

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FRANK MACIAS,

Petitioner

v.

RENEE BAKER, et al.,

Respondents

Case No.: 3:15-cv-00461-RCJ-CLB

ORDER

In March 2020, this court granted in part respondents' motion to dismiss some

claims in Frank Macias' pro se 28 U.S.C. § 2254 habeas corpus petition (ECF No. 32).

In response, Macias has filed a motion to stay in order that he can return to state court

to exhaust his unexhausted claims (ECF No. 33). He has also filed another motion for

appointment of counsel (ECF No. 38). Respondents oppose both motions (ECF Nos.

35, 40). The motions are denied.

In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations

upon the discretion of the court to facilitate habeas petitioners' return to state court to

exhaust claims. The *Rhines* Court stated:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's

1 failure to present his claims first to the state courts, stay and abeyance is
2 only appropriate when the district court determines there was good cause
3 for the petitioner's failure to exhaust his claims first in state court.

4 Moreover, even if a petitioner had good cause for that failure, the district
5 court would abuse its discretion if it were to grant him a stay when his
6 unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2)
7 ("An application for a writ of habeas corpus may be denied on the merits,
8 notwithstanding the failure of the applicant to exhaust the remedies
9 available in the courts of the State").

10 *Rhines*, 544 U.S. at 277. The Court went on to state that, "[I]t likely would be an
11 abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if
12 the petitioner had good cause for his failure to exhaust, his unexhausted claims are
13 potentially meritorious, and there is no indication that the petitioner engaged in
14 intentionally dilatory litigation tactics." *Id.* at 278. The Ninth Circuit has held that the
15 application of an "extraordinary circumstances" standard does not comport with the
16 "good cause" standard prescribed by *Rhines*. *Jackson v. Roe*, 425 F.3d 654, 661-62
17 (9th Cir. 2005). The Court may stay a petition containing both exhausted and
18 unexhausted claims if: (1) the habeas petitioner has good cause; (2) the unexhausted
19 claims are potentially meritorious; and (3) petitioner has not engaged in dilatory litigation
20 tactics. *Rhines*, 544 U.S. at 277; see also *Wooten v. Kirkland*, 540 F.3d 1019, 1023-24
21 (9th Cir. 2008).

22 In March 2017, this court granted Macias' first motion to stay this case pending
23 the completion of his state-court proceedings (ECF No. 15). The court then declined
24 when Macias sought a continuation of the stay after his state litigation concluded (ECF
25 Nos. 17, 21). The case was reopened, and respondents moved to dismiss several
26 claims (ECF Nos. 21, 23). The court dismissed 2 grounds and held that several claims
27 were unexhausted (ECF No. 32). Macias now seeks a second stay and claims that such

1 a stay is in order to present unexhausted claims to the state's highest court (ECF No.
2 33). Macias states that he filed unspecified "petitions and motions" in state district court
3 in February and March 2018. But respondents represent that they have been unable to
4 identify any active state cases for Macias (ECF No. 35). This action has already been
5 stayed, and Macias does not attempt to articulate good cause for his failure to exhaust
6 these claims. The second motion to stay is denied.

7 Macias has also filed a second motion for appointment of counsel (ECF No. 38).
8 When it denied his previous motion, the court explained that there is no constitutional
9 right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v.*
10 *Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir.1993).
11 The decision to appoint counsel is generally discretionary. *Chaney v. Lewis*, 801 F.2d
12 1191, 1196 (9th Cir.1986), cert. denied, 481 U.S. 1023 (1987); *Bashor v. Risley*, 730
13 F.2d 1228, 1234 (9th Cir.), cert. denied, 469 U.S. 838 (1984). However, counsel must
14 be appointed if the complexities of the case are such that denial of counsel would
15 amount to a denial of due process, and where the petitioner is a person of such limited
16 education as to be incapable of fairly presenting his claims. See *Chaney*, 801 F.2d at
17 1196; see also *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir.1970). Macias' second
18 motion for counsel is the same form motion that he filed in 2016 (see ECF Nos. 7, 38).
19 He has presented no new bases for the appointment of counsel. Further, Macias has
20 litigated in pro se extensively in this federal habeas matter as well as in his state-court
21 proceedings. The court is not persuaded that counsel is warranted. Macias' second
22 motion for counsel is denied.

1 As the motion for stay is denied, Macias must now either (1) submit a sworn
2 declaration voluntarily abandoning the unexhausted claims in his federal habeas
3 petition, and proceed only on the exhausted claims; (2) or he may opt to try to return to
4 state court to exhaust his unexhausted claims, in which case his federal habeas petition
5 will be denied without prejudice.¹

6 **IT IS THEREFORE ORDERED** that petitioner's motion to continue stay and
7 abeyance (ECF No. 33) is **DENIED**.

8 **IT IS FURTHER ORDERED** that petitioner's motion for appointment of counsel
9 (ECF No. 38) is **DENIED**.

10 **IT IS FURTHER ORDERED** that petitioner shall have **30 days** to either: (1)
11 inform this court in a sworn declaration that he wishes to formally and forever abandon
12 the unexhausted grounds for relief in his federal habeas petition and proceed on the
13 exhausted grounds; OR (2) inform this court in a sworn declaration that he wishes to
14 dismiss this petition without prejudice in order to return to state court to exhaust his
15 unexhausted grounds.

16 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted
17 grounds, respondents shall have **30 days** from the date petitioner serves his declaration
18 of abandonment in which to file an answer to petitioner's remaining grounds for relief.
19 The answer shall contain all substantive and procedural arguments as to all surviving
20 grounds of the petition and shall comply with Rule 5 of the Rules Governing
21 Proceedings in the United States District Courts under 28 U.S.C. §2254.

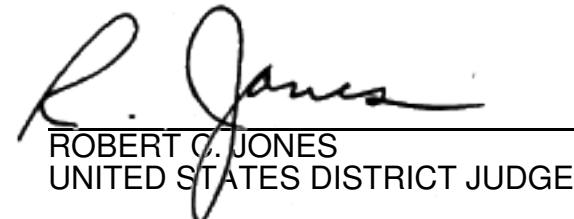
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23 ¹ As the court has stated previously, it makes no assurances as to the timeliness of any future-filed petition.

1 **IT IS FURTHER ORDERED** that petitioner shall have **30 days** following service
2 of respondents' answer in which to file a reply.

3 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within
4 the time permitted, this case may be dismissed.

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6 Dated: January 8, 2021

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8 ROBERT C. JONES
9 UNITED STATES DISTRICT JUDGE
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