IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

LOGAN CHENEY,

Petitioner,

vs.

No. CIV 18-0196 JB\CG
No. CIV 18-0218 JB\CG
No. CIV 18-0385 KG\CG

BETTY JUDD, *Warden*, and
ATTORNEY GENERAL OF
THE STATE OF NEW MEXICO

Respondents.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on: (i) Petitioner's Amended Habeas Corpus Petition Under 28 U.S.C. § 2254, filed April 16, 2018 (No. CIV 18-0218 JB\CG, Doc. 8)("Amended Petition"); (ii) Petitioner's Petition for Writ of Habeas Corpus, filed April 25, 2018 (No. CIV 18-0385 KG\CG, Doc. 1)("Second Habeas Petition"); (iii) Petitioner's Motion to Consolidate, filed May 10, 2018 (No. CIV 18-0218 JB\CG, Doc 13)("First Motion to Consolidate"); (iv) Petitioner's Motion to Consolidate, filed May 10, 2018 (No. CIV 18-0385 KG\CG, Doc. 6)("Second Motion to Consolidate'); and (v) Plaintiff's Motion to Consolidate, filed May 10, 2018 (No. CIV 18-0196 JB\CG, Doc. 24)("Third Motion to Consolidate"). Petitioner Logan Cheney seeks to consolidate his two habeas actions (No. CIV 18-218 JB\CG and No. CIV 18-385 KG\CG) and his 42 U.S.C. § 1983 civil rights action (No. CIV 18-196 JB\CG). In the habeas actions, Cheney challenges the constitutionality of his state court convictions for aggravated battery. See Amended Petition at 1; Second Habeas Petition at 1. The Honorable Carmen Garza, United States Magistrate Judge for the United States District Court for the District of New Mexico, ordered Cheney to show cause why his habeas claims should not be dismissed for

failing to exhaust state remedies, as required by 28 U.S.C. § 2254(b)(1)(A). See Order to Show Cause at 1, filed May 1, 2018 (No. CIV 18-0218 JB\CG, Doc. 11). Having reviewed the Response, the record, and applicable law, the Court will consolidate the two habeas actions but dismiss both cases without prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

The following background information was taken from the Amended Petition in No. CIV 18-0218 JB\CG and Cheney's state court criminal docket, which is subject to judicial notice. See United States v. Ahidley, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007)(noting that district courts have "discretion to take judicial notice of publicly-filed records . . . and certain other courts concerning matters that bear directly upon the disposition of the case at hand").

On May 7, 2015, the State of New Mexico charged Cheney with attempted murder, shooting at a dwelling or occupied building and tampering with evidence. See Criminal Information in case no. D-1116-CR-2015-00385. Cheney later pled guilty to aggravated battery causing great bodily harm and aggravated battery with a deadline weapon in violation of N.M. Stat. Ann. §§ 30-03-05(C) and 31-18-16. See Plea and Disposition Agreement, entered November 3, 2017 in case no. D-1116-CR-2015-00385. On December 5, 2017, the State District Court sentenced Cheney to seven years in prison, followed by two years of parole. See Amended Petition at 1.

Cheney then initiated a series of actions in federal court. First, Cheney filed a civil rights complaint. See Pro Se Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 at 1, filed February 28, 2018 (Doc. 1)("Complaint"). Cheney then filed a motion challenging his State sentence's length. See Motion to Resentence on the Grounds of Unduly Harsh and Excessive Sentencing, filed On March 6, 2018 (Doc. 1)("Motion"). On March 14, 2018, Magistrate Judge Garza

explained that Cheney must file a habeas proceeding under 28 U.S.C. § 2254 if he wished to challenge his state sentence in federal court. See Order to Cure Deficiency at 1, filed March 14, 2018 (Doc. 3). Cheney then submitted a § 2254 Habeas Corpus Petition. See Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody at 1, filed March 23, 2018 (Doc. 6). However, he failed to sign that submission under penalty of perjury as required by Habeas Corpus Rule of Procedure 2(c)(5). Magistrate Judge Garza again required Cheney to cure the deficiency. See Second Order to Cure Deficiency, filed April 3, 2018 (Doc. 7). Cheney then filed the Amended Petition on April 16, 2018. See Amended Petition at 1-3. Cheney also filed a Motion for Leave to Proceed In Forma Pauperis on April 16, 2018 (Doc. 9), which the Court granted on April 25, 2018, see Order Granting Motion to Proceed *in Forma Pauperis* at 1 (Doc. 10). On the same day, Cheney filed a second habeas corpus action under 28 U.S.C. § 2254. See Second Habeas Petition at 1.

In the habeas proceedings, Cheney asks the Court to vacate his state court sentence. See Amended Petition at 7, 10; see also Second Habeas Petition at 3. Cheney raises claims for "unduly harsh and excessive sentencing," "bias . . . of court officers," and double jeopardy violations. Second Habeas Petition at 1. Cheney has not raised any of his federal claims before the New Mexico Supreme Court. See Amended Petition at 3; Second Habeas Petition at 3. Accordingly, Magistrate Judge Garza ordered Cheney to show cause why his Amended Petition should not be dismissed for failure to exhaust state remedies. See Order to Show Cause, filed May 1, 2018 (Doc. 11)("Third Order to Show Cause"). See 28 U.S.C. § 2254(b)(1)(A) (requiring a habeas applicant to exhaust "remedies available in the Courts of the State").

Cheney responded to the Third Order to Show Cause. See Response at 1, filed May 10, 2018 (Doc. 12) Cheney argues that the exhaustion requirement should be excused because: (i)

the time for filing a direct criminal appeal is expired; (ii) he is ignorant of the law; and (iii) he filed two other federal proceedings -- another habeas proceeding and a 42 U.S.C. § 1983 civil rights action. See Response at 1. Cheney also asks that the Court consolidate all three federal actions. See Motion at 1.

LAW REGARDING CONSOLIDATION

Rule 42 of the Federal Rules of Civil Procedure provides: "If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a). In deciding whether to grant a motion to consolidate, the court should initially consider whether the cases to be consolidated involve a common question of law or fact. See Servants of the Paraclete, Inc. v. Great American Insurance Co., 866 F. Supp. 1560, 1572 (D.N.M. 1994)(Burciaga, J.). If there is a common question, the court should weigh the interests of judicial convenience in consolidating the cases against the delay, confusion, and prejudice that consolidation might cause. See Servants of the Paraclete v. Great American Insurance Co., 866 F. Supp. at 1572. The party moving for consolidation bears the burden of demonstrating that consolidation is desirable. See Servants of the Paraclete v. Great American Insurance Co., 866 F. Supp. at 1572.

Consolidation does not result in a merger of separate suits into a single cause of action. See Harris v. Ill–Cal. Esp., Inc., 687 F.2d 1361 (10th Cir. 1982).

> "[C]onsolidation does not cause one civil action to emerge from two; the actions do not lose their separate identity; the parties to one action do not become parties to the other" ... Instead, consolidation is an artificial link forged by a court for the administrative convenience of the parties, it fails to erase the fact that, underneath consolidation's façade, lie two individual cases.

Chaara v. Intel Corp., 410 F.Supp.2d 1080, 1089, 1094 (D.N.M. 2005)(Browning, J.)(quoting

McKenzie v. United States, 678 F.2d 571, 574 (5th Cir. 1982)).

The Court has broad discretion in determining whether to consolidate cases. See Gillette Motor Transp., Inc. v. N. Okla. Butane Co., 179 F.2d 711 (10th Cir. 1950). Consolidation is a question of convenience and economy in judicial administration, and the court is given broad discretion to decide whether consolidation under rule 42(a) would be desirable, and the district judge's decision inevitably is highly contextual. See 9A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, Federal Practice & Procedure, Civil § 2383 at 26–31 (3d ed. 2008). A court's decision to grant or deny consolidation is reviewed for abuse of discretion and a court's denial of a party's request to consolidate will be affirmed on appeal absent clear error or exigent circumstances. See Skirvin v. Mesta, 141 F.2d 668, 672 (10th Cir. 1944); Am. Emp'rs Ins. Co. v. Bottger, 545 F.2d 1265 (10th Cir. 1976).

LAW REGARDING § 2254 AND EXHAUSTION OF STATE REMEDIES

Section 2254 provides:

> a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). When a state prisoner challenges his custody and, by way of relief, seeks to vacate his sentence and obtain immediate or speedy release, his sole federal remedy is a writ of habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973); Henderson v. Sec'y of Corr., 518 F.2d 694, 695 (10th Cir. 1975).

A writ of habeas corpus generally may not be granted unless the applicant has exhausted state remedies. See O'Sullivan v. Boerckel, 526 U.S. 838 (1999); Dever v. Kansas State Penitentiary, 36 F.3d 1531, 1534 (10th Cir. 1994). "The exhaustion requirement is satisfied if the federal issue has been properly presented to the highest state court, either by direct review of the

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