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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GERALD F. STANLEY,

Petitioner,

vs.

No. CIV S-95-1500 JAM GGH DP

**DEATH PENALTY CASE**

EDDIE YLST, Acting Warden  
of San Quentin State Prison,

Respondent.

FINDINGS & RECOMMENDATIONS

Introduction and Summary

It should come as no surprise, given the history of this case, that this very procedurally complicated capital case has become even more so. The precise issue here is whether exhaustion principles require that a state court retrospective competency determination, previously mandated by a federal court ruling on a habeas petition, must be exhausted at all available levels before return to federal court to contest that state court determination. Although petitioner’s arguments in this rather infrequent procedural situation are not without color, the undersigned finds that petitioner may not return to federal court to contest the result of a retrospective competency hearing unless and until he has exhausted all available state court remedies.

1 Procedural Facts

2           Only the procedural facts pertinent to the retrospective competency hearing shall  
3 be set forth here. Those facts were well set forth in the Ninth Circuit opinion in this case  
4 addressing, in part, the entry of partial judgment and deferral of penalty phase claims.

5           Stanley's case was transferred to Butte County in 1982 where it  
6 was tried by retired Butte County Superior Court Judge Jean  
7 Morony. After a seven-month trial, the jury found Stanley guilty of  
8 arson, burglary, first degree murder, and the special circumstances  
9 that Stanley intentionally killed the victim while lying in wait and  
10 that Stanley killed the victim for the purpose of preventing her  
11 from testifying in a criminal proceeding. In a separate proceeding,  
12 the court and jury found true additional special circumstances.

13           Judge Morony held a penalty phase trial beginning in August 1983.  
14 Defense counsel intended to present as mitigating evidence the  
15 testimony of psychiatrist Dr. David Axelrad and videotaped  
16 interviews of Stanley he conducted. Stanley changed his mind  
17 repeatedly over the course of several days and ultimately refused to  
18 waive his psychiatrist-patient and Fifth Amendment privileges in  
19 order to permit his attorneys to call Dr. Axelrad or present this  
20 evidence to the jury. Arguing that Stanley was interfering  
21 irrationally with their "entire mitigation strategy," defense counsel  
22 moved for competency proceedings under California Penal Code §  
23 1368. Section 1368 provides that either counsel or the court may  
24 move for a hearing to determine whether a criminal defendant is  
25 competent to stand trial. Judge Morony denied the § 1368 motion  
26 twice, finding both times that there was insufficient doubt as to  
Stanley's competency to warrant a § 1368 hearing. When counsel  
made the motion a third time, Judge Morony finally granted it. He  
suspended the penalty phase trial and kept the jury on call pending  
a determination of Stanley's competency.

19           A month-long competency trial, with a separate jury, was held in  
20 Butte County before Superior Court Judge Reginald M. Watt. In  
21 November 1983, that jury returned a verdict that Stanley was  
22 competent within the meaning of California Penal Code §§ 1367  
23 and 1368.

22           Judge Morony then resumed the penalty phase trial before the  
23 original jury. By this time, Stanley had changed his mind again. He  
24 permitted Dr. Axelrad to testify and allowed his counsel to play the  
25 tapes of the Axelrad interviews. On December 28, 1983, the  
26 original jury returned a verdict of death.

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1 On April 10, 2007, Judge Hollows issued Findings and  
2 Recommendations (“F & R”) recommending granting relief on  
3 Claim 21 of Stanley’s amended petition. Claim 21 alleged that a  
4 juror in the competency trial had engaged in misconduct by failing  
5 to disclose facts during voir dire and by lying about her ability to  
6 be impartial. Judge Hollows found that the juror had engaged in  
7 misconduct that warranted invalidation of the competency verdict.  
8 Judge Hollows recommended that the district court remand to the  
9 state court to determine whether a retrial on the question of  
10 Stanley’s penalty phase competency would be feasible. Judge  
11 Hollows also recommended that once the district court adjudicated  
12 Stanley’s guilt phase claims, the remaining penalty phase claims be  
13 held in abeyance pending the state court’s determination  
14 concerning the feasibility of a retrial.

15 District Judge Damrell adopted the F & R on the competency juror  
16 misconduct claim. Judge Damrell rejected Stanley’s contention that  
17 the federal court, rather than the state court, should determine  
18 whether a retrial on competency is feasible. He concluded that the  
19 F & R’s suggested remand procedure “makes practical sense and  
20 ensures the most efficient use of the court’s resources.”

21 On August 29, 2007, Judge Hollows issued an F & R  
22 recommending the denial of relief on all of Stanley’s pretrial and  
23 guilt phase claims and the deferral of adjudication of the remaining  
24 penalty phase claims. The F & R recommended denying relief as to  
25 the following guilt phase issues relevant to this appeal....

26 Stanley v. Cullen, 633 F.3d 852, 857-859 (9th Cir. 2011).

Complex proceedings commenced in state court regarding the remand on  
competency issues; however, all the detail surrounding those proceedings, and alleged  
deficiencies therein, are not germane to the exhaustion question. Suffice it to say that the state  
court determined that a retrospective competency hearing was possible, and upon holding such a  
hearing, determined that petitioner Stanley was competent at the time of his penalty phase. No  
appeal or other review was sought by petitioner concerning the trial court’s determination.

Stanley complains of certain deficiencies in the state court proceedings on  
remand, and made known to this court what his claims were in this regard. (Docket # 887.) The  
undersigned held a status conference on May 31, 2012, and inquired why no review, i.e.,  
exhaustion, was sought for the claims regarding the recent competency hearing. Briefing was  
ordered, and both petitioner and respondent filed that briefing.

1 Discussion

2 There exist several reasons why exhaustion is required:

- 3 1. The fact that an issue arose from state court proceedings on remand from a federal habeas  
4 proceeding does not excuse exhaustion;
- 5 2. No reason is apparent which would distinguish a competency issue from any other issue  
6 adjudicated in state court which is subject to the exhaustion requirement with respect to the  
7 necessity for state court exhaustion;
- 8 3. No clear authority exists which would exempt a competency issue arising in state court  
9 proceedings occurring after a federal court remand from exhaustion, and the sparse, on point case  
10 authority which does exist indicates exhaustion is required.

11 The statute which directs exhaustion of federal issues in state court prior to federal  
12 rulings on the merits makes no exception for issues which arise in renewed state court  
13 proceedings, held by reasons of a previous federal ruling finding constitutional fault. 28 U.S.C. §  
14 2254— provides:

15 (b)(1) An application for a writ of habeas corpus on behalf of a  
16 person in custody pursuant to the judgment of a State court shall  
not be granted unless it appears that--

17 (A) the applicant has exhausted the remedies available in the courts  
18 of the State; or

19 (B)(i) there is an absence of available State corrective process; or

20 (ii) circumstances exist that render such process ineffective to  
protect the rights of the applicant.

21 (2) An application for a writ of habeas corpus may be denied on the  
22 merits, notwithstanding the failure of the applicant to exhaust the  
remedies available in the courts of the State.

23 (3) A State shall not be deemed to have waived the exhaustion  
24 requirement or be estopped from reliance upon the requirement  
unless the State, through counsel, expressly waives the  
25 requirement.

26 (c) An applicant shall not be deemed to have exhausted the  
remedies available in the courts of the State, within the meaning of

1 this section, if he has the right under the law of the State to raise,  
2 by any available procedure, the question presented.

3 Stanley does not argue that he exhausted his objections to the most recent  
4 competency proceedings. He does not allege that no further state process is available. Finally,  
5 he does not make the argument that further state court review is *per se* ineffective to protect his  
6 rights. He only argues that he is not subject to the exhaustion provisions.

7 Generally, courts should refrain from rewriting statutes to create an exception  
8 from its requirements when the drafters included no such express exception. “The Supreme  
9 Court has made quite clear that courts are not authorized to rewrite statutes, even though a statute  
10 might be ‘susceptible of improvement.’ Badaracco v. Commissioner of Internal Revenue, 464  
11 U.S. 386, ----, 104 S.Ct. 756, 764, 78 L.Ed.2d 549, 560 (1984).” Kidd v. U.S. Dept. Of the  
12 Interior, 756 F.2d 1410, 1412 (9th Cir. 1985). See also Vanisi v. CIR, 599 F.3d 567, 574 (7th  
13 Cir. 2010). While an exception may be created if the statute would be rendered absurd without  
14 it, see DeSylva v. Ballentine, 351 U.S. 570, 579, 76 S.Ct. 974 (1956), no such absurdity exists  
15 here. Indeed, if a competency issue requires exhaustion in the first instance, which even  
16 petitioner does not contest, it stands to reason that exhaustion would be required a second time as  
17 well, i.e., the decision of the state supreme court, which will be given AEDPA deference, or  
18 which was decided on independent state grounds, must be procured in order that the state’s final  
19 word on the subject be given. Why should the state *trial court’s* determination on federal or state  
20 law be elevated to the status given the state supreme court? Petitioner gives no adequate  
21 explanation for the question which answers itself adverse to petitioner simply from its  
22 postulation. For example, if a case were remanded for further proceedings due to an  
23 unconstitutional conflict of interest on the part of defense counsel during initial state court  
24 competency hearings, issues arising in that further proceeding, e.g., prosecutorial misconduct,  
25 withholding of exculpatory evidence, ineffective assistance of counsel, and the like would require  
26 the highest state court ruling to finalize the new dispute, just like any other. Here, the reason for

1 remand involved a juror’s bias during a state law required jury proceeding on competency.  
2 Nothing in the nature of that error exempts the new proceeding from higher state court scrutiny  
3 on unrelated issues. The fact that the competency issue here involved a threshold issue of  
4 whether a retrospective competency determination could be made at all makes no difference –  
5 many state court proceedings involve threshold issues, the determination of which adverse to a  
6 defendant permits the issue to go forward on the merits.

7           Secondly, no apparent reason exists to except competency issues from an  
8 exhaustion requirement. Competency issues arise under both state and federal law, and state  
9 courts are bound to follow the decisions of the United States Supreme Court, just as they are for  
10 every other issue, at least with respect to a floor for the application of federal constitutional  
11 rights. It remains possible that the state supreme court would find if given the chance, for  
12 example, that contrary to the ruling of the trial court, no retrospective competency hearing could  
13 take place given constraints of due process. That determination would finally close this habeas  
14 case as much as would a state trial court decision, if given final status. Petitioner never  
15 adequately explains why the state supreme court should not have the final state say on the state  
16 competency proceeding. If interlocutory, collateral-to-the-judgment issues such as competency  
17 are initially required to be exhausted, how does the nature of this exhaustion requirement change  
18 simply because the new competency hearing raises issues of its own?

19           Petitioner nevertheless asserts that the finding by the state trial court in this case  
20 (that a retrospective competency hearing could be held, and that petitioner was indeed competent  
21 at the time of his penalty phase) is not a “judgment of a state court” to which objections of  
22 petitioner are not subject to exhaustion. This argument begs the exhaustion issue. Of course,  
23 petitioner is being held in custody pursuant to a judgment of the state court.<sup>1</sup> Nothing in this  
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25           <sup>1</sup> And if the competency determination of the state court on remand is not a claim in  
26 some way attacking “custody pursuant to a judgement of a state court” (petitioner’s stated *sine*  
*qua non* for exhaustion), why then is it reviewable *at all* in a later federal habeas action?

1 court's ruling, the Court of Appeals, or the state trial court on remand changed that fact, and it is  
2 necessary to this court's habeas jurisdiction in the first place. Simply because there has been a  
3 further ruling on a collateral issue to the merits of that judgment does not change that fact.

4           Moreover, there is no doubt that petitioner's present habeas proceeding is a  
5 proceeding after judgment was rendered in the federal court on the competency issue. Docket  
6 numbers 842 and 843 contain the order certifying *judgment* on certain issues, including the  
7 competency claim, and the judgment itself. The court did *not* retain jurisdiction to review the  
8 outcome of further competency hearings to be held in state court. Petitioner appealed this partial  
9 judgment, and it was affirmed in all respects. Any habeas review of the further state proceedings  
10 would be held similarly to any other habeas review.

11           Respondent in this case demonstrates that competency issues on remand are  
12 afforded full exhaustion as any other habeas claim would require. McMurtney v. Ryan, 539 F.3d  
13 1112 (9th Cir. 2008), presented a case where the federal habeas court initially remanded a case  
14 because of competency issues. The case chronology after remand demonstrated that the trial  
15 court ruled on the renewed competency claim which was then followed by state supreme court  
16 review of that issue. Thus, a second federal habeas review thereupon commenced after full  
17 exhaustion of the remanded issue. Id. at 1113.

18           Respondent further cited cases, including Walker v. Ward, 934 F. Supp. 1286,  
19 1292 (N.D. Ok. 1996), hit the exhaustion question of remanded competency proceedings head  
20 on. See also Jones v. McDonald, 2011 WL 4055267 (E.D. Cal. 2011), presenting the identical  
21 issues regarding exhaustion of new issues on a remanded competency claim in a setting nearly  
22 procedurally identical to the one herein. These cases stand for the proposition that exhaustion of  
23 new issues arising on remanded proceedings require exhaustion.

24           Petitioner relies primarily on Odle v. Woodford, 238 F.3d 1084 (9th Cir. 2001)  
25 which did involve a competency issue remanded for further development by the federal courts.  
26 In its determination affirming the district court's remand decision on the competency issue, the

1 Ninth Circuit did expressly direct that the district court retain jurisdiction:

2 We therefore remand the case to district court with instructions to  
3 grant the writ unless the state trial court conducts a hearing within  
4 sixty days to determine whether Odle was competent at the time he  
5 stood trial. See Miles, 108 F.3d at 1114. The district court shall  
6 retain jurisdiction. If the state court vacates the conviction, the  
7 district court shall dismiss the habeas petition. If it upholds the  
8 conviction, the district court shall review the state court's  
9 determination consistent with this opinion.

10 Odle, 238 F.3d at 1090.

11 The case only superficially supports petitioner's position. Odle did not preclude exhaustion even  
12 though the language of the opinion referred to the state trial court, and in any event, the panel  
13 never discussed the exhaustion issue. It is well established that the mere directive of an appellate  
14 court which assumes the issue in dispute, and does not discuss any issue surrounding the  
15 directive, does not stand as binding authority for a later case in which the disputed issue *is raised*  
16 for an adjudication on its merits.

17 Although we have applied the Chapman standard in a handful of  
18 federal habeas cases, *see, e.g.*, [citations omitted], we have yet  
19 squarely to address its applicability on collateral review. [footnote  
20 omitted]. Petitioner contends that we are bound by these habeas  
21 cases, by way of *stare decisis*, from holding that the *Kotteakos*  
22 harmless-error standard applies on habeas review of *Doyle* error.  
23 But since we have never squarely addressed the issue, and have at  
24 most assumed the applicability of the *Chapman* standard on  
25 habeas, we are free to address the issue on the merits. See Edelman  
26 v. Jordan, 415 U.S. 651, 670-671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d  
662 (1974).

27 Brecht v. Abrahamson, 507 U.S. 619, 630-631, 113 S.Ct. 1710 (1993). See also Thompson v.  
28 Frank, 599 F.3d 1088, 1090 (n.1) (9th Cir. 2010); Amalgamated Transit Union v. Laidlaw  
29 Transit Services, 435 F.3d 1140, 1146 (n.5) (9th Cir. 2006); Burbank-Glendale-Pasadena Airport  
30 Authority v. City of Burbank, 136 F.3d 1360, 1363 (9th Cir. 1998).

31 Finally, to the extent that the Ninth Circuit did intend to preclude exhaustion by  
32 mandating that the district court retain jurisdiction over the remand proceedings of the state trial  
33 court, it expressly so directed. This is the case in petitioner's other cited cases which again did



1 not reference or make any ruling on the exhaustion requirement. See Miles v. Stainer, 108 F.3d  
2 1109, 1114 (9th Cir. 1997); Evans v. Raines, 800 F.2d 884, 886 (9th Cir. 1986); Seiling v.  
3 Eyman, 478 F.2d 211, 216 (9th Cir. 1973), disapproved on other grounds, Godinez v. Moran,  
4 509 U.S. 389 (1993). No such retention of jurisdiction was made for the competency issue in  
5 petitioner’s case.

6 Thus, Odle and petitioner’s other cited cases ultimately do not support the  
7 proposition that exhaustion is excused for issues which arise in the state courts on remand from  
8 an initial habeas action, at least in a situation where the district court enters a judgment requiring  
9 remand, and is not directed by the federal appellate court to retain jurisdiction over the state trial  
10 court’s decision on remand.

11 Conclusion

12 While the requirement for exhaustion in remanded proceedings has not been  
13 directly explicated in the Ninth Circuit, it has been in other circuits and is consistent with the  
14 language of the controlling statute itself. The statute, 28 U.S.C. §2254(b) requires exhaustion  
15 and the undersigned so finds.

16 Previously, petitioner, concerned that any AEDPA limitations clock would be  
17 running while this court considered the exhaustion question, requested that if the court  
18 determined exhaustion was necessary, the time at which his claims concerning the remand  
19 proceedings in state court were effectively filed would be those claims described in his status  
20 report – the time at which his claims were made known. Because the undersigned raised the  
21 exhaustion issue *sua sponte*, which effectively halted all other procedures herein, the undersigned  
22 finds that the ten issues (claims) raised in the filed status report, Docket number 887, May 24,  
23 2012, and other issues fairly encompassed by the status report, were “filed” for purposes of  
24 federal habeas on the above date. This finding does not preclude petitioner from seeking to raise  
25 additional issues which could not have been reasonably ascertained at the time of the filing of the  
26 status report.

1           ACCORDINGLY, pursuant to the above discussion and findings, the undersigned  
2 recommends that this action be stayed and held in abeyance pending the exhaustion of issues  
3 pertinent to the competency proceedings on remand.<sup>2</sup>

4           These findings and recommendations are submitted to the United States District  
5 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
6 fourteen (14) days after being served with these findings and recommendations, any party may  
7 file written objections with the court and serve a copy on all parties. Such a document should be  
8 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the  
9 objections shall be served and filed within seven (7) days after service of the objections. The  
10 parties are advised that failure to file objections within the specified time may waive the right to  
11 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: January 14, 2013

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14                                 /s/ Gregory G. Hollows  
  UNITED STATES MAGISTRATE JUDGE

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17 stanley.ord  
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25           <sup>2</sup>Certainly, at the time of the reinstatement of federal proceedings, the exhausted penalty  
26 phase issues remained viable, and therefore this mixed petition is subject to stay pursuant to  
Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528 (2005).