

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**November 30, 2005**

**Clerk of Court**

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ROBERT MICHAEL GAUNTLETT,  
Petitioner-Appellant,

No. 05-6065

EDWARD C. CUNNINGHAM,  
Honorable, Judge of the District Court  
for the Twenty-Sixth Judicial District,  
in and for Canadian County, State of  
Oklahoma; DREW EDMONDSON,

Respondents-Appellees.

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**ORDER**

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Before **TYMKOVICH**, Circuit Judge.

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On June 12, 2003, the State of Oklahoma filed two felony Informations against appellant in the District Court in and for Canadian County, Oklahoma, accusing appellant of committing the following crimes under Oklahoma law: (1) Lewd Proposal to a Child Under the Age of Sixteen; and (2) Forcible Sodomy. The state alleged that appellant committed these crimes between and during the months of January 1994 and September 1994. Appellant is awaiting trial on these charges, and the state-court proceedings have been stayed pending the outcome of this federal action. In addition, appellant is not presently in the physical custody

of the State of Oklahoma, as he successfully posted the required cash bonds in each of the state-court cases.

In this action, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Oklahoma seeking pretrial habeas relief under 28 U.S.C. § 2254. The district court dismissed appellant's habeas petition without prejudice, and this matter now comes before this court on appellant's application for a certificate of appealability (COA).<sup>1</sup> Specifically, appellant is seeking a COA to appeal the district court's determination that it was required, in accordance with the principles set forth in *Younger v. Harris*, 401 U.S. 37 (1971), to abstain from exercising jurisdiction over appellant's habeas petition.

According to 28 U.S.C. § 2253(c)(1)(A), “[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.” In this case, while appellant is currently free pursuant to the terms of the cash bonds that he posted, he is still in the custody of the State of Oklahoma for purposes of the federal habeas statutes. *Cf. Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-01 (1984) (holding that habeas petitioner released on personal

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<sup>1</sup> The district court previously entered an order denying COA. The court deems appellant's notice of appeal to be a renewed application for a COA. *See* Fed. R. App. P. 22(b)(2); 10th Cir. R. 22.1(A).

recognizance pending jury trial was “in custody” for purposes of federal habeas statutes where release terms subjected petitioner to restraints not shared by public generally). As a result, because “the detention complained of arises out of process issued by a State court,” 28 U.S.C. § 2253(c)(1)(A), appellant is required to obtain a COA even if his habeas petition is construed as being filed under 28 U.S.C. § 2241(c)(3), instead of 28 U.S.C. § 2254(a).<sup>2</sup> See *Davis v. Roberts*, 425 F.3d 830, 833 (10th Cir. 2005).

To obtain a COA under 28 U.S.C. § 2253(c), appellant “must make a substantial showing of the denial of a constitutional right, a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). As the Supreme Court has recognized, however, “[t]he issue becomes

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<sup>2</sup> The court notes that appellant is not presently in custody “pursuant to the judgment of a State court” as required by 28 U.S.C. § 2254(a) (emphasis added). See, e.g., *Thomas v. Crosby*, 371 F.3d 782, 786 (11th Cir. 2004) (noting that a person held in pretrial detention is not in custody pursuant to a judgment of a state court, and that such a person must therefore “file an application for a writ of habeas corpus governed by § 2241 only”); *Stow v. Murashige*, 389 F.3d 880, 885-86 (9th Cir. 2004) (same). Consequently, this court may be required to treat appellant’s habeas petition as being filed under 28 U.S.C. § 2241(c)(3) for purposes other than COA. The court does not need to decide this issue at the present time, however, and, if necessary, the issue can be addressed by the merits panel.

somewhat more complicated where, as here, the district court dismis[s]e[d] the petition based on procedural grounds.” *Id.*

When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

*Id.*

The Supreme Court has also stressed that “a COA does not require a showing that the appeal will succeed.” *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). To the contrary:

a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner has already failed in that endeavor.

*Id.* (quotation omitted); *see also id.* at 338 (noting that a habeas petitioner is not required “to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus”).

Based on the court’s initial review, it appears that the district court correctly applied the abstention principles set forth in *Younger*. Nor does it appear that appellant can make a sufficient showing to invoke any of the

exceptions to *Younger* abstention. In particular, it does not appear that the ex post facto and due process claims should be treated in a manner analogous to the way double jeopardy claims are treated for purposes of *Younger*. See *Gully v. Kunzman*, 592 F.2d 283, 286-88 (6th Cir. 1979) (concluding that double jeopardy claims asserted in a pretrial habeas petition were not subject to *Younger* abstention, but that ex post facto and due process claims were subject to abstention); see also Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4255 at 252 (2d ed. 1988) (stating that “the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution is not enough” to satisfy the irreparable injury exception to *Younger*). Further, it does not appear that this case involves a state statute that is, on its face, flagrantly and patently unconstitutional. See *Phelps v. Hamilton*, 59 F.3d 1058, 1064 (10th Cir. 1995) (“The standard for enjoining a pending state court proceeding based upon an unconstitutional state statute requires that the law be ‘flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.’”) (quoting *Younger*, 401 U.S. at 53-54; further quotation omitted).

That said, with regard to the charge that appellant committed the criminal offense under Oklahoma law of making a lewd proposal to a child in 1994, it appears that the limitations period and law enforcement discovery rule in Okla.

Stat. tit. 22, § 152(C) and (G) (as amended effective Nov. 1, 2000),<sup>3</sup> could be retroactively applied in a manner that violates appellant's rights under the Federal Constitution's Ex Post Facto Clause, Art. I, § 10, cl. 1. *See Stogner v. California*, 539 U.S. 607, 610-621 (2003) (holding that state violated Ex Post Facto Clause when it retroactively applied a limitations period to revive a previously time-barred prosecution).<sup>4</sup> As a result, appellant has raised a significant constitutional issue concerning the application of § 152 to his situation, and it is at least arguable that his "as applied" constitutional challenge is sufficient to invoke an exception to *Younger*. *See Phelps*, 59 F.3d at 1064 (noting that it is unclear whether the statement in *Younger* regarding the exception for flagrantly and patently unconstitutional statutes "was intended to be construed literally to mean that a statute must be unconstitutional as applied to every conceivable situation, or whether it means only that a statute must be unconstitutional under any possible interpretation as applied to the facts of the instant case") (emphasis added).

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<sup>3</sup> Okla. Stat. tit. 22, § 152, was also amended in 2001, 2002, and 2005, but it does not appear that those amendments are relevant here. However, as a result of the 2001 amendments (effective July 1, 2001), the law enforcement discovery rule that is at issue in this case is now codified in § 152(H). In addition, as a result of the 2002 amendments (effective Aug. 23, 2002), the limitations period that is at issue in this case is now codified in § 152(C)(1).

<sup>4</sup> As set forth in appellant's brief, it appears that the five-year limitations period that was in effect in 1994 for the crime of making a lewd proposal to a child expired in 1999. *See* Aplt. Br. at 5-7, 21; *see also* Okla. Stat. tit. 22, § 152(A) (1994).

In light of the above, the court believes that jurists of reason would find it debatable whether appellant's habeas petition states a valid claim of the denial of a constitutional right. While the court is skeptical that appellant can ultimately prevail on his claim that the district court erred by abstaining under *Younger*, the court also believes that jurists of reason would find it debatable whether the district court was correct in its procedural ruling under *Younger*. The court therefore grants appellant a COA on the procedural question of *Younger* abstention. The court also directs appellees to file a response brief that addresses all of the arguments set forth in appellant's brief. In their response brief, appellees shall also specifically address the following:

1. Appellees shall explain why they believe the underlying criminal charges were filed against appellant in a timely manner under Okla. Stat., tit. 22, § 152. Specifically, appellees shall inform the court whether they are relying upon any of the amendments to § 152 that were enacted after 1994. And, if appellees are relying upon any such amendments, they shall provide the effective date and year of the specific amendments being relied upon.

2. In addition to the double jeopardy exception, appellees shall address the exception to *Younger* abstention for flagrantly and patently unconstitutional state statutes. *See Phelps*, 59 F.3d at 1064. Appellees shall also address: (a) whether this exception applies to state statutes that are *being applied* in a flagrantly and patently unconstitutional manner; and (b) if so, whether Okla. Stat. tit. 22, § 152 (as amended since 1994), is being applied in such a manner in this case. Appellees shall also address whether appellant must show that the pending state criminal prosecution was commenced in bad faith or to harass as part of any "as applied" constitutional challenge. *See Phelps*, 59 F.3d at 1063.

3. As set forth in a pleading that appellant submitted to the district court, it appears that "the state court criminal prosecution [in

Canadian County District Court Case Nos. CF-2003-299 and CF-2003-300] has been continued by the state trial court, by agreement of the parties . . . , pending the outcome of this federal action.” Dist. Ct. Docket, Doc. 7 at 1. Appellees shall inform the court of the present status of Case Nos. CF-2003-299 and CF-2003-300. Taking into account the fact that appellant has apparently conceded that the state-court proceedings are ongoing for purposes of *Younger*, see Dist. Ct. Docket, Doc. 16 at 1-2, appellees shall also address whether any such continuance has any effect on the abstention analysis under *Younger*. In addition, appellees shall address whether this court’s decision in *Southwest Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162 (10th Cir. 2001), has any applicability to this case. See *id.* at 1178 (concluding that district court erred by abstaining under *Younger* where “[t]he parties [did] not dispute that the [state] court . . . stayed its own proceedings in favor of federal resolution of the issues”); see also *Morrow v. Winslow*, 94 F.3d 1386, 1390 (10th Cir. 1996) (noting that a state may waive abstention under *Younger*, but that such a waiver generally occurs only where “the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits”).

Appellees shall submit their response brief to this court within thirty days of the entry of this order. Appellant shall then file a reply brief within fifteen days after service of the brief filed by appellees.

Finally, the court has decided to place this case on the oral argument calendar. The parties will be notified of the exact date and time of the setting at a later date.

Entered for the Court  
Clerk, Court of Appeals

By:   
Deputy Clerk