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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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8 STERLING ATKINS,

9 Petitioner,

2:02-cv-01348-JCM-PAL

10 vs.

ORDER11 TIMOTHY FILSON *et al.*,

12 Respondents.

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15 In this capital habeas corpus action, the respondents filed a motion to dismiss on
16 December 22, 2016 (ECF No. 192). The petitioner, Sterling Atkins, is due to respond to the motion
17 to dismiss by April 21, 2017. *See* Order entered February 16, 2017 (ECF No. 198).

18 On April 11, 2017, Atkins filed a motion entitled “Opposed Motion to Defer Filing of
19 Motion for Evidentiary Hearing” (ECF No. 199). In that motion, Atkins states that, pursuant to the
20 scheduling order entered on August 10, 2015 (ECF No. 167), he intends to file a motion for leave to
21 conduct discovery with his response to the motion to dismiss, but that, on the other hand, he does not
22 intend to file a motion for evidentiary hearing with his response to the motion to dismiss. Atkins
23 requests that the time for him to file a motion for evidentiary hearing be deferred until after the
24 motion to dismiss is resolved.

25 Atkins’ motion appears to be premised on a misreading of the scheduling order. The
26 scheduling order states: “If petitioner wishes to request an evidentiary hearing, petitioner shall file

1 and serve a motion for an evidentiary hearing concurrently with, but separate from, the response to
2 respondents' motion to dismiss or the reply to respondents' answer." Order entered August 10, 2015
3 (ECF No. 167), pp. 2-3. This provision allows a motion for evidentiary hearing to be filed with a
4 response to a motion to dismiss or with a reply to an answer, or both. This provision is based on the
5 court's recognition that, depending on the case, a habeas petitioner may have reason to request an
6 evidentiary hearing with respect to issues raised in a motion to dismiss, and that a habeas petitioner
7 may also have reason to request an evidentiary hearing later, with respect to the merits of his claims.
8 In cases in which the petitioner does not seek an evidentiary with respect to issues raised in a motion
9 to dismiss -- such as this case, apparently -- the scheduling order still allows for the filing of a
10 motion for evidentiary hearing, after resolution of the motion to dismiss, with the petitioner's reply
11 to the respondents' answer.

12 Therefore, in this case, whether or not Atkins files a motion for evidentiary hearing with his
13 response to the motion to dismiss, the scheduling order provides that he may still file a motion for
14 evidentiary hearing with his reply to respondents' answer. Atkins' motion is, therefore, unnecessary
15 and moot, and will be denied on that ground.

16 **IT IS THEREFORE ORDERED** that petitioner's Opposed Motion to Defer Filing of
17 Motion for Evidentiary Hearing (ECF No. 199) is **DENIED** as unnecessary and moot.

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19 Dated April 13, 2017.

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22 UNITED STATES DISTRICT JUDGE
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