IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD JOSEPH BERRY,

Petitioner, No. 2:10-cv-0305 WBS JFM (HC)

vs.

FRANCISCO JACQUEZ, ORDER AND

Respondent. FINDINGS & RECOMMENDATIONS

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Petitioner, a state prisoner proceeding with counsel, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 11, 2011, petitioner filed an amended petition and a motion to stay. Respondent opposes both the filing of the amended petition and the motion to stay. Upon review of the motions, the documents in support and opposition, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

FACTUAL AND PROCEDURAL BACKGROUND

On December 20, 2007, a jury convicted petitioner in Weaverville, CA of second degree murder and corporal injury of a cohabitant with an enhancement for assault with a firearm. Lodgment ("LD") 4 at 1. He was sentenced to twenty-five years to life. Id. at 2.

On direct appeal, petitioner raised the following grounds for relief: (1) the trial court improperly instructed the jury on mutual combat; (2) the trial court improperly instructed

the jury on felony murder based on a felony which is dangerous to human life in violation of Due Process and California law; (3) the trial court erroneously permitted expert testimony on battered woman syndrome and erroneously excluded statements of the victim regarding her state of mind; (4) the trial court erred by excluding evidence of a statement petitioner reportedly made to a defense investigator after the killing that included a reference to the victim attacking him with scissors; (5) cumulative error; (6) the upper terms were imposed erroneously on counts two and three without an adequate statement of reasons and in violation of petitioner's Sixth Amendment rights; and (7) the abstract of judgment failed to reflect that counts two and three were stayed by the trial court. LD 1.

On October 9, 2009, the California Court of Appeal, Third Appellate District, affirmed petitioner's conviction and sentence in an unpublished opinion. LD 4.

Petitioner appealed to the California Supreme Court, which denied the petition for review on January 13, 2010. LD 6. Petitioner did not appeal to the United States Supreme Court. Petitioner also did not file any applications for post-conviction relief or collateral review in the state courts.

On February 5, 2010, petitioner filed a petition for writ of habeas corpus in this court setting forth three grounds for relief: (1) the trial court improperly instructed the jury on mutual combat; (2) the trial court improperly instructed the jury on felony murder based on a felony which is dangerous to human life in violation of Due Process and California law; and (3) the trial court erred by excluding evidence of a statement petitioner reportedly made to a defense investigator after the killing that included a reference to the victim attacking him with scissors. On July 13, 2010, respondent filed an answer.

On September 15, 2010, petitioner filed a motion for a competency hearing. That motion was filed by a jailhouse lawyer who asserted that, in light of petitioner's mental capacity, petitioner would be unable to function competently in his own defense. On October 1, 2010, petitioner's state appellate counsel filed a letter also questioning petitioner's mental capacity.

On October 19, 2010, the undersigned ordered the Federal Defender to determine whether petitioner qualified for appointment of counsel pursuant to 18 U.S.C. § 2006A and, if so, whether petitioner's state appellate counsel should be appointed. The Federal Defender met with petitioner on November 30, 2010 and subsequently determined that petitioner did appear to qualify for appointment of counsel; petitioner requested that someone other than his state appellate counsel be appointed. Thereafter, the Federal Defender was appointed, but was unable to continue their representation of petitioner. On January 28, 2011, John Balazs was appointed to represent petitioner.

On April 11, 2011, petitioner, through newly appointed counsel, filed a first amended petition and a motion to stay. In the amended petition, petitioner sets forth four grounds for relief: (1) the trial court improperly instructed the jury on mutual combat; (2) the trial court improperly instructed the jury on felony murder; (3) ineffective assistance of counsel for trial counsel's failure to move to exclude testimony of witnesses, to object to privileged testimony, to object to improper jury instructions, and to object to sentencing errors; and (4) cumulative error. On April 18, 2011, respondent filed an opposition. Also on April 18, 2011, petitioner filed a reply with a request for leave to file the amended petition.

On August 29, 2011, the undersigned ordered petitioner to submit supplemental briefing concerning his mental health problems. On September 14, 2011, petitioner submitted a response to the court's order.

DISCUSSION

A. Request for Leave to Amend

An application for a writ of habeas corpus "may be amended or supplemented as provided in the rules of civil procedure applicable to civil actions." 28 U.S.C. § 2242. See also Rule 11, Fed. R. Governing § 2254 Cases (providing that the Federal Rules of Civil Procedure may be applied in habeas corpus proceedings to the extent that the rules of civil procedure are not inconsistent with any statutory provision or with the rules governing habeas cases); Fed. R.

Civ. P. 81(a)(4) (providing that the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings). Under Federal Rule of Civil Procedure 15(a), a habeas petitioner may amend his pleadings once as a matter of course before a responsive pleading is served and may seek leave of court to amend his pleading at any time during the proceeding. Mayle v. Felix, 545 U.S. 644 (2005).

The amended petition proposes to add a claim for ineffective assistance of trial counsel. This claim is unexhausted and is presently pending before the California Supreme Court in a petition for writ of habeas corpus. See Mot. to Stay, Attach. Petitioner seeks leave to file the amended petition due to his lack of education, mental health problems, the size of the record and the complexity of the murder case. These arguments are made by petitioner's counsel, who was appointed nearly one year after the underlying petition was filed by petitioner proceeding pro se. Because leave to amend should be freely given, see Fed. R. Civ. P. 15(a), and because respondent has not shown that he would be prejudiced by the amendment, the court will grant petitioner's request for leave to amend.

B. Motion to Stay

Having granted petitioner's request for leave to amend, the court now turns to petitioner's motion to stay the mixed petition pending exhaustion of the newly added ineffective assistance of counsel claim. Respondent opposes the motion on the ground that good cause has not been shown for failure to exhaust and because the new claim lacks merit.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived explicitly by respondents' counsel. 28 U.S.C. § 2254(b)(3).[1] A waiver of exhaustion, thus, may not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before

[1] A petition may be denied on the merits without exhaustion of state court remedies. 28 U.S.C. § 2254(b)(2).

presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir.), cert. denied, 478 U.S. 1021 (1986). The United States Supreme Court has held that a federal district court may not entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with respect to each of the claims raised. Rose v. Lundy, 455 U.S. 509 (1982).

The Ninth Circuit Court of Appeals has recently clarified the procedures for analyzing stay-and-abeyance motions. See King v. Ryan, 564 F.3d 1133 (9th Cir. 2009). There are two approaches for analyzing a motion for a stay-and-abeyance, depending on whether the petition is mixed or fully exhausted. See id. at 1135-36; Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005). If the petitioner seeks a stay-and-abeyance order as to a mixed petition containing both exhausted and unexhausted claims, the request can be analyzed under the standard announced by the Supreme Court in Rhines v. Weber, 544 U.S. 269 (2005). See Jackson, 425 F.3d at 661. If, however, the petition currently on file is fully exhausted, and what petitioner seeks is a stay-and-abeyance order to exhaust claims not raised in the current federal petition, the approach set out in Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007), applies. See Jackson, 425 F.3d at 661.

Under Rhines, a district court has discretion to stay a mixed petition to allow a petitioner time to return to state court to present the unexhausted claim and then return to federal court for review of his perfected petition. Rhines, 544 U.S. at 276. This stay and abeyance is available in limited circumstances, and only when: (1) there is "good cause" for the failure to exhaust; (2) the unexhausted claims are potentially meritorious; and (3) the petitioner did not intentionally engage in dilatory litigation tactics. Rhines stays and holds in abeyance both the exhausted and unexhausted claims.

In contrast, under Kelly, a district court has discretion to stay a fully exhausted petition. See King, 564 F.3d at 1140-41. Under Kelly's three-step procedure: (1) a petitioner files an amended federal petition deleting his unexhausted claims; (2) the district court "stays

and holds in abeyance the amended, fully exhausted petition, allowing petitioner the opportunity to proceed to state court to exhaust the deleted claims"; and (3) petitioner later amends his petition and reattaches "the newly-exhausted claims to the original petition." Id. at 1135. Under Kelly, similar to Rhines, a stay and abeyance order is appropriate only if petitioner has demonstrated the unexhausted claims are valid, not "plainly meritless," and that he is diligently pursuing his state court remedies with respect to these claims. Id. at 1070. Thus in order to grant a stay and abeyance under Kelly, a court must determine that a petitioner's unexhausted claim is not barred by the statute of limitations and also raises a valid and not otherwise "plainly meritless" claim.

In the amended petition, petitioner presents a new, unexhausted claim for ineffective assistance of counsel. Petitioner's remaining claims are exhausted. Thus, because the amended petition contains both exhausted and unexhausted claims, it is a mixed petition and the Rhines three-step test applies.

Rhines's first step concerns a 'good cause' determination for petitioner's failure to exhaust. Rhines does not go into detail as to what constitutes good cause for failure to exhaust, and the Ninth Circuit has provided no clear guidance beyond holding that the test is less stringent than an "extraordinary circumstances" standard. Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005). Several district courts have concluded that the standard is more generous than the showing needed for "cause" to excuse a procedural default. See, e.g., Rhines v. Weber, 408 F. Supp. 2d 844, 849 (D.S.D. 2005) (applying the Supreme Court's mandate on remand). This view finds support in Pace v. DiGuglielmo, 544 U.S. 408 (2005), where the Supreme Court acknowledged that a petitioner's "reasonable confusion" about the timeliness of his federal petition would generally constitute good cause for his failure to exhaust state remedies before filing his federal petition. 544 U.S. at 416-17.

However, in Wooten v. Kirkland, 540 F.3d 1019 (9th Cir. 2008), the Ninth Circuit ruled that petitioner did not show good cause by arguing that he was "under the impression" that

his counsel had raised all claims before the state court of appeal. Wooten, 540 F.3d at 1024. The Ninth Circuit explained that finding good cause in that argument "would render stay-and-abey orders routine" and "would run afoul of Rhines and its instruction that district courts should only stay mixed petitions in 'limited circumstances.'" Wooten, 540 F.3d at 1024.

The following facts are relevant to the good cause determination. Direct review of petitioner's state court conviction concluded on April 13, 2010 when the time for seeking review before the United States Supreme Court expired. On February 5, 2010, petitioner filed a habeas petition in this court. Thus, his petition is timely. He now seeks a stay pending resolution of a habeas petition he filed in the California Supreme Court on April 4, 2011 asserting a claim for ineffective assistance of trial counsel. Petitioner explains the delay in filing that petition by stating "I am filing this petition as soon as practicable after my state appeal became final. I have limited access to a law library and limited education, and I am assisted by attorney Balazs, see ## 16-17." Mot. to Stay, Attach. at 6. In his declaration submitted with the motion to stay, counsel for petitioner declares that a stay is necessary because petitioner "suffers from learning disabilities and mental health problems that would have made it difficult, if not impossible, for him to evaluate his case in order to determine on his own any potential legal claims and whether he needed to file a state petition to exhaust claims." Id., ¶ 3.

Petitioner's lack of access to a law library does not constitute good cause pursuant to Rhines. "[T]he Constitution does not guarantee a prisoner unlimited access to a law library." Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 858 (9th Cir. 1985). See also Stull v. Hedgpeth, 2010 WL 1403942 (E.D. Cal. 2010). Petitioner's argument that he has a limited education also fails. See Hernandez v. California, 2010 WL 1854416, *2-3 (N.D. Cal. 2010) (concluding that limited education, lack of legal assistance, and routine restrictions on law library access were insufficient to satisfy the Rhines good cause requirement). Allowing a stay for either of these reasons would be contrary to Rhines's command that stays be issued on in limited circumstances. See Wooten, 540 F.3d at 1024.

Petitioner has, however, presented good cause with respect to his mental health problems, evidence of which was presented in supplemental briefing filed September 14, 2011. See Taylor v. McDaniel, 2011 WL 1322783, at *2 (D. Nev. 2011) ("In the present case, the Court finds that petitioner's mental health difficulties, his borderline intellectual functioning, and the substantial variations in his mental health medication regimen, as detailed in the briefing on the motion to dismiss, are sufficient to clear the less stringent threshold required to establish good cause under Rhines"); Ranteesi v. Grounds, 2010 WL 2089317 (E.D. Cal. 2010); Watts v. Adams, 2010 WL 1838093 (E.D. Cal. 2010). The court further finds that the unexhausted claim is potentially meritorious and the petitioner did not intentionally engage in dilatory litigation tactics. Accordingly, petitioner's motion for stay should be granted.

Based thereon, IT IS HEREBY ORDERED that petitioner's motion to amend is granted;

IT IS HEREBY RECOMMENDED that petitioner's request to stay this action be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The

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parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 4, 2011.

UNITED STATES MAGISTRATE JUDGE

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