

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FOSTER BATES,)
)
 Petitioner,)
)
 v.) Civil No. 9-6-B-W
)
 STATE OF MAINE,)
)
 Respondent.)

ORDER ON MOTION TO STAY 28 U.S.C. § 2254 PROCEEDING

On January 7, 2009, Foster Bates filed a petition pursuant to 28 U.S.C. § 2254 seeking to set aside his 2002 convictions for murder and gross sexual assault. On January 9, 2009, I entered an order to clarify the record because the petition filed by Bates represented that Bates has pursued post-conviction relief in the state courts through a standard petition for post-conviction review and a post-conviction DNA motion and it was not clear from the face of the petition whether both of these motions had been fully resolved.

According to the State in its status report responding to this order, Bates filed a post-conviction DNA motion in the superior court on March 14, 2004. That motion is still pending in the superior court and DNA testing is being conducted. As a consequence, in order for Bates to fully exhaust this DNA claim – a prerequisite for any federal § 2254 review of such a claim – he must fully exhaust his state court remedies which means that if he is not successful in the superior court he will have to appeal that decision to the Maine Supreme Court. In this report the State admits: "Since that properly filed motion is still pending, the 2254 statute of limitations has not yet begun to run." (Doc. No. 3 at 1.)

I then issued a recommended decision indicating:

It appears that under Rule 4 of the Rules Governing Section 2254 Cases that Bates would not be entitled to any relief in this Court, at least as to his DNA claim, because he has not exhausted his available remedies in the state courts within the meaning of 28 U.S.C. § 2254(b)(1)(A). Bates would have to fully exhaust the pending DNA motion both in the Superior Court and in an appeal to the Maine Law Court before it would be ripe for this Court's consideration. Unless the State of Maine expressly waives the exhaustion requirement in a written objection to this recommended decision, (See 28 U.S.C. § 2254 (b)(3)), it is my recommendation that the Court dismiss this petition without prejudice to Bates's right to renew all of his claims in one comprehensive petition when he has fully exhausted his state court remedies. The only alternative would be for this Court to consider those claims that are already exhausted in the state court and dismiss the DNA claim as an unexhausted claim. However, if the Court proceeded in that fashion, if Bates failed to prevail on his DNA claim in state court, any federal challenge would then be a second and successive habeas petition subject to the procedural and substantive hurdles set forth in 28 U.S.C. § 2244. Thus it is in Bates's own interest for this Court to dismiss the current petition without prejudice to Bates's right to bring a new petition when all of his state post-conviction remedies have been fully exhausted.

(January 14, 2009, Rec. Dec. at 1-2, Doc. No. 4.)

On January 21, 2009, Bates filed a motion to stay this proceeding until the final resolution of his post-conviction DNA motion. (Doc. No. 5.) Notably, he has not asked this Court to dismiss his DNA claim and proceed to adjudicate his other potentially exhausted 28 U.S.C. § 2254 claims. After Rhines v. Weber, 544 U.S. 269, 277-78 (2005) this court clearly has discretion to order the stay and abeyance of a 28 U.S.C. § 2254 in appropriate circumstances. See Day v. McDonough, 547 U.S. 198, 210 n.10 (2006). Given the fact that Bates filed his post-conviction DNA motion in a timely manner and it has not been summarily dismissed by the State courts and he has pursued his state court remedies as to his other claims, it cannot be said that he was dilatory or that the DNA claims are patently frivolous. See Rhines, 544 U.S. at 278; compare Clements v. Maloney, 485 F.3d 158, 169 -71 (1st Cir. 2007); Josselyn v. Dennehy, 475 F.3d 1, 4 -5 (1st Cir. 2007); Powers v. O'Brien, 571 F.Supp.2d 230, 237 -39 (D. Mass. 2008). However, with the DNA motion facing its fifth anniversary in the state court system, there is no

telling how long it will take for a final state-court resolution of his motion. There is also the not insignificant consideration that Bates might actually obtain relief in the state courts on his pending motion, in which case there would be no basis for relief as to his current 28 U.S.C. § 2254 claims pertaining to his conviction.

Accordingly, I deny Bates's motion to stay. For the reasons set forth above, this motion for stay does not change the recommendation that the case be dismissed without prejudice set forth in my January 14, 2009, recommended decision.

CERTIFICATE

Any objections to this Order shall be filed in accordance with Fed.R.Civ.P. 72.

So Ordered.

January 23, 2009

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

BATES v. MAINE, STATE OF

Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAGISTRATE JUDGE MARGARET J.
KRAVCHUK

Cause: 28:2254 Petition for Writ of Habeas Corpus
(State)

Date Filed: 01/07/2009

Jury Demand: None

Nature of Suit: 530 Habeas Corpus
(General)

Jurisdiction: Federal Question

Petitioner

FOSTER BATES

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Respondent

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