

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 10, 2022

SEAN F. McAVOY, CLERK

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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9  
10 JESSE MCKAY,

2:21-CV-00256-SAB

11 Petitioner,

12 v.

13 THE STATE OF WASHINGTON, by and  
14 through Director Michael Sparber, Director  
15 of Detention Services, Spokane County  
16 and its Attorney General, Bob Ferguson,

**ORDER DENYING PETITION  
FOR WRIT OF HABEAS  
CORPUS UNDER 28 U.S.C. §  
2241**

17 Respondent.  
18

19 Before the Court is Petitioner's Verified Petition for Writ of Habeas Corpus  
20 Under 28 U.S.C. § 2241 and Motion for Discovery Under 28 U.S.C. § 2246, ECF  
21 No. 1. Petitioner is represented by Nicolas V. Vieth and Justin P. Lonergan. The  
22 State of Washington is represented by John Samson. Spokane County is  
23 represented by Richard Sterett.

24 In his Petition, Petitioner asks the Court to order Respondents to return  
25 Petitioner to federal authorities for the purpose of serving his previously adjudged  
26 federal sentence. He asserts that the continued detention on the pending state  
27 charges violate the Due Process and Equal Protection guarantees of the Fourteenth  
28 Amendment.

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS UNDER  
28 U.S.C. § 2241 ~ 1**

1 Here, the Court finds that on the face of the Petition, Petitioner is not entitled  
2 to the writ as a matter of law.

### 3 **Background Facts**

4 In 2019, Petitioner was charged in the Eastern District of Washington with  
5 Assault Resulting in Serious Bodily Injury in Indian Country. He was arrested on  
6 September 17, 2019, and was ordered detained at Spokane County Jail, in  
7 Spokane, Washington, under the jurisdiction of the U.S. Marshals Service. While  
8 detained, and before his federal proceedings were completed, Petitioner was  
9 accused of sexually assaulting his cellmate. The alleged assault took place in  
10 January 2020.

11 On February 10, 2020, the State of Washington filed an information against  
12 Petitioner charging him with second-degree rape. On February 26, 2020, the State  
13 moved for a bench warrant on the grounds that Petitioner “violated the terms and  
14 conditions of his release pending trial for the crimes of Second Degree Rape.”<sup>1</sup> The  
15 Spokane County Superior Court granted the State’s request for a bench warrant  
16 and denied Petitioner bail.

17 In March 2020, the United States filed a superseding information charging  
18 Petitioner with sexual abuse, based on the January 2020 allegations. In July 2020,  
19 Petitioner entered into a plea agreement in which the United States agreed to  
20 dismiss the sexual abuse charge.

21 The sentencing hearing took place in late October 2020. Judge Robert H.  
22 Whaley sentenced Petitioner to 120 months confinement. The Judgment ordered  
23 that Petitioner be “remanded to the custody of the United States Marshal” and  
24 \_\_\_\_\_

25 <sup>1</sup> Petitioner asserts the reason for the warrant was because he did not show up for  
26 the arraignment hearing, notwithstanding the fact that the jail authorities had  
27 brought him to the court’s holding area to await his case being called, but then  
28 never brought him into the courtroom.



1 *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000). Pursuant to section  
2 2241, a district court is authorized to entertain the habeas petition of any individual  
3 who is “in custody in violation of the Constitution or laws or treaties of the United  
4 States.” 28 U.S.C. § 2241(c)(3). Thus, “the general grant of habeas authority in  
5 [section 2241] is available for challenges by a state prisoner who is not in custody  
6 pursuant to a state court judgment [such as] a defendant in pre-trial detention[.]”  
7 *Stow v. Murashige*, 389 F.3d 880, 886 (9th Cir. 2004); *Hoyle v. Ada Cty.*, 501 F.3d  
8 1053, 1058 (9th Cir. 2007) (holding that section 2241 is an appropriate means by  
9 which a pretrial detainee may challenge his or her detention).

10 Where a habeas petition challenges pretrial detention under section 2241, the  
11 Court reviews the state court’s factual findings with a presumption of correctness  
12 and reviews legal conclusions *de novo*. *Hoyle*, 501 F.3d at 1058–59. Unless the  
13 petition reveals on its face that as a matter of law the petitioner is not entitled to the  
14 writ, the writ or an order to show cause must issue. 28 U.S.C. § 2243; *Wright v.*  
15 *Dickson*, 336 F.2d 878, 881 (9th Cir. 1964).

## 16 B. Writ

17 Washington courts have recognized that the issuance of a writ of habeas  
18 corpus ad prosequendum is the common practice for obtaining a prisoner from  
19 federal authorities. *Matter of Harris*, 38 Wash. App 684, 686 (1984); *see also*  
20 *Smith v Hooey*, 393 U.S. 374, 381 n.13 (1969). “[I]t has been long that the United  
21 States may consent to the exercise of state jurisdiction over a federal prisoner.”  
22 *Harris*, 38 Wash. App. at 686 (citing *Ponzi v. Fessenden*, 258 U.S. 254 (1922)). As  
23 such, “[t]he decision to allow the state authorities to try a federal prisoner belongs  
24 to the federal government, and the defendant has no right to a hearing on the  
25 transfer nor can he complain about it.” *Id.* (citations omitted). The transfer from  
26 federal to state authorities is presumed to be authorized absent a showing to the  
27 contrary. *Id.* (citation omitted). Federal and Washington state courts have held that  
28 an illegal arrest or detention does not invalidate an otherwise valid conviction even

1 where the seizure of the defendant violates state or federal law. *Id.* at 687  
2 (collecting cases).

3 The concept of primary jurisdiction was established by the U.S. Supreme  
4 Court when it acknowledged the need for comity between state and federal  
5 authorities with respect to managing defendants who are subject to both state and  
6 federal criminal prosecutions and sentences. *Johnson v. Gill*, 883 F.3d 756, 761  
7 (9th Cir. 2018).

8 As a general rule, the first sovereign to arrest a defendant has priority of  
9 jurisdiction for trial, sentencing, and incarceration. *Thomas v. Brewer*, 923 F.2d  
10 1361, 1364 (9th Cir. 1991). The sovereign with primary jurisdiction can consent to  
11 the defendant's transfer to another sovereign for trial or other proceedings. *Ponzi*,  
12 258 U.S. at 261. Such a decision is vested "solely to the discretion of the  
13 sovereignty making it," acting through "its representatives with power to grant  
14 it." *Id.* at 260. In the federal system, for example, a "transfer of a federal prisoner  
15 to a state court for such purposes" may be "exercised with the consent of the  
16 Attorney General." *Id.* at 261–62.

17 When an accused is transferred pursuant to a writ of habeas corpus ad  
18 prosequendum, he is considered to be "on loan." *Id.* Notably, in *Thomas*, the  
19 defendant was first in state custody, then writted out to federal custody, and then  
20 returned to state custody after sentencing. The Ninth Circuit explained:

21 When an accused is transferred pursuant to a writ of habeas corpus ad  
22 prosequendum he is considered to be "on loan" to the federal  
23 authorities so that the sending state's jurisdiction over the accused  
24 continues uninterrupted. Failure to release a prisoner does not alter  
25 that "borrowed" status, transforming a state prisoner into a federal  
26 prisoner.

27 *Id.* at 1367 (quotation omitted).

### 28 **C. Younger Abstention Doctrine**

Generally speaking, the *Younger* abstention doctrine forbids federal courts

1 from enjoining pending state criminal proceedings. *Younger v. Harris*, 401 U.S.  
2 37, 53-54 (1971); *see also Middlesex Cty. Ethics Comm'n v. Garden State Bar*  
3 *Ass'n*, 457 U.S. 423, 431 (1982) (stating that *Younger* “and its progeny espouse a  
4 strong federal policy against federal-court interference with pending state judicial  
5 proceedings absent extraordinary circumstances”). The Ninth Circuit has held that  
6 abstention is appropriate when: (1) the state judicial proceedings are ongoing; (2)  
7 the proceedings implicate important state interests; (3) the state proceedings  
8 provide an adequate opportunity to raise constitutional challenges; and (4) the  
9 relief requested “seek[s] to enjoin” or has “the practical effect of enjoining” the  
10 ongoing state judicial proceedings. *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th  
11 Cir. 2018). Where all elements are met, a district court must abstain from hearing  
12 the case and dismiss the action. *See Beltran v. State of Cal.*, 871 F.2d 777, 782 (9th  
13 Cir. 1988) (stating that “[w]here *Younger* abstention is appropriate, a district court  
14 cannot refuse to abstain, retain jurisdiction over the action, and render a decision  
15 on the merits after the state proceedings have ended... [because] *Younger*  
16 abstention requires dismissal of the federal action”) However, even where *Younger*  
17 abstention is appropriate, “federal courts do not invoke it if there is a ‘showing of  
18 bad faith, harassment, or some other extraordinary circumstance that would make  
19 abstention inappropriate.’” *Arevalo*, 882 F.3d at 765–66.

#### 20 **D. Exhaustion of Remedies**

21 As a “prudential matter,” federal prisoners are generally required to exhaust  
22 available administrative remedies before bringing a habeas petition pursuant to 28  
23 U.S.C. § 2241. *Huang v. Ashcroft*, 390 F.3d 1118, 1123 (9th Cir. 2004) (citation  
24 omitted). The exhaustion requirement as applied to § 2241 petitions is judicially  
25 created, rather than a statutory requirement; thus, a failure to exhaust does not  
26 deprive a court of jurisdiction over the controversy. *Brown v. Rison*, 895 F.2d 533,  
27 535 (9th Cir. 1990), *overruled on other grounds, Reno v. Koray*, 515 U.S. 50, 54–  
28 55 (1995). If a petitioner has not properly exhausted his or her claims, a district

1 court in its discretion may either excuse the faulty exhaustion and reach the merits  
2 or require the petitioner to exhaust their administrative remedies before proceeding  
3 in court. *Brown*, 895 F.2d at 535. Exhaustion may be excused if the administrative  
4 remedies are inadequate or ineffective, or if attempting to exhaust would be futile  
5 or would cause irreparable injury. *Fraley v. United States Bureau of Prisons*, 1  
6 F.3d 924, 925 (9th Cir. 1993); *United Farm Workers of America v. Arizona Agr.*  
7 *Emp. Rel. Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982). Factors weighing in favor of  
8 requiring exhaustion include whether 1) agency expertise makes agency  
9 consideration necessary to generate a proper record and reach a proper decision; 2)  
10 relaxation of the requirement would encourage the deliberate bypass of the  
11 administrative scheme; and 3) administrative review is likely to allow the agency  
12 to correct its own mistakes and to preclude the need for judicial review. *Noriega–*  
13 *Lopez v. Ashcroft*, 335 F.3d 874, 880–81 (9th Cir. 2003).

14 Because the failure to exhaust administrative remedies is properly treated as  
15 a curable defect, it should generally result in a dismissal without prejudice. *City of*  
16 *Oakland, Cal. v. Hotels.com LP*, 572 F.3d 958, 962 (9th Cir. 2009).

### 17 E. Analysis

18 Petitioner has not shown he is entitled to habeas relief for three reasons.

19 First, Petitioner has not challenged the legality of the state’s writ of habeas  
20 corpus ad prosequendum. As such, the Court presumes the transfer of Petitioner  
21 from federal to state custody is valid. Consequently, Petitioner is properly on loan  
22 to state authorities and this Court does not have authority to order the return of  
23 Petitioner to federal custody.

24 Second, the Court abstains from exercising its jurisdiction over this manner  
25 pursuant to the *Younger* doctrine. The state judicial proceedings are ongoing; the  
26 proceedings implicate important state interests; the state proceedings provide an  
27 adequate opportunity to raise constitutional challenges; and the relief requested  
28 “seek[s] to enjoin” or has “the practical effect of enjoining” the ongoing state

1 judicial proceedings. Petitioner has not alleged bad faith, harassment, or some  
2 other extraordinary circumstance that would make abstention inappropriate.

3 Finally, Petitioner has failed to exhaust his administrative remedies with the  
4 state court and this Court declines to hear his Petition until he does so.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. The Verified Petition for Writ of Habeas Corpus Under 28 U.S.C. §  
7 2241 and Motion for Discovery Under 28 U.S.C. § 2246, ECF No. 1, is **DENIED**  
8 **without prejudice.**

9 2. Pursuant to 28 U.S.C. § 2553(c), the Court denies a certificate of  
10 appealability. Defendant has not made a substantial showing that he is entitled to  
11 habeas relief.

12 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order  
13 and provide copies to counsel.

14 **DATED** this 10th day of January 2022.



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A handwritten signature in blue ink that reads "Stanley A. Bastian".

20 Stanley A. Bastian  
21 Chief United States District Judge  
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