHAM, ME 04082 v. MCC, SUPT CHARLES K. LEADBETTER defendant 289-3661 [COR LD NTC] ASSISTANT ATTORNEY GENERAL STATE HOUSE STATION 6 AUGUSTA, ME 04333