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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ESEQUIEL “PAUL” GARCIA,
Petitioner,

v.

NEIL MCDOWELL, Warden,
Respondent.

Case No. 16-05301 BLF (PR)

**ORDER DENYING MOTION FOR
STAY; DENYING MOTIONS FOR
APPOINTMENT OF COUNSEL;
GRANTING MOTION FOR fourth
EXTENSION OF TIME TO FILE
TRAVERSE**

(Docket Nos. 72, 76, 77, 79, 80)

Petitioner, a state prisoner proceeding *pro se*, filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court found the second amended petition, Dkt. No. 35 (“SAP”), stated cognizable claims, and ordered Respondent to show cause why the petition should not be granted. Dkt. No. 37. Respondent has filed an answer along with exhibits in support. Dkt. Nos. 56-59. Petitioner was granted three extensions of time to file a traverse. Dkt. Nos. 63, 65, 71. Before the Court is Petitioner’s motion for a stay, motions for appointment of counsel, and a motion for a fourth extension of time to file his traverse. Dkt. Nos. 72, 76, 79, 80.

BACKGROUND

According to the second amended petition, Petitioner was found guilty by a jury in

1 Santa Clara County Superior Court of first-degree murder and aiding and abetting special
2 circumstance. SAP at 1, 2. Petitioner was sentenced on May 10, 2012, to life without the
3 possibility of parole. *Id.* at 1.

4 Petitioner pursued a direct appeal as well as a concurrent petition for writ of habeas
5 corpus in the state courts without success. *Id.* at 3-6. Thereafter, Petitioner continued to
6 pursue various post judgment remedies in the state courts and with other entities. *Id.* at 7-
7 42.

8 On September 15, 2016, Petitioner filed a letter, initiating this federal habeas action,
9 and five days later, a petition for writ of habeas corpus. Dkt. Nos. 1, 5. On January 20,
10 2017, the Court granted Petitioner's motion for stay under *Rhines v. Weber*, 544 U.S. 269
11 (2005). Dkt. No. 22.

12 On January 16, 2019, the Court granted Petitioner's motion to reopen the action,
13 and granted Petitioner leave to file a second amended petition. Dkt. No. 29. After two
14 extension of time, Petitioner filed a second amended petition on June 16, 2019. Dkt. No.
15 35.

16 The Court found the SAP stated the following cognizable claims for federal habeas
17 relief: (1) his rights under the Confrontation Clause was violated when the trial court
18 admitted both oral and written testimonial statements from non-testifying co-defendant,
19 Miguel Chaldez, *id.* at 1; (2) ineffective assistance of counsel for failure to investigate and
20 other failings, *id.* at 84, 119; (3-I) prosecutorial misconduct based on misrepresentation
21 and use of perjured testimony and false evidence, *id.* at 223, 326-329; (3-II) ineffective
22 assistance of trial and appellate counsel for failure to investigate, *id.* at 223, 395-398; (4)
23 juror misconduct due to outside influences and related ineffective assistance of counsel
24 claim, Dkt. No. 35-7 at 1, 27; (5) prosecutorial misconduct based on improper cross-
25 examination, *id.* at 52-53; (6) ineffective assistance of counsel for failing to conduct
26 reasonable pre-trial investigation into Fourth, Fifth and Sixth Amendment violations, *id.* at
27 81-82; (7) his conviction was based on less than proof beyond a reasonable doubt of each
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1 and every element of the charged crime, *id.* at 175; (8) his counsel had a conflict of interest
2 that materially compromised the defense, *id.* at 195; (9) he was denied his right to retain
3 counsel of his choice, *id.* at 244; and (10) cumulative error, *id.* at 263. Dkt. No. 37 at 2.

4 On June 19, 2020, Respondent filed an answer along with exhibits in support. Dkt.
5 Nos. 56-59. On November 16, 2020, Petitioner filed a motion to stay this habeas action
6 due to a pending hearing in state court for a *Brady/Pitchess* motion for discovery. Dkt.
7 No. 72 at 3-4. Respondent filed opposition to the motion for stay, Dkt. No. 75, and
8 Petitioner filed a reply, Dkt. No. 78.¹ Petitioner also filed two motions requesting
9 appointment of counsel due to COVID-19, Dkt. Nos. 76, 80, and motion for a fourth
10 extension of time to file his traverse, Dkt. No. 79.

12 DISCUSSION

13 A. Motion for Stay and Abeyance

14 In his motion for stay, Petitioner states that there is a pending matter in state court
15 on a *Brady/Pitchess* motion for habeas discovery of peace officer records and a “motion
16 for discovery file reconstruction, missing discovery (beyond file reconstruction), and
17 reasonable access to that discovery.” Dkt. No. 72 at 4. Petitioner states that if evidence of
18 a *Brady* violation is found, then he may then need to move for a stay under *Rhines*, 544
19 U.S. 269, to essentially exhaust the new claim. *Id.* at 6. In opposition, Respondent asserts
20 that the request is unwarranted because all the claims in the SAP are exhausted and the
21 alleged discovery Petitioner seeks does not include *Brady* material. Dkt. No. 75 at 3-5. In
22 reply, Petitioner refutes that there is “no *Brady* evidence to disclose,” that he needs to wait
23 for a ruling from the trial judge on his discovery motion, and then time to review the actual
24 documents before he can determine whether he will be able to raise a *Brady* claim. Dkt.
25 No. 78 at 4, 8.

26 ¹ Petitioner filed a request for an extension of time to file a reply to Respondent’s
27 opposition which is GRANTED. Dkt. No. 77. Accordingly, the reply filed on December
28 23, 2020, is deemed timely filed and will be considered.

1 The United States Supreme Court has held that a district court may stay mixed
2 habeas petitions to allow the petitioner to exhaust in state court. *Rhines v. Weber*, 544 U.S.
3 269, 277-78 (2005). *Rhines* requires a petitioner to show (1) “good cause” for his failure
4 to exhaust his claims in state court; (2) that his unexhausted claims are not “plainly
5 meritless”; and (3) that he has not engaged in “intentionally dilatory litigation tactics.” *Id.*
6 at 278. The district court’s discretion to stay a mixed petition is circumscribed by
7 AEDPA’s stated purposes of reducing delay in the execution of criminal sentences and
8 encouraging petitioners to seek relief in the state courts before filing their claims in federal
9 court. *Id.* at 277. Because the use of a stay and abeyance procedure has the potential to
10 undermine these dual purposes of AEDPA, its use is only appropriate where the district
11 court has first determined that there was good cause for the petitioner’s failure to exhaust
12 the claims in state court and that the claims are potentially meritorious. *Id.*

13 In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that “the
14 suppression by the prosecution of evidence favorable to an accused upon request violates
15 due process where the evidence is material either to guilt or to punishment, irrespective of
16 the good faith or bad faith of the prosecution.” *Id.* at 87. In sum, for a *Brady* claim to
17 succeed, petitioner must show: (1) that the evidence at issue is favorable to the accused,
18 either because it is exculpatory or impeaching; (2) that it was suppressed by the
19 prosecution, either willfully or inadvertently; and (3) that it was material (or, put
20 differently, that prejudice ensued).² *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler*
21 *v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material if “there is a reasonable
22 probability that, had the evidence been disclosed to the defense, the result of the
23 proceeding would have been different.” *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). The
24 Supreme Court has since made clear that the duty to disclose such evidence applies even
25 when there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107
26 (1976), and that the duty encompasses impeachment evidence as well as exculpatory

27 ² For the purpose of *Brady*, the terms “material” and “prejudicial” have the same meaning.
28 *United States v. Kohring*, 637 F.3d 895, 902 n.1 (9th Cir. 2011).

1 evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985).

2 The Court finds Petitioner fails to satisfy the factors under *Rhines* to warrant a
3 second stay at this late stage in the proceedings. First of all, Petitioner was already granted
4 a stay that lasted two years, from 2017 to 2019, to pursue new and unexhausted claims,
5 such that his second amended petition, which contains numerous claims, is fully
6 exhausted. Furthermore, Petitioner is only able to speculate that the additional discovery
7 which he hopes to obtain contains *Brady* material. Even if it is shown that the prosecution
8 suppressed the discovery at issue, Petitioner has not identified the specific *Brady* evidence
9 that was favorable to his case or described how it was material, *i.e.*, the result of the
10 proceeding would have been different had the evidence been disclosed to the defense. For
11 example, Petitioner seeks personnel files of the police officers involved in his case but fails
12 to explain what information contained therein would have any effect on his trial. As
13 Respondent points out, the testimony of these officers was minimal to none at trial, with
14 two of the officers testifying to the authenticity of cell phone and computer records
15 submitted at trial. Dkt. No. 75 at 4-5. In reply, Petitioner argues that there is evidence
16 impacting the credibility of these officers, *i.e.*, impeachment evidence. Dkt. No. 78 at 6-7.
17 However, there is no showing that had this information been disclosed, the result of the
18 proceedings would have been different. With respect to the “discovery reconstruction,”
19 the record shows that the prosecution did provide the defense with another set of discovery
20 and therefore, this ground cannot be a basis for a *Brady* suppression claim. *Id.* at 5-6.
21 Petitioner asserts that this cannot be confirmed until the trial judge rules on his motion. *Id.*
22 at 8. But this argument is an admission that Petitioner has yet to establish a *Brady* claim,
23 and that he is merely speculating.

24 Based on the foregoing, the Court finds Petitioner is not entitled to a second stay
25 based on what amounts to nothing more than a fishing expedition for a *Brady* claim, that
26 also depends wholly on whether the trial court grants his motion. The Court finds no good
27 cause for warranting further delay in this matter where Petitioner has already been granted
28 one opportunity to exhaust numerous claims. Accordingly, the motion for a stay is

1 DENIED.

2 **B. Motion for Appointment of Counsel**

3 Petitioner has filed two motions for appointment of counsel based on prison
4 conditions due to the COVID-19 pandemic, e.g., lockdowns, restricted law library access,
5 and quarantines. Dkt. No. 76, 80. Petitioner contracted the virus in December 2020, and
6 as of the filing of his latest motion for appointment of counsel, was recovering from the
7 virus but with lingering symptoms. Dkt. No. 80 at 7. The Sixth Amendment’s right to
8 counsel does not apply in habeas corpus actions. *See Knaubert v. Goldsmith*, 791 F.2d
9 722, 728 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986). Unless an evidentiary hearing is
10 required, the decision to appoint counsel is within the discretion of the district court. *Id.* at
11 728; *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984).
12 An evidentiary hearing does not appear necessary at this time. With regard to Petitioner’s
13 circumstances in contracting and recovering from COVID-19, it does not amount to an
14 exceptional circumstance warranting appointment of counsel. The Court notes that despite
15 his alleged challenges, Petitioner has been able to file several coherent briefs, indicating
16 his continued ability to prosecute this matter *pro se*. Accordingly, Petitioner’s motions for
17 appointment of counsel are DENIED without prejudice to the Court’s sua sponte
18 reconsideration should the Court later find an evidentiary hearing necessary following
19 consideration of the merits of Petitioner’s claims.

20 **C. Motion for Extension of Time to File Traverse**

21 Petitioner has filed a motion for a fourth extension of time to file a traverse due to
22 restrictions to law library access and his recovery from COVID-19. Dkt. No. 79. Good
23 cause appearing, the motion is GRANTED. Petitioner shall file a traverse in the time
24 provided below.

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1 **CONCLUSION**

2 For the foregoing reasons, the Court orders as follows:

3 1. Petitioner’s motion for a stay is **DENIED**. Dkt. No. 72. Petitioner’s motion
4 for an extension of time to file a reply is **GRANTED**. Dkt. No. 77.

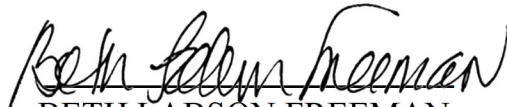
5 2. Petitioner’s motions for appointment of counsel are **DENIED** without
6 prejudice. Dkt. Nos. 76, 80.

7 3. Petitioner’s motion for a fourth extension of time to file a traverse is
8 **GRANTED**. Dkt. No. 79. Petitioner shall file his traverse **no later than sixty (60) days**
9 from the date this order is filed. The matter will be deemed submitted on the date
10 Petitioner’s traverse is due.

11 This order terminates Docket Nos. 72, 76, 77, 79, and 80.

12 **IT IS SO ORDERED.**

13 Dated: May 17, 2021


14 BETH LABSON FREEMAN
15 United States District Judge
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