

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10917  
Summary Calendar

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JOEL LYNN BAILEY,  
Appellant,

Petitioner-

versus

WAYNE SCOTT, Director,  
Texas Department of Criminal  
Justice Institutional Division,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:94-CV-195-H)

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(May 25, 1995)  
Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Joel Lynn Bailey, a Texas state prisoner, appeals the district court's dismissal of his petition for a writ of habeas corpus for failure to exhaust state remedies. 28 U.S.C. § 2254. Finding the district court properly dismissed the petition, we AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

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\* Local Rule 47.5 provides:  
"The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."  
Pursuant to that Rule, the Court has determined that this opinion should not be published.

Bailey, a former attorney, represented himself at trial, and the jury convicted him of theft of property in excess of \$20,000. On August 14, 1992, he received a 20-year sentence and a \$10,000 fine. Bailey gave notice of appeal on August 14, 1992, and appellate counsel was appointed on that same date. The transcript from Bailey's trial was filed with the Texas Court of Appeals on October 21, 1992. Bailey's counsel filed an appellate brief on March 25, 1993, and the state's brief was served on August 4, 1993.

On February 1, 1994, Bailey filed a federal habeas petition alleging that the delay in processing his direct appeal in state court had denied him due process of law. The state responded that the delay was not enough to excuse exhaustion. On August 22, 1994, the magistrate judge issued a report recommending that the petition be denied because Bailey had "failed to establish an unreasonable delay in the state appellate process." Also on August 22, the Texas Court of Appeals handed down its decision, affirming Bailey's conviction, but modifying the judgment to grant him additional credit for time served. Bailey v. State, 885 S.W.2d 193, 202-03 (Tex. Ct. App. 1994). The Texas Court of Criminal Appeals refused Bailey's petition for discretionary review on February 1, 1995.

The district court, adopting the magistrate judge's findings and conclusions over Bailey's objections, dismissed the petition without prejudice for failure to exhaust state remedies. The court also denied Bailey a certificate of probable cause (CPC). We granted Bailey's motion for a CPC.

## II. EXHAUSTION OF STATE REMEDIES

Before a state prisoner may seek federal habeas relief, he must exhaust available state remedies. See 28 U.S.C. § 2254(b). Exhaustion usually requires that the petitioner present his federal claims to the state's highest court in accordance with state procedural rules. Myers v. Collins, 919 F.2d 1074, 1075-77 (5th Cir. 1990). The exhaustion requirement, however, is excused when there exist "exceptional circumstances of peculiar urgency," as, for example, "when the state system inordinately and unjustifiably delays review of a petitioner's claims so as to impinge upon his due process rights." Deters v. Collins, 985 F.2d 789, 795 (5th Cir. 1993) (internal quotations and citations omitted). The inordinate-delay exception requires that the delay in reviewing the petitioner's claims be wholly the fault of the state. Id. at 796.

In determining whether a delay of a prisoner's appeal violates due process, this Court looks to the factors set forth in Barker v. Wingo, 407 U.S. 514, 530 (1972). See United States v. Bermea, 30 F.3d 1539, 1568-69 (5th Cir. 1994) (direct criminal appeal), cert. denied, 115 S.Ct. 1113 (1995) (citing Rheuark v. Shaw, 628 F.2d 297, 302-04 (5th Cir. 1980) (civil rights action), cert. denied, 450 U.S. 931 (1981)). The factors are the length of the delay, the reasons for the delay, the defendant's assertion of his right, and the prejudice to the defendant occasioned by the delay.

The first Barker factor--the length of the delay--is a threshold requirement. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Id. 407 U.S. at 530.

In support of his claim that the exhaustion requirement should be excused, Bailey cites Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994). In that case, the Tenth Circuit held "that the state appellate process should be presumed to be ineffective and, therefore, exhaustion should presumptively be excused, when a petitioner's direct criminal appeal has been pending for two years without resolution absent a constitutionally sufficient justification by the State."

This Court has not established a bright line for determining when the state process presumptively has become ineffective because of delay.<sup>1</sup> Significantly, however, in an analysis of the Barker v. Wingo factors in the context of a federal criminal appeal, we opined that while a year and a half delay between the filing of the notice of appeal and receipt of the record is "unfortunate, it is not so excessive as to militate strongly in [the appellant's] favor." Bermea, 30 F.3d at 1569.

Here, the trial transcript was on file with the state court approximately two months after the notice of appeal was given. See

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<sup>1</sup> Cf. Shelton v. Heard, 696 F.2d 1127, 1129 (5th Cir. 1983) (we found that an unexplained 16-month delay between the date the record was completed and the date it was filed in the state appellate court allowed the petitioner to be excused from exhausting his state remedies); Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980) (civil rights case) (we assumed, without deciding, that a delay of nearly two years in the preparation of the statement of facts exceeded the limits of due process); Breazale v. Bradley, 582 F.2d 5, 6 (5th Cir. 1978) (in dicta, we opined that exhaustion should be excused because state habeas petition had been completely dormant for over one year and the State had offered "no reason for its torpor"); Rheuark v. Wade, 540 F.2d 1282, 1283 (1976) (we remanded the case to allow the district court to determine if a 15-month delay in preparing the transcript was justified.)

Tex. R. App. P. 54(b) (record shall be filed within 60 days after sentence imposed). It is apparent that both sides received extensions for filing their appellate briefs. Although the rules provide that the appellant's brief shall be filed within thirty days after the record is filed, see Tex. R. App. P. 74(k), Bailey's court-appointed attorney filed an appellate brief some five months after the record was filed. Rule 74(m) provides that the appellee shall file his brief within twenty-five days after the filing of the appellant's brief, and the state's brief was filed some four and one-half months after that date. In Perry v. Jones, 437 F.2d 758, 759 (5th Cir. 1971), we found that an appeal that had been pending for 22 months did not excuse the petitioner from exhausting his state remedies because he had successfully requested several extensions of time to file his brief.

There is approximately a year between the time the state's brief was filed and the court of appeals decided the case. It appears, however, that the court of appeals heard oral argument after the briefs were filed.<sup>2</sup>

In light of the fact that Bailey was responsible for some of the delay in the processing of his appeal,<sup>3</sup> we agree with the district court's determination that the delay in the disposition of

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<sup>2</sup> Bailey's counsel requested argument, and Rule 75(a) provides that, if properly requested, any party is entitled to submit an oral argument to the court. The state's brief "request[ed] oral argument only if appellant requests oral argument."

<sup>3</sup> Additionally, we note that the case was complex. The trial lasted five days, and the state court of appeals opinion was published.

Bailey's direct appeal was neither unreasonable nor presumptively prejudicial. Because Bailey has failed to make a showing of presumptively prejudicial delay, we need not analyze Bailey's claim under the remaining Barker factors.

CONCLUSION

Accordingly, the judgment of the district court is AFFIRMED.