

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

JAMES C. CARR, JR.,

Petitioner,

-vs-

WARDEN, Southern Ohio  
Correctional Facility,

Respondent.

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Case No. 3:10-cv-245

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District Judge Walter Herbert Rice  
Magistrate Judge Michael R. Merz

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**DECISION AND ORDER**

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This habeas corpus case is before the Court on Petitioner's Motion to Hold these Proceedings in Abeyance Pending the Outcome of Further Proceedings in the State Courts (Doc. No. 15).

Petitioner asserts that the judgment on which he is being imprisoned not a valid final judgment under Ohio R. Crim P. 32(C), relying on *State v. Baker*, 119 Ohio St. 3d 197, 893 N.E. 2d 163 (2008). Petitioner's theory is that, because the Termination Entry of January 22, 2008, does not include all the elements required by Ohio R. Crim P. 32(C), it was not a final appealable order and this Court of Appeals did not have jurisdiction to consider his appeal. *Baker* was decided July 9, 2008. In a later case the same term, *State, ex rel. Culgan, v. Medina County Court of Common Pleas*, 119 Ohio St. 3d 535, 895 N.E. 2d 805 (Sept. 18, 2008), the Ohio Supreme Court held that a criminal defendant whose judgment entry did not conform to Ohio R. Crim P. 32(C) would be entitled to writs of procedendo and mandamus from the court of appeals to compel the Common Pleas Court to enter a conforming judgment.

The Termination Entry in this case was entered by the Common Pleas Court on January 22, 2008 (Exhibit A to Doc. No. 15, PageID 2671-2672). On its face it does not appear to conform to Ohio R. Crim P. 32(C) in that it does not include the manner of conviction. In *Culgan, supra*, the Ohio Supreme Court applied *Baker* to a 2002 judgment, so there does not appear to be a bar to retroactive application of *Baker* to this case. It also appears from *Culgan* that Petitioner has a remedy by which he may obtain a new appealable judgment that complies with Ohio R. Crim P. 32(C). Thus it appears that Petitioner could apply to the Common Pleas Court for a new sentencing entry and obtain a writ of mandamus and/or procedendo compelling that court to provide such an entry if it would not do so on motion.

The potential availability of a new sentencing entry is not, however, good grounds for staying these proceedings. The United States Supreme Court has decided that district courts have authority to grant stays in habeas corpus cases to permit exhaustion of state court remedies in consideration of the AEDPA's preference for state court initial resolution of claims made in habeas corpus. It cautioned, however,

[S]tay 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"). . . .

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.

*Rhines v. Weber*, 544 U.S. 269, 277-278 (2005). As is evident from this excerpt, stay and abeyance is only available when the habeas petition is a “mixed” petition, i.e. a petition containing claims which are both exhausted and unexhausted. This claim about the failure of the termination entry to conform to Ohio R. Crim P. 32(C) is not made in the Petition here, so it is not a mixed petition.

Moreover, Petitioner would not be granted leave to amend to add this Ohio R. Crim P. 32(C) claim to his Petition because it does not state a claim for violation of Petitioner’s constitutional rights. Federal habeas corpus is available only to correct federal constitutional violations. 28 U.S.C. §2254(a); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Smith v. Phillips*, 455 U.S. 209 (1982), *Barclay v. Florida*, 463 U.S. 939 (1983). In other words, federal habeas courts do not sit to correct errors of state law and the United States Constitution does not command that a criminal judgment follow Ohio R. Crim P. 32(C).

Because Petitioner seeks a stay to pursue a non-constitutional claim in the Ohio courts, his Motion is not well taken and is denied.

December 7, 2010.

s/ **Michael R. Merz**  
United States Magistrate Judge