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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHNNY AVILA, JR.,)	Case No. 1:11-cv-01196-AWI-P
)	
Petitioner,)	<u>DEATH PENALTY CASE</u>
)	Order Granting Petitioner's
vs.)	Motion for Stay and Abeyance;
)	Vacating Hearing; and Setting
KEVIN CHAPPELL, Acting Warden)	Schedule for Exhaustion Briefing
of San Quentin State Prison,)	
)	HEARING DATE:
Respondent.)	September 10, 2012
)	VACATED

On June 14, 2012, Petitioner Johnny Avila, Jr. ("Avila") filed his federal petition for writ of habeas corpus, and a Motion for stay and abeyance of his federal proceedings. Doc. 27. Avila concurrently filed a second state habeas petition (Case No. S203288), presenting unexhausted claims, with the California Supreme Court. Respondent Kevin Chappell ("Warden") filed an opposition to Avila's motion for stay and abeyance August 27, and Avila filed a reply August 29, 2012. This matter can be decided on the papers without need for a hearing.

Avila asserts he has discovered, and included in his federal petition, claims that were not previously raised in state court (Claims 1, 2, 8, 31, 50, and 51), and expanded other claims previously pled (Claims 9 and 30). Avila states the state exhaustion petition, filed contemporaneously with his federal petition, includes all of his unexhausted claims.

1 The claims in his federal petition which Avila admits are unexhausted
2 present the following allegations: Claim 1 - Intellectual Disability (“*Atkins*
3 claim”)¹; Claim 2 - Cognitive Impairments Equal to Intellectual Disability;
4 Claim 8 - Jury Misconduct, Material Misstatement at Selection and Outside
5 Consultation during Penalty Deliberations; Claim 50 - Unconstitutional State
6 Appellate and Post-Conviction Review; and Claim 51 - Ineffective Assistance of
7 State Appellate and Habeas Counsel. The prior presented claims which are
8 expanded allege: Claim 9 - Ineffective Assistance of Counsel at Guilt; and
9 Claim 30 - Ineffective Assistance of Counsel at Penalty.

10 **Avila’s Motion for Stay and Abeyance**

11 Avila alleges there is uncertainty over whether his state exhaustion petition
12 will be considered properly filed, and thus whether it will toll the one-year
13 statute of limitations. Avila contends there is good cause for this uncertainty,
14 and also good cause for bringing the exhaustion petition at this time. Avila has
15 asserted, in support of the timeliness of the claims in his exhaustion petition, that
16 evidence was newly discovered through the provision of federal funding, and
17 that post-conviction counsel was ineffective. Avila argues the vagueness and
18 complexity of California’s procedural bar rules, as well as their random
19 enforcement, makes it impossible to reliably predict the state court’s ruling on the
20 timeliness of his exhaustion petition.

21 Avila contends that his state exhaustion petition contains potentially
22 meritorious claims, and that he has not engaged in intentionally dilatory
23 litigation tactics. Avila argues his federal proceedings should be stayed pending
24 the resolution of his state exhaustion petition.

25
26 ¹ An *Atkins* claim asserts that a petitioner is mentally retarded and thus
exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002).

1 **Warden’s opposition**

2 The Warden agrees there is no evidence that Avila has intentionally
3 engaged in dilatory litigation tactics, but contends he has not demonstrated good
4 cause for his failure to previously exhaust the unexhausted claims in state court.
5 The Warden asserts, contrary to Avila’s argument, that under *Pace* there is no
6 reasonable confusion over the timeliness of Avila’s exhaustion petition. The
7 Warden contends California’s timeliness rule is firmly established and regularly
8 followed, and that Avila has failed to establish the absence of substantial delay
9 for his exhaustion petition, or good cause for the delay, or that the unexhausted
10 claims fall within an exception to the timeliness rule.

11 The Warden argues that several of Avila’s unexhausted claims reasonably
12 could, and should, have been raised in the first state habeas petition. The
13 Warden recommends rejection of the contention that other claims should be
14 found timely due to the ineffectiveness of state post-conviction counsel, as Avila
15 has not shown either deficient performance nor prejudice. The Warden also
16 alleges that ineffectiveness of state post-conviction counsel is not available to
17 allow consideration of Avila’s untimely claims because he is not constitutionally
18 entitled to counsel on state collateral review.

19 Lastly, the Warden contends that none of Avila’s unexhausted claims fall
20 within any exception to California’s timeliness rules. Accordingly, the Warden
21 argues that Avila has failed to establish good cause to stay the federal
22 proceedings.

23 **Avila’s reply**

24 Avila asserts his federal counsel have an ethical duty to independently
25 investigate and timely present his habeas claims in federal court. In the absence
26 of any waiver of the exhaustion requirement by the Warden, competent habeas

1 counsel who develop new claims and evidence with federal funds have no choice
2 but to file simultaneous federal and state petitions and seek exhaustion, as a
3 petitioner is prohibited under 28 U.S.C. § 2254(b)(1)(A) from proceeding with
4 litigation of unexhausted claims in federal court. Avila contends he has followed
5 the advice of the United States Supreme Court in *Pace v. DiGuglielmo*, 544 U.S. 408
6 (2005) and *Rhines v. Weber*, 544 U.S. 269 (2005).

7 Avila asserts his state exhaustion petition is not necessarily untimely, as
8 the California Supreme Court has ordered the Warden to file an informal
9 response to the petition, signaling that further briefing is desired. Avila contends
10 that although his exhaustion petition was filed after the presumptive timeliness
11 date, it contains allegations of “triggering” facts, the diligence of counsel, and the
12 timeliness issue. Under California procedures and law, so long as a petitioner’s
13 claims are filed without significant delay, there is good cause for the delay, or one
14 of the exceptions to the diligence rule apply, the state court will consider the
15 claims on the merits.

16 Avila argues that California’s timeliness standards are difficult, if not
17 impossible, to predict since they are vague, inexact, and subject to judicial
18 discretion. The timeliness standards are intentionally flexible and purposely
19 inexact, to enable California courts to determine whether a petitioner has
20 exercised due diligence. Avila contends his exhaustion petition does not merely
21 reiterate prior claims, but asserts new claims, including an *Atkins* claim. Avila
22 contends the California Supreme Court has yet to deny an *Atkins* claim as
23 successive, untimely, or procedurally barred, but has either denied it on the
24 merits or issued an order to show cause. Avila asserts he has a legitimate interest
25 in fully litigating all the evidence developed by federal habeas counsel. Lastly,
26 Avila alleges that ineffectiveness of post-conviction counsel may constitute good

1 cause for failure to exhaust, *Rhines v. Weber*, 408 F. Supp. 2d 844, 848-849 (D.S.D.
2 2005), or may be cause to excuse a procedural default. *Martinez v. Ryan*, __ U.S.
3 __, 132 S. Ct. 1309, 1318 (2012).

4 **Standard for Granting Abeyance**

5 District courts have discretion to hold a federal mixed petition in abeyance
6 to permit exhaustion of claims in state court. *Rhines*, 544 U.S. at 276. The high
7 Court observed that “it likely would be an abuse of discretion for a district court
8 to deny a stay and to dismiss a mixed petition if the petitioner [1] had good cause
9 for his failure to exhaust, [2] his unexhausted claims are potentially meritorious,
10 and [3] there is no indication that the petitioner engaged in intentionally dilatory
11 litigation tactics.” *Id.* at 278. Where a petitioner satisfies these criteria, “the
12 district court should stay, rather than dismiss, the mixed petition.” *Id.*

13 The Warden adds that *Rhines* cautions “abeyance should be available only
14 in limited circumstances,” *id.*, 544 U.S. at 277, and courts should not routinely
15 excuse the failure to present claims to the state court in the first instance. The
16 Warden also offers a definition of “good cause” which *Rhines* did not explain.
17 Acknowledging that “good cause” for abeyance is less stringent than an
18 “extraordinary circumstances” standard, the Warden argues that at a minimum,
19 “good cause” requires a showing of diligence, citing Ninth Circuit authority in
20 another context. *See Johnson v. Mammoth Recreations, Inc.*, 974 F.2d 604, 609 (9th
21 Cir., 1992).

22 **Order**

23 Avila has established good cause for his *Atkins* claim. Although his first
24 state habeas petition was filed on June 9, 2003, about one year after the Supreme
25 Court issued the opinion in *Atkins*, it was filed before California established the
26 criteria for stating a valid claim under *Atkins*. *See In Re Hawthorne*, 35 Cal.4th 40

1 (Feb. 10, 2005) (holding Cal. Penal Code § 1376, eff. Jan. 1, 2004, applies on post-
2 conviction). State habeas counsel filed a confidential request for funds with the
3 state court on March 13, 2003, but the court did not rule on the request until June
4 18, 2003, nine days after Avila's first habeas petition was filed. The funding
5 request and order were both confidential so it is unclear what the purpose of the
6 funds were or whether it was granted or denied. It is probable that under
7 California's policies and procedures in place at the time, Avila did not have the
8 ability to establish facts which would have allowed him to present an *Atkins*
9 claim to the state court during his first round of state post-conviction review.
10 Further, the grant of abeyance stays Avila's entire federal proceeding, so
11 presentation of other unexhausted claims to the state court, whether or not there
12 is good cause for each claim, will not additionally delay the federal petition.

13 Avila's motion to hold the federal proceedings in abeyance is granted.
14 Abeyance will commence after the Court addresses the exhaustion status of the
15 remaining claims in Avila's federal petition. Counsel for the parties shall meet
16 and confer within the next 30 days to discuss the exhaustion status of the claims
17 in the petition and shall file a Joint Statement on Exhaustion within 45 days of the
18 date of this order. Should the parties disagree about the exhaustion status of any
19 claim, Avila shall concurrently file a separate pleading addressing the issue and
20 stating where he believes the claim was presented to the state court.

21 IT IS SO ORDERED.

22
23 DATED: September 7, 2012

24 /s/ Anthony W. Ishii

25 Chief United States District Judge