

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

David Barron,

Petitioner,

v.

Civil Action No. 1:12-cv-92

Andrew Pallito, Vermont
Department of Corrections,

Respondents.

ORDER

David Barron, a Vermont inmate proceeding *pro se*, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 4.) Barron is currently serving a state sentence of twenty years to life after having been convicted of sexual assault on a minor. His petition asserts a series of claims, including: that his confession was coerced; that he was questioned by law enforcement without receiving *Miranda* warnings and without his lawyer present; that his victim changed her story and thus was not credible; that his lawyer did not allow him to testify on his own behalf; and that he should not have been sentenced as a habitual offender because one of his previous offenses was no longer a crime under Vermont law.

Respondents have opposed the petition, arguing that Barron is trying to re-litigate issues that either have been addressed, or should have been raised, in the state courts. For the reasons set forth below, the Court finds that Barron's petition sets forth a mix of exhausted and unexhausted claims, and requires further guidance from Barron as to

whether he (1) wants to delete the unexhausted claims from his petition so that the Court may address his exhausted claims, or (2) argue for a stay and abeyance of his petition while he pursues his unexhausted claims in state court.

Factual and Procedural Background¹

On July 5, 2007, police responded to a domestic altercation between Barron and his wife. Barron was found to be in violation of his probation, was charged with disorderly conduct, and was taken into custody. During the transport to the sheriff's office, Barron voluntarily stated that his wife wanted him arrested so that she could carry out an affair with A.M., a fifteen-year-old girl living in their home. At the sheriff's office, he wrote an affidavit describing the altercation with this wife, and noted again that his wife was having a sexual relationship with A.M. He also claimed that his wife and A.M. had threatened to have him "locked up" if he revealed their relationship.

On July 11, 2007, a detective interviewed Barron to investigate the allegations about his wife. The investigation took place at the Chittenden Regional Correctional Facility, where Barron was being held based upon his probation violation. The detective did not provide a *Miranda* warning, and no attorney was present. On July 16, 2007, the detective met with Barron's wife and with A.M. A.M. confirmed having had sexual relations with Barron's wife, but initially denied having relations with Barron himself. During a second interview, however, conducted on August 1, 2007, A.M. stated that she had had sexual contact with both Barron and his wife.

¹ This factual background is derived in large part from the factual summary set forth by the Vermont Supreme Court in *State v. Barron*, 16 A.3d 620, 623-25 (Vt. 2011).

AEDPA limitations period, *Rhines*, 544 U.S. at 274-75, the limitations period will expire on or about December 17, 2012.

If I were to recommend to the Court that the entire petition be dismissed without prejudice while Barron returns to state court and exhausts each of his claims, my Report and Recommendation would not be resolved before mid-November 2012, as there is a mandatory fourteen-day objection period. *See* 28 U.S.C. § 636(b)(1). This would leave Barron, at most, approximately 30 days in which to file his post-conviction review petition and, once state court remedies are exhausted, return to this Court. Such a period of time would be insufficient to safeguard Barron's access to federal habeas review. *See, e.g., Zarvela*, 254 F.3d at 381 (noting that district courts should generally allow petitioners 30 days to initiate state court remedies, and after exhaustion is completed, 30 days in which to return to federal court).

As dismissal without prejudice is not an appropriate course, the Court is thus left with only two options: (1) allow Barron the opportunity to withdraw his unexhausted claims; or (2) stay the petition and hold it in abeyance while Barron pursues his remaining state court remedies. With respect to the latter option, neither party has briefed the question of whether Barron can carry his burden of showing good cause for a stay, or whether his unexhausted claims have sufficient merit to warrant a stay. *See Rhines*, 544 U.S. at 278. The Court therefore requires further input from Barron on these matters.

Like the Court, Barron has options: (1) he may move to withdraw his unexhausted claims, or (2) he may argue for a stay. If he chooses the first option, Barron must file a motion to amend his petition to submit only his exhausted claims. *See Rhines*, 544 U.S.

at 278 (“a petitioner can always amend the petition to delete the unexhausted claims, rather than returning to state court”). The motion must be filed within 30 days of this Order.² If Barron would prefer that the Court stay his petition while he pursues his unexhausted claims in the state courts, he must file a motion for stay and abeyance. That motion must set forth good cause for a stay, must demonstrate that his claims are not plainly meritless, and must also be filed within 30 days. *See id.* If Barron submits either such filing within 30 days, Respondents shall have 14 days in which to file a response.

If Barron fails to choose either course within 30 days, I will recommend that the Court dismiss his unexhausted claims and proceed to a review of the exhausted claims pursuant to the standard set forth at 28 U.S.C. § 2254(d).³ *See, e.g., McCrae v. Artus*, 2012 WL 3800840, at *10 (E.D.N.Y. Sept. 2, 2012) (noting that where courts are presented with “a mixed petition that is ineligible for a stay and that would be untimely if refiled following dismissal,” they generally assume that petitioner would prefer to have his exhausted claims heard rather than have the entire petition dismissed) (collecting cases).

² Dismissal of the unexhausted claims would be without prejudice, leaving open the possibility that they might be raised again in state court. Upon state court exhaustion, however, those claims would most likely be barred from review in federal court, as they would be untimely and would constitute a second or successive petition in violation of 28 U.S.C. § 2244(b).

³ Pursuant to 28 U.S.C. § 2254(d), a habeas corpus application “shall not be granted” unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law,” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 8th day of November, 2012.

/s/ John M. Conroy
John M. Conroy
United States Magistrate Judge