

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Louis Joseph Cassise,
Petitioner,
vs.
Charles L. Ryan, et al.,
Respondents.

No. CV-15-01281-PHX-PGR (ESW)

ORDER

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Willett (Doc. 27, filed June 8, 2016) in light of Petitioner’s Objections to the Magistrate’s Report and Recommendation (Doc. 28, filed June 20, 2016), the Court finds that the petitioner’s objections should be overruled since the Court agrees with the Magistrate Judge that the respondents’ Motion to Dismiss Habeas Petition for Containing Only Unexhausted Claims (Doc. 19, filed February 1, 2016) should be granted and that the petitioner’s habeas petition, filed pursuant to 28 U.S.C. § 2254, should be dismissed without prejudice.

The petitioner pleaded guilty to ten counts of public sexual indecency; he was sentenced to consecutive two-years terms of imprisonment on two of the counts and concurrent terms of lifetime probation on the remaining counts. The petitioner filed

1 his of-right state petition for post-conviction relief on August 14, 2014, which the
2 state trial court denied on November 25, 2014. He filed his notice of appeal to the
3 Arizona Court of Appeals, No. 1 CA-CR 14-0852 PRPC, on December 22, 2014; that
4 appeal is still pending. It is undisputed that all claims raised in the petitioner's
5 federal habeas petition are unexhausted given that this action was filed prior to the
6 resolution of the petitioner's state court appeal.

7 The Magistrate Judge initially recommends that the petitioner's habeas
8 petition be dismissed pursuant to the abstention doctrine of Younger v. Harris, 401
9 U.S. 37 (1971), which recommendation the petitioner fails to object to in his
10 Objections. The Court agrees with the Magistrate Judge that the Younger abstention
11 doctrine requires that the Court dismiss the habeas petition because all three
12 Younger requirements are satisfied here in that the state appellate proceeding was
13 underway at the time this action was filed and remains ongoing, the state proceeding
14 implicates important state interests, and it affords adequate opportunity to raise
15 constitutional claims, and because there are no extraordinary circumstances present
16 that justify the Court's interference with the state appellate process.

17 The Magistrate Judge also recommends that the habeas petition be dismissed
18 on the additional ground that the petitioner had not exhausted his state court
19 remedies prior to filing this action. The petitioner has objected to this portion of the
20 Report and Recommendation. Although the Court need not even reach this issue
21 due to its acceptance of Younger abstention, the Court agrees with the Magistrate
22 Judge that the petitioner's undisputed failure to exhaust is not excusable under 28
23 U.S.C. § 2254(b)(1)(B).¹

24 1

25 Section 2254(b)(1) provides that "[a]n application for a writ of habeas
26 corpus on behalf of a person in custody pursuant to the judgment of a State court

1 The gist of the petitioner’s objection to the Report and Recommendation is
2 that his non-exhaustion of his state remedies is excused by the lengthy delay in the
3 resolution of his state post-conviction relief petition. The petitioner’s appeal has now
4 been pending for some eighteen months. While an excessive delay in the state
5 appellate process may render a state corrective process ineffective and thus waive
6 the requirement for exhaustion of state remedies, there is “no talismanic number of
7 years or months” that constitutes an unacceptable delay. Coe v. Thurman, 922 F.2d
8 528, 530-31 (9th Cir.1990). The Court agrees with the Magistrate Judge that the
9 Arizona Court of Appeals’ eighteen-month delay in adjudicating the petitioner’s
10 appeal does not excuse his non-exhaustion inasmuch as the Ninth Circuit has
11 concluded that a state appellate court’s delay of less than two years is not extreme
12 enough to excuse the statutory exhaustion requirement. Hamilton v. Calderon, 134
13 F.3d 938, 939 (9th Cir.1998). *See also*, Gay v. Ayers, 262 Fed.Appx 826, 828 (9th
14 Cir.2008) (Court concluded that a “nineteen-month period of delay does not weigh
15 toward finding an exception” under §2254(b)(1)(B); Gooden v. Pima County Jail,
16 2014 WL 6907445, at *1 (D.Ariz. Dec. 8, 2014) (“This Court finds that a seventeen-
17 month delay is not unusual or unacceptable and does not meet the threshold
18 requirement of establishing undue delay” for purposes of § 2254(b)(1)(B)). The
19 Court further agrees with the Magistrate Judge that the other Coe factors do not
20 excuse the petitioner’s non-exhaustion, and that this case does not involve any
21 exceptional circumstances of peculiar urgency that justify dispensing with the
22 exhaustion requirement. Therefore,

23 _____
24 shall not be granted unless it appears that - (A) the applicant has exhausted the
25 remedies available in the courts of the State; or (B)(i) there is an absence of
26 available State corrective process; or (ii) circumstances exist that render such
process ineffective to protect the rights of the applicant.”

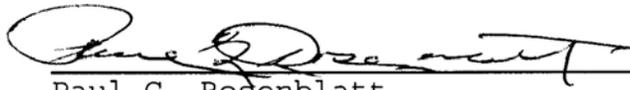
1 IT IS ORDERED that the Magistrate Judge's Report and Recommendation
2 (Doc. 27) is accepted and adopted in its entirety by the Court.

3 IT IS FURTHER ORDERED that the respondents' Motion to Dismiss Habeas
4 Petition for Containing Only Unexhausted Claims (Doc. 19) is granted and that the
5 petitioner's Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a
6 Person in State Custody is denied and that this action is dismissed without prejudice.

7 IT IS FURTHER ORDERED that no certificate of appealability shall issue and
8 that leave to appeal *in forma pauperis* is denied because the dismissal of the
9 petitioner's habeas petition is justified by a plain procedural bar and jurists of reason
10 would not find the Court's procedural ruling debatable.

11 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment
12 accordingly.

13 DATED this 28th day of June, 2016.

14
15 
16 Paul G. Rosenblatt
United States District Judge