UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TONY TRAN,
Petitioner,

v. **Case No. 23-CV-0434**

ROBERT MILLER,[1] ***Warden,***
***Racine Correctional Institution*.**
Respondent.

DECISION AND ORDER

Petitioner Tony Tran, a Wisconsin state prisoner currently incarcerated at Racine Correctional Institution, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that his state court conviction and sentence were imposed in violation of the Constitution.

I. BACKGROUND

In 2017, a jury found Tran guilty of first-degree sexual assault and armed robbery. Tran appealed, arguing that the circuit court erred in excluding certain testimony from Officer Justus under a state law evidentiary rule. The Wisconsin Court of Appeals affirmed. *State v. Tran (Tran I)*, No. 2019AP290-CR, 2020 WL 13356413, *unpublished slip op.* (Wis. App. May 19, 2020). The Wisconsin Supreme Court denied review, and the United States Supreme Court denied certiorari. Tran then filed a *Knight* petition[2] in state court, advancing an ineffective assistance claim against his appellate counsel for failure to raise the issue of a speedy trial violation on appeal. The court of appeals denied the petition, finding that Tran

[1] At the time this petition was filed, Jason Wells served as Warden of Racine Correctional Institute and was named as respondent in this action. Robert Miller replaced Pollard as Warden in June of 2024. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Miller is hereby substituted for Wells as respondent.
[2] *See State v. Knight*, 484 N.W.2d 540 (Wis. 1992).

had failed to show that the speedy trial claim was clearly stronger than the claims his appellate counsel did bring on direct appeal. *State of Wisconsin ex rel. Tony Tran v. Randall Hepp (Tran II)*, No. 2022AP2-W, *unpublished slip op. and order* (Wis. App. Sep. 21, 2022).

Tran then filed this habeas petition asserting two grounds for relief: (1) violation of his due process right to be afforded a meaningful opportunity to present a complete defense; and (2) denial of his Sixth Amendment right to a speedy trial. Respondent moves to dismiss the petition, arguing that both grounds are procedurally defaulted as unexhausted, and that the state courts would find them procedurally barred if presented now. ECF No. 9. In response, Tran filed a motion to amend his petition, conceding that Ground One is procedurally defaulted but asking the court to allow him to proceed on Ground Two as an ineffective-assistance-of-appellate-counsel claim for failure to raise the speedy trial violation on direct appeal. ECF No. 12. Respondent opposes the motion to amend, contending that Ground Two would be procedurally defaulted even if amended to allege ineffective-assistance-of-appellate-counsel.

II. DISCUSSION

A. Ground One: Denial of Right to Present a Defense

A habeas petitioner must first exhaust his claims in state court before proceeding in federal court. 28 U.S.C. § 2254(b)(1)(A). Exhaustion means that a petitioner has fairly presented his constitutional claims "through at least one complete round of the state's established appellate review process before presenting the claims to a federal court for habeas review." *Hicks v. Hepp*, 871 F.3d 513, 530 (7th Cir. 2017) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). To satisfy that requirement, a petitioner must present "both the operative facts and the legal principles that control each claim to the state judiciary." *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001) (citing *Rodriguez v. Scillia*, 193 F.3d 913, 916 (7th Cir. 1999); *Bocian v. Godinez*, 101 F.3d 465, 469 (7th Cir. 1996)). If a

petitioner fails to do so and the opportunity to raise that claim in state court has lapsed, he has procedurally defaulted his claim, and a federal court is precluded from reviewing the merits. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004). Procedural default may be excused if the petitioner can show both cause for and prejudice from the default or can demonstrate that the district court's failure to consider the claim would result in a fundamental miscarriage of justice. *Bolton v. Akpore*, 730 F.3d 685, 696 (7th Cir. 2013).

As Tran concedes, Ground One of this petition is procedurally defaulted because the federal claim was never fairly presented through one complete round of state-court review. Respondent argues that it is now too late for Tran to exhaust Ground One, as it would be procedurally barred by Wisconsin Statute § 974.06. Under Wisconsin's post-conviction rules, Tran was required to raise all available claims for relief in his first postconviction motion or on direct appeal. *See* Wis. Stat. § 974.06; *State v. Escalona-Naranjo*, 517 N.W.2d 157, 162–63 (Wis. 1994). Tran did not raise Ground One on direct appeal, nor did he mention his appellate counsel's failure to assert the claim on appeal in his *Knight* petition. Section 974.06(4) bars successive postconviction motions unless the defendant can demonstrate a "sufficient reason" for failing to raise the claim earlier. *Escalona-Naranjo*, 517 N.W.2d at 162. Tran has not alleged a sufficient reason for not exhausting this claim, nor has he demonstrated that failure to consider the claim would result in a fundamental miscarriage of justice. I will therefore grant respondent's motion to dismiss as to Ground One of the petition.

B. Ground Two: Speedy Trial Violation

The parties agree that Ground Two of the petition was also never directly presented to the Wisconsin Court of Appeals. Petitioner's speedy trial claim is thus unexhausted. However, Tran moves to amend Ground Two of the petition and proceed on an ineffective assistance of counsel claim for his appellate attorney's failure to raise a speedy trial claim

on direct appeal. Under the Federal Rules of Civil Procedure,[3] a party may amend its pleading once as a matter of course no later than: (A) 21 days after service, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. Fed R. Civ P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed R. Civ P. 15(a)(2). I must freely give leave to amend when justice so requires. *Id.* However, I have broad discretion to deny a request to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile. *Hukic v. Aurora Loan Services*, 588 F.3d 420, 432 (7th Cir. 2009). I do not believe that Tran's motion to amend is brought in bad faith or with a dilatory motive. Nor do I believe that the amendment will unduly burden the respondent.

I must consider whether granting leave to amend would be futile. Respondent argues that the proposed amendment is futile because Ground Two would be procedurally defaulted even if pursued as an ineffective assistance of counsel claim. Tran presented his ineffective-assistance-of-appellate-counsel claim to the Wisconsin Court of Appeals in his *Knight* petition. The court of appeals rejected this claim, finding that Tran had failed to show that the speedy trial claim was "clearly stronger" than the issues his appellate counsel chose to pursue, as required by *State v. Romero-Georgana*, 849 N.W.2d 668 (Wis. 2014). *Tran II*, No. 2022AP2-W at *1–2.

[3] Rule 11 of the Rules Governing Section 2254 Cases permits application of the Federal Rules of Civil Procedure in habeas cases "to the extent that [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules." *Mayle v. Felix*, 545 U.S. 644, 655 (2005); *see also* Fed. Rule Civ. Proc. 81(a)(2) (The civil rules "are applicable to proceedings for ... habeas corpus").

Federal habeas review of a claim is foreclosed if the state court's disposition of the claim rests on a state law ground that is adequate and independent of the merits of the federal claim. *Triplett v. McDermott*, 996 F.3d 825, 829 (7th Cir. 2021). The Seventh Circuit has held that failure to satisfy *Romero-Georgana* is an independent and adequate state-law ground that bars federal review of a habeas claim. *Garcia v. Cromwell*, 28 F.4th 764, 767 (7th Cir. 2022). There are, however, "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002). A state ground is "adequate" only if the state court acts in a consistent and principled way. "A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990).

In an unpublished, ex parte denial of Tran's *Knight* petition, the court of appeals stated that:

> On direct appeal, Tran's appointed appellate counsel argued that the circuit court erroneously exercised its discretion when it made an evidentiary ruling. ***Tran has not addressed why he believes his speedy trial argument is clearly stronger than the evidentiary argument appellate counsel raised.*** Instead, he contends "that this is a case that presents a circumstance where the 'clearly stronger' standard should not apply."

Tran II, No. 2022AP2-W at *2 (emphasis added). Tran contends that he did address why the speedy trial issue was clearly stronger than the issues actually pursued. *See* ECF No. 11 at 4; ECF No. 15. at 3. My review of Tran's Knight petition reveals that Tran devoted two pages of argument to why his speedy trial claim was "clearly stronger" than the evidentiary issue actually raised by appellate counsel. ECF No. 10-3 at 13–14. Tran first argued that appellate counsel "raised an issue that requires the defendant to overcome both the great deference granted the trial court on evidentiary ruling and the harmless error standard,"

while the abandoned speedy trial issue would have been entitled to de novo review. *Id.* at 13. He further argued that the evidentiary issue raised by appellate counsel "had no real chance of success, because counsel failed to put forward any argument for how the exclusion of this evidence infringed on any of Tran's substantial rights." *Id.* Though I will not speculate as to whether these arguments satisfy the "clearly stronger" requirement of *Romero-Georgana*, Tran clearly did address why he believes his speedy trial argument is clearly stronger than the evidentiary issue his appellate counsel raised on appeal.

Because the court of appeals did not apply *Romero-Georgana* to Tran's *Knight* petition in a consistent and principled way, no adequate state-law ground hinders my consideration of the ineffective assistance claim on the merits. The claim is thus not procedurally defaulted and granting leave to amend would not be futile. I will therefore grant petitioner's motion and allow him to proceed on Ground Two of the petition as an ineffective-assistance-of-appellate-counsel claim for failure to raise a speedy trial violation on direct appeal.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that petitioner's motion for leave to file sur-reply (ECF No. 15) is **GRANTED**.

IT IS FURTHER ORDERED that petitioner's motion the amend petition for a writ of habeas corpus (ECF No. 12) is **GRANTED**.

IT IS FURTHER ORDERED that respondent's motion to dismiss (ECF No. 9) is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that that within sixty days of this order, respondent shall file an answer in accordance with Rule 5 of the Rules Governing § 2254 Cases to petitioner's ineffective-assistance-of-appellate-counsel claim. The parties shall abide by the following schedule regarding the filing of briefs on the merits of petitioner's remaining

claims: (1) petitioner shall have 45 days following the filing of respondent's answer within which to file his brief in support of his petition; (2) respondent shall have 45 days following the filing of petitioner's initial brief within which to file a brief in opposition; and (3) petitioner shall have 30 days following the filing of respondent's opposition brief within which to file a reply brief, if any.

Pursuant to Civil L.R. 7.1(f), the following page limitations apply: briefs in support of or in opposition to the habeas petition or a motion filed by respondent must not exceed thirty pages and reply briefs must not exceed fifteen pages, not counting any statements of facts, exhibits, and affidavits.

Dated at Milwaukee, Wisconsin, this 17th day of June, 2024.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge