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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEITH EDWARD ADCOX,)
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Petitioner,)
)
vs.)
)
MICHAEL MARTEL*, Acting)
Warden of San Quentin State Prison,)
)
Respondent.)

Case No. 1:92-cv-5830-OWW
DEATH PENALTY CASE
Order Granting Petitioner’s Motion
for Reconsideration of Order Denying
Stay of Second Amended Petition
(Doc. 153) and Motion for Leave to
File Third Amended Petition (Doc.
154); and Vacating Merits Briefing
Schedule

Petitioner Keith Edward Adcox (“Adcox”), a state prisoner facing capital punishment, filed his initial federal petition for writ of habeas corpus April 3, 1995, which was found to contain unexhausted claims. The federal proceedings were held in abeyance pending state exhaustion. While on state exhaustion, lead counsel moved to withdraw, and the Federal Defender for the Eastern District of California, Capital Habeas Unit, was appointed. The California Supreme Court summarily denied Adcox’s state exhaustion petition, both on the merits and as untimely, January 3, 2007. Upon resumption of the federal proceedings following the denial by the California Supreme Court, Wendy Peoples was

* Michael Martel is substituted for his predecessor as Warden of San Quentin State Prison, pursuant to Federal Rule of Civil Procedure 25(d).

1 substituted in as co-counsel to represent Adcox.

2 Adcox filed his second amended petition February 28, 2008, and
3 Respondent Vincent Cullen (“the Warden”) filed an answer January 26, 2009. In
4 a Joint Statement, the parties agreed that the second amended petition contained
5 unexhausted claims. An order on exhaustion was issued March 31, 2009, finding
6 the ten claims or subclaims, about which the parties did not agree regarding the
7 exhaustion status, to be exhausted. Adcox filed his second motion for stay and
8 abeyance, which the Warden opposed. Adcox’s second motion for stay and
9 abeyance was denied July 1, 2010, portions of two claims were dismissed as
10 abusive, one claim was denied on the merits, and two other claims were
11 dismissed as abandoned.

12 While Adcox’s second motion for stay and abeyance was pending, he filed
13 a fourth state habeas petition (case number S180912) with the California Supreme
14 Court, presenting some of the unexhausted claims from the second amended
15 petition, as well as presenting claims which were not included in the second
16 amended petition.¹ The California Supreme Court directed that an informal
17 response to the fourth state petition be submitted, which is anticipated to be filed
18 March 17, 2011.

19
20 Adcox’s Motion for Reconsideration

21 Adcox filed a motion for reconsideration of the order denying abeyance
22

23 ¹ Adcox asserts the claim of cumulative error at guilt and penalty in the fourth
24 state habeas petition is included in the second amended federal petition, albeit not
25 with a separate heading. See second amended federal petition at page 40. For
26 clarity, Adcox seeks to add the claim under a separate heading in the third amended
federal petition. The section of the second amended federal petition cited by Adcox
presents a prosecutorial misconduct claim, and incorporates by reference five other
claims in the petition, but does not make a cumulative error claim.

1 July 19, 2010. Adcox argues reconsideration is appropriate since 1) he did not
2 understand the Warden's briefing to be invoking abuse of the writ doctrine;
3 2) abuse of the writ applies only where a new petition is filed following final
4 judgment on a prior federal petition; 3) if the standard of *Rhines v. Weber* does not
5 apply then the correct standard is abuse of discretion; and 4) Claim VI should not
6 have been dismissed as it was raised in the pending fourth state habeas petition
7 and thus was incorrectly determined to be abandoned.

8 The Warden's Response

9 In response to Adcox's argument that abuse of the writ doctrine only
10 applies to send or successive petitions, the Warden observes that federal courts
11 have broad powers to prevent duplicative or unnecessary litigation, citing *Slack v.*
12 *McDaniel*, 529 U.S. 473, 478 (2000), and have the discretion to decline to permit
13 repeated amendments. Fed. R. Civ. P. 15(a).

14 In response to Adcox's assertion that the new portion of Claim VI was
15 raised in the new state habeas petition, the Warden agrees the claim was raised
16 but contends that it is new and can only be added to the federal petition with
17 leave of Court, which should be declined. However, this claim was included in
18 the second amended federal petition, which was filed prior to the Warden's
19 answer, and for which amendment was authorized. See Order Setting Date to
20 Amend Federal Petition, issued February 20, 2007 (Doc. 95).

21 The Warden observes Adcox was sufficiently informed that the function of
22 the previous stay was to exhaust his unexhausted claims, which he did in his
23 third state habeas petition. The Warden contends that under the circumstances,
24 the Court is well within its discretion to refuse Adcox permission to add new
25 claims to the federal petition. Additionally, the Warden argues Adcox has failed
26 to justify his delay in adding the new claims, contending the descriptions of how

1 information was discovered late do not demonstrate the information was unable
2 to be discovered earlier. To the contrary, the Warden asserts all the new claims
3 in the Second Amended Petition were disclosed by records which have long been
4 available to Adcox. Further, the Warden argues Adcox has failed to show the
5 new claims have merit. The Warden maintains Adcox also has failed to show
6 why the information supporting his new claim of juror misconduct, raised in the
7 fourth state habeas petition, could not have been obtained earlier.

8 In conclusion, the Warden requests the Court deny amendment of the
9 federal petition to add the new claims: V(A)(4)-(5); the new portion of VI;
10 XX(A)(2)(a)-(b); XX(A)(2)(c)(iii); XX(A)(2)(d)(i)-(iii); XX(A)(2)(g); and XX(A)(3).²
11 The Warden agrees the new portion of Claim VI should not be dismissed as
12 abandoned. The Warden urges the Court to deny reconsideration of its order
13 denying a stay and abeyance.

14 Conclusion

15 The findings in the Order Denying Stay and Abeyance of the Second
16 Amended Federal Petition denying Claims V(A)(4) and (5); Claims XX(A)(2)(a),
17 (b), (c), (d), and (g), and Claim XX(A)(3) as abusive are reversed. The dismissal of
18 Claim VI as abandoned is reversed. Although the Warden is correct that Adcox
19 was sufficiently informed that the purpose of the previous stay was to present all
20 his unexhausted claims to the state, the inclusion of the juror misconduct
21 allegation in the Third Amended Federal Petition warrants reconsideration of
22 Adcox's motion for stay and abeyance.

23 /////

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26 ² As noted above, these claims were included in Adcox's second amended federal petition, for which leave of court was granted.

1 Adcox's Motion for Leave to Amend

2 Adcox filed a motion for leave to amend his federal petition July 20, 2010,
3 seeking to add two claims, one involving allegations of juror misconduct and one
4 alleging cumulative error. Adcox asserts the factual basis for the juror
5 misconduct claim was only recently obtained when the fourth state habeas
6 petition was being investigated and drafted, and the cumulative error claim was
7 inadvertently omitted from the second amended federal petition.

8 Adcox contends the juror misconduct claim is meritorious and warrants a
9 second round of abeyance. Adcox asserts Juror Louis Castner received extra-
10 record information: visiting what he thought to be the crime scene during the
11 trial; making a conclusion, based on his observations of the scene, that Adcox's
12 trial testimony was untrue; and discussing his observations and conclusion with
13 other jurors. Adcox contends this extra-record information was extremely
14 prejudicial to his credibility and defense, and rendered his trial fundamentally
15 unfair. Adcox states that without Juror Castner's extraneous information, it is
16 reasonably probable the jury would have credited his testimony, or at least
17 would have harbored doubts about the identity of the actual shooter.

18 Adcox contends he has been diligent in raising the juror misconduct claim.
19 Adcox asserts that Jurors Castner and Verbeet refused to talk to his investigators
20 during state habeas or earlier federal proceedings, and that Juror Guinn (now
21 Lee) could not be located. Adcox states that during the post-exhaustion drafting
22 of the second amended federal petition in December of 2007, investigators re-
23 contacted jurors who had previously declined to be interviewed and both Jurors
24 Castner and Verbeet agreed to be interviewed. At this interview, Juror Castner
25 revealed his visit to an area he believed to be the crime scene, his conclusions
26 about Adcox's testimony, and that he told other jurors about visiting the area and

1 his opinions. A declaration was prepared for Juror Castner, but he refused to
2 sign it and shortly after that passed away. Adcox states the juror misconduct
3 claim was not presented at that time due to the need to gather confirming
4 affidavits corroborating Juror Castner's account in light of his refusal to sign the
5 declaration and subsequent death. Juror Verbeet's interview confirmed in part
6 Juror Castner's admission to having visited the crime scene, and is supported by
7 a signed declaration. Two years later, in February of 2010, Juror Guinn was
8 located and interviewed. Juror Guinn provided a declaration of her experience,
9 corroborating Juror Castner's account of his having visited the crime scene and
10 discussing his conclusions with fellow jurors.

11 Adcox asserts the cumulative error claim reveals that the totality of errors
12 at his trial prejudiced his conviction and sentence, and that consideration of the
13 cumulative prejudicial effect is necessary. Adcox contends the cumulative
14 prejudice of the errors merits relief.

15 Adcox observes that under Federal Rules of Civil Procedure, Rule 15(a)
16 there is a presumption favoring amendment unless there is undue prejudice to
17 the opposing party, undue delay, bad faith or dilatory motive, repeated failure to
18 cure deficiencies with previous amendments, or futility of amendment. Adcox
19 argues that none of these factors exist in this case, so amendment should be
20 granted.

21 The Warden's Response

22 The Warden maintains Adcox has failed to show why the information
23 could not have been obtained earlier, and further that principles of federalism
24 dictate this court should not grant a stay based on allegations which have not
25 been presented to it. However, this claim is included in the lodged document,
26 Doc. 154-1 at Claim XLV, for which Adcox seeks leave to file as the Third

1 Amended Federal Petition.

2 Conclusion

3 In light of Adcox's new claim alleging juror misconduct, leave to amend
4 his federal petition is granted. The Third Amended Federal Petition, lodged as
5 Attachment #1 to Doc. 154 is authorized to be filed.

6
7 Merits Briefing Schedule

8 Following the July 1, 2010, denial of Adcox's motion for a second stay, a
9 schedule for briefing the merits of Adcox's second amended petition was
10 established. Adcox has requested, and been granted, four extensions of time to
11 file his merits brief.

12 In light of the reversals of the denials of portions of two unexhausted
13 claims, the addition of two new claims in the Third Amended Federal Petition,
14 and the granting of stay and abeyance on reconsideration, the merits briefing
15 schedule is vacated.

16
17 Order

- 18 1. The denials of Claims V(A)(4) and (5), and Claims XX(A)(2)(a), (b), (c), (d),
19 and (g), and Claim XX(A)(3) as abusive are reversed.
- 20 2. The dismissal of Claim VI as abandoned is reversed.
- 21 3. Adcox's motion for a stay of his federal proceedings and a second round of
22 abeyance is granted.
- 23 4. Adcox is granted leave to amend his federal petition a third time. The
24 petition, lodged as Attachment #1 to Doc. 154, is authorized to be filed.
- 25 5. The merits briefing schedule established July 1, 2010, is vacated.
- 26 6. Adcox shall file quarterly status reports with this court until the state

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proceedings on his fourth state habeas petition are concluded.

7. Adcox shall promptly notify this Court of any state court determination regarding his unexhausted claims.

IT IS SO ORDERED.

DATED: March 9, 2011

/s/ Oliver W. Wanger
Senior United States District Judge