

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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JONATHAN ADEYANJU,

Petitioner,

v.

SCOTT PUGH, Warden,  
Stanley Correctional Institution,

Respondent.

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OPINION AND ORDER

11-cv-0081-wmc

Jonathan Adeyanju, an inmate at the Stanley Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before the court is petitioner's motion to stay the petition and hold it in abeyance so that he can exhaust his state court remedies with respect to three claims that he included in his petition but did not raise in his state court direct appeal. The court will grant petitioner's request for a stay.

FACTS

On March 31, 2006, after a jury trial in Dane County Circuit Court, petitioner Jonathan Adeyanju was found guilty of three counts of attempted first-degree intentional homicide while armed and three counts of endangering safety by use of a firearm. He was sentenced to 15 years in prison and 9 years extended supervision. (Case No. 05CF1876).

Petitioner appealed his conviction to the Wisconsin Court of Appeals, claiming that his trial counsel was ineffective for failing to request a lesser included instruction of first degree reckless endangering safety. (Case No. 2007AP2388). On July 16, 2009, the Court of Appeals affirmed petitioner's conviction, finding that his trial counsel was not ineffective for failing to

request the lesser included instruction. On November 3, 2009, the Wisconsin Supreme Court denied petitioner's petition for review.

Petitioner's one year statute of limitations to file the instant petition in federal court started to run 90 days later on February 3, 2010 and it expired on February 3, 2011. Petitioner filed his petition in this court on January 31, 2011 raising the following claims (1) his trial counsel was ineffective for failing to raise a lesser included jury instruction of first degree reckless endangering safety; (2) trial counsel was ineffective for allowing admission of gang-related evidence in violation of the court's order; (3) trial counsel was ineffective for not correcting the court's statement that he pled guilty to a charge to which he did not; and (4) trial court erred in admitting gang-related evidence.

#### OPINION

Petitioner asks the court hold his petition in abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269, 277 (2005). In *Rhines*, the Supreme Court considered whether a federal district court has discretion to stay a mixed federal habeas petition, that is, a petition containing both exhausted and unexhausted claims, to allow the petitioner to present his unexhausted claims to the state court in the first instance and then return to federal court for review of his perfected petition. Taking into account the interplay between the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d), and the total exhaustion requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), the Court ruled that a district court has such discretion in cases like this one in which outright dismissal of a mixed petition could jeopardize the opportunity for any federal review of the unexhausted claims. *Id.* at 275.

The Court cautioned, however, that the stay-and-abeyance procedure was a proper exercise of discretion only if it was compatible with the Antiterrorism and Effective Death Penalty Act's objectives of encouraging finality of state court judgments and streamlining federal habeas proceedings by requiring petitioners to first exhaust their claims in the state courts. *Id.* at 277. Stay and abeyance is available only if there was good cause for petitioner's failure to exhaust his claims in state court first, the unexhausted claims are not plainly meritless and the petitioner does not appear to be engaged in abusive litigation tactics or intentional delay. *Id.*

In deciding whether a stay is appropriate, a threshold question is whether one or more of the petitioner's claims is unexhausted. A claim is not exhausted if the petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Petitioner contends that he has not raised in state court these three of his four federal claims: trial counsel was ineffective for allowing admission of gang-related evidence in violation of the court's order; trial counsel was ineffective for not correcting the court's statement that he pled guilty to a charge to which he did not; and trial court erred in admitting gang-related evidence. Petitioner claims that he did not raise these claims on direct appeal because of the ineffectiveness of his appellate counsel. Petitioner can raise the claims in state court now by filing a post-conviction motion pursuant to Wis. Stat. § 974.06. That statute provides a vehicle by which a prisoner may raise constitutional issues after the time for direct appeal has expired, but only if the prisoner can establish a "sufficient reason" for not raising them on direct appeal or in any prior post-conviction motion. Wis. Stat. § 974.06(1), (4). Ineffective assistance of counsel can provide such a reason. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682-83, 556 N.W. 2d 136, 139-40 (Ct. App. 1996).

Next, the court considers whether petitioner has good cause for his failure to exhaust and whether his claims have potential merit. (There is no indication that petitioner has engaged in intentionally dilatory litigation tactics, which is the third of the *Rhines* factors.) Because petitioner contends that his counsel was ineffective in failing to identify and raise these unexhausted claims on appeal, the court finds that petitioner had good cause for his failure to exhaust.

Further, the court is unable to conclude from the limited record before it that petitioner's claims have no potential merit. Without a transcript of the state court proceedings, it is difficult to determine whether admission of gang-related evidence or incorrect information about a prior guilty plea violated petitioner's constitutional rights. Therefore, the court concludes that petitioner's claims have potential merit and will grant petitioner's motion for a stay.

A few additional comments are in order, mainly for petitioner's benefit. First, the Wisconsin courts distinguish claims challenging the effectiveness of *post-conviction* counsel from those challenging the effectiveness of *appellate* counsel. *Rothering*, at 678-79, 556 N.W.2d at 138. The distinguishing factor is the deficiency alleged. *Id.* Where counsel's allegedly ineffective conduct related to proceedings in the trial court that are prerequisites to filing a notice of appeal, for example, by failing to request a post-conviction evidentiary hearing before the trial court, then the error relates to post-conviction representation and the proper forum for bringing an ineffectiveness claim is the trial court. *Id.* at 681, 556 N.W.2d at 139 (claim of ineffective assistance of post-conviction counsel should be raised in the trial court either by a petition for habeas corpus or a motion under Wis. Stat. §974.06). In contrast, challenges to counsel's briefing and oral argument in the court of appeals, such as a claim that counsel failed

to brief meritorious issues (provided those issues were preserved for appeal) should be raised by means of a petition for habeas corpus in the appellate court that heard the appeal. *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992).

In this case, the claims that petitioner says his post-conviction/appellate lawyer should have raised relate to the performance of his trial counsel and potentially of the trial court as it relates to the gang-related evidence. Accordingly, *Rothering* controls. To exhaust his state court remedies, petitioner should file a postconviction motion in the trial court pursuant to Wis. Stat. § 974.06. To the extent petitioner intends to pursue a claim of ineffective assistance of trial counsel, he must request an evidentiary hearing. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (1979) (holding that it is prerequisite to claim of ineffective representation on appeal to preserve testimony of trial counsel). Further, once petitioner receives a ruling from the trial court, he must appeal that decision to the Wisconsin Court of Appeals and then the Wisconsin Supreme Court in order to satisfy the exhaustion requirement. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (to comply with exhaustion requirement, state prisoner “must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process”).

This court will not hold petitioner’s federal habeas petition in abeyance indefinitely. *Rhines*, 544 U.S. at 277. I will grant the stay with the following conditions: 1) petitioner must file a postconviction motion in the state trial court no later than March 22, 2011; and 2) after completely exhausting his state court remedies, petitioner has 30 days from the date of the last order from the state courts in which to file a motion in this court to lift the stay. If petitioner fails to meet these conditions, then the stay may be vacated *nunc pro tunc* as of the date the stay was entered and the petition may be dismissed.

## ORDER

IT IS ORDERED that:

1. Petitioner's motion to stay and hold the petition in abeyance is GRANTED;
2. The instant petition is STAYED pending exhaustion of petitioner's state remedies with the following conditions:
  - a) Petitioner must file a postconviction motion in the state trial court no later than March 22, 2011; and
  - b) after completely exhausting his state court remedies, petitioner has 30 days from the date of the last order from the state courts in which to file a motion in this court to lift the stay.
3. If petitioner fails to meet these conditions, then the stay may be vacated *nunc pro tunc* as of the date of this order and the petition may be dismissed.
4. The clerk of court is directed to close this case, subject to re-opening by petitioner upon the filing of his motion to lift the stay.

Entered this 22<sup>nd</sup> of February, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge