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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JOAQUIN BROUSHON HILL,

Petitioner,

v.

TIMOTHY FILSON, et al.,

Respondents.

Case No. 3:16-cv-00694-MMD-WGC

ORDER

**I. SUMMARY**

This pro se habeas matter under 28 U.S.C. § 2254 comes before the Court on Petitioner Joaquin Broushon Hill's motion for stay and abeyance in accordance with Rhines v. Weber in order that he may exhaust all grounds of the Petition (ECF No. 28). Respondents opposed the motion to stay (ECF No. 29), and Hill replied (ECF No. 31). Hill also filed a motion for appointment of counsel, which the Court considers first (ECF No. 32).

**II. MOTION FOR APPOINTMENT OF COUNSEL (ECF NO. 32)**

There is no constitutional right to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir.1993). The decision to appoint counsel is generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir. 1984). However, counsel must be appointed if the complexities of the case are such that denial of counsel would amount to a denial of due process, and where the petitioner is a person of such limited education as to be incapable of fairly presenting his

1 claims. See Chaney, 801 F.2d at 1196; see also Hawkins v. Bennett, 423 F.2d 948 (8th  
2 Cir. 1970). Here, Hill's Petition sets forth his claims reasonably clearly, and he has already  
3 both opposed the motion to dismiss and filed a motion for stay pro se. His form motion  
4 for appointment of counsel does not provide any allegations or argument as to why  
5 counsel should be appointed at this stage of the litigation. Therefore, the Court concludes  
6 that counsel is not justified, and Hill's motion is denied.

7 **III. MOTION FOR STAY AND ABEYANCE (ECF NO. 28)**

8 The Court turns next to Hill's motion for stay and abeyance. In Rhines v. Weber,  
9 544 U.S. 269 (2005), the Supreme Court placed limitations upon the discretion of the  
10 court to facilitate habeas petitioners' return to state court to exhaust claims. The Rhines  
11 Court stated:

12 [S]tay and abeyance should be available only in limited circumstances.  
13 Because granting a stay effectively excuses a petitioner's failure to present  
14 his claims first to the state courts, stay and abeyance is only appropriate  
15 when the district court determines there was good cause for the petitioner's  
16 failure to exhaust his claims first in state court. Moreover, even if a petitioner  
17 had good cause for that failure, the district court would abuse its discretion  
if it were to grant him a stay when his unexhausted claims are plainly  
meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas  
corpus may be denied on the merits, notwithstanding the failure of the  
applicant to exhaust the remedies available in the courts of the State").

18 Rhines, 544 U.S. at 277.

19 The Court went on to state that "it likely would be an abuse of discretion for a  
20 district court to deny a stay and to dismiss a mixed petition if the petitioner had good  
21 cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and  
22 there is no indication that the petitioner engaged in intentionally dilatory litigation tactics."  
23 Id. at 278.

24 Thus, this Court may stay a petition containing both exhausted and unexhausted  
25 claims if: (1) the habeas petitioner has good cause; (2) the unexhausted claims are  
26 potentially meritorious; and (3) petitioner has not engaged in dilatory litigation tactics.  
27 Rhines, 544 U.S. at 277; Gonzalez v. Wong, 667 F.3d 965, 977-80 (9th Cir. 2011). "[G]ood  
28 cause turns on whether the petitioner can set forth a reasonable excuse, supported by

1 sufficient evidence, to justify [the failure to exhaust a claim in state court].” Blake v. Baker,  
2 745 F.3d 977, 982 (9th Cir. 2014). “While a bald assertion cannot amount to a showing  
3 of good cause, a reasonable excuse, supported by evidence to justify a petitioner’s failure  
4 to exhaust, will.” Id. An indication that the standard is not particularly stringent can be  
5 found in Pace v. DiGuglielmo, 544 U.S. 408 (2005), where the Supreme Court stated that  
6 “a petitioner’s reasonable confusion about whether a state filing would be timely will  
7 ordinarily constitute ‘good cause’ to excuse his failure to exhaust.” Pace, 544 U.S. at 416  
8 (citing Rhines, 544 U.S. at 278); see also Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir.  
9 2005) (the application of an “extraordinary circumstances” standard does not comport  
10 with the “good cause” standard prescribed by Rhines).

11 In its order dated February 1, 2018, this Court granted Respondents’ motion to  
12 dismiss in part and concluded that grounds 3, 4, 5(b), and 5(c) were unexhausted (ECF  
13 No. 25). In ground 3, Hill argues that the trial court and trial counsel erred in failing to  
14 qualify an alibi witness. (ECF No. 6 at 7.) He contends in ground 4 that the prosecutor  
15 committed several instances of misconduct. (Id. at 9.) In ground 5(b), Hill argues that trial  
16 counsel was ineffective for failing to adequately explore his competency to stand trial and  
17 significant mental impairments. (Id. at 11.) Finally, in ground 5(c), Hill contends that trial  
18 counsel was ineffective for failing to object to the admission of autopsy photographs. (Id.)

19 In his motion to stay, Hill mainly argues that he did present these claims to the  
20 state courts and that they are in fact exhausted (ECF No. 28). He also intimates that the  
21 fact that the victim’s husband had been a justice of the peace in Verdi, Nevada—where  
22 the murder occurred until the husband’s death in 1980—prevented a fair trial. Hill further  
23 complains that the state district court violated his due process rights by adjudicating his  
24 state postconviction petition without conducting an evidentiary hearing. These arguments  
25 do not demonstrate good cause for failure to exhaust his unexhausted claims.

26 Hill also generally invokes ineffective assistance of his state postconviction  
27 counsel and appears to argue that he can demonstrate good cause for failure to exhaust  
28 these claims due to such ineffective assistance. In Martinez v. Ryan, the United States

1 Supreme Court held that the failure to appoint counsel or the ineffective assistance of  
2 counsel in a state postconviction proceeding may establish cause to overcome procedural  
3 default of a claim of ineffective assistance of trial counsel. 566 U.S. 1, 17 (2012). The  
4 Ninth Circuit then held in *Blake v. Baker*, 745 F.3d 977 (9th Cir. 2014) that a valid claim  
5 of ineffective assistance of state postconviction counsel under *Martinez* (which would also  
6 encompass the absence of counsel) that would establish “cause” for overcoming a default  
7 would also be sufficient to justify a stay for purposes of exhausting the petitioner’s claims.  
8 *Blake*, 745 F.3d at 983-84 (holding that “cause” under *Rhines* “cannot be any more  
9 demanding” than the *Martinez* standard); *id.* at 984 n.7 (noting that the Supreme Court  
10 has suggested the *Rhines* standard is more liberal).

11 Hill’s argument that ineffective assistance of state postconviction counsel provides  
12 good cause for his failure to exhaust is unavailing on its face with respect to ground 4,  
13 which alleges prosecutorial misconduct, and with respect to the claim of trial court error  
14 in ground 3, because these types of claims generally must be raised on direct appeal.  
15 Thus, it is entirely unclear how the failure to raise the claims in a state postconviction  
16 petition would constitute ineffective assistance or provide a reasonable excuse here.  
17 *Blake*, 745 F.3d at 982; see also *Jones v. Barnes*, 463 U.S. 745 (1983) (counsel does not  
18 have a duty even to raise every non-frivolous claim on appeal).

19 Next, Hill argues that postconviction counsel was ineffective because he did not  
20 raise the claim of ineffective assistance of trial counsel for failing to qualify an alibi witness  
21 (the remaining claim in ground 3). However, Hill raised this claim in his pro se state  
22 postconviction petition, and his state postconviction counsel raised the claim in both the  
23 amended and second-amended supplemental state petitions. (Exh. 106 (ECF No. 12-15)  
24 at 18-19, 28-29; Exh. 138D (ECF No. 13-20) at 4-5; Exh. 146 (ECF No. 13-28) at 4-5,  
25 respectively.) The state district court considered the claim and denied it on its merits.  
26 (Exh. 162 (ECF No. 14-11) at 4.) State postconviction counsel did not raise this claim on  
27 appeal of the denial of the state petition. However, counsel has no duty to raise every  
28 non-frivolous issue on appeal and in fact should select the strongest claims in order to

1 maximize the possibility of success on appeal. Jones, 463 U.S. 745. This claim was raised  
2 in the state postconviction litigation, and thus the alleged ineffective assistance of state  
3 postconviction counsel cannot serve as good cause for a stay as to ground 3.<sup>1</sup>

4 Similarly, Hill presented ground 5(b)—alleging ineffective assistance of trial  
5 counsel for failing to adequately explore Hill’s competency to stand trial and significant  
6 mental impairments—in his original pro se state postconviction petition. (Exh. 106 (ECF  
7 No. 12-15) at 16-17, 26-27.) The state district court considered the merits of the claim.  
8 (Exh. 162 (ECF No. 14-11) at 3-4, 6.) As with ground 3, this claim was presented in the  
9 state postconviction litigation, and counsel has no duty to raise even every non-frivolous  
10 issue on appeal. Jones, 463 U.S. 745.

11 Finally, with respect to ground 5(c), Hill contends that trial counsel was ineffective  
12 for failing to object to the admission of autopsy photographs. This claim was never raised  
13 in Hill’s state postconviction proceedings. However, Hill provides no argument and has  
14 not demonstrated that this is a non-frivolous claim that counsel unreasonably failed to  
15 discover and raise. See Delgado v. Lewis, 223 F.3d 976, 980 (9th Cir. 2000). This court  
16 concludes that Hill has not demonstrated good cause for failure to exhaust ground 5(c).  
17 Blake, 745 F.3d at 982. Further, Hill has not shown or even argued that this claim is  
18 potentially meritorious.

19 Accordingly, Petitioner’s motion for a stay and abeyance of this federal habeas  
20 corpus proceeding is denied. Hill must now either (1) inform this Court in a sworn  
21 declaration that he wishes to formally and forever abandon the unexhausted grounds for  
22 relief in his federal habeas petition and proceed on the exhausted ground; or (2) inform

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24 <sup>1</sup>The Court notes that Hill also fails to demonstrate that the alibi claims are  
25 potentially meritorious. In his state postconviction petition he alleged, with no specific  
26 timeline or other support, that he spent time at his girlfriend’s house and at a friend’s  
27 house in Sacramento, California between when he was released from the Sacramento  
28 County Jail and when he was stopped for a traffic violation outside of Ely, Nevada about  
thirty-eight hours later. Taking Hill’s estimated travel times between Sacramento and  
Verdi, Nevada and between Verdi and Ely as accurate, his alleged alibi does not support  
his claim that he had insufficient time to commit a burglary and murder in Verdi. (See,  
e.g., Exh. 146 (ECF No. 13-28) at 4-5.)

1 this Court in a sworn declaration that he wishes to dismiss this Petition without prejudice  
2 in order to return to state court to exhaust his unexhausted claims.

3 **IV. CONCLUSION**

4 It is therefore ordered that Petitioner's motion for appointment of counsel (ECF No.  
5 32) is denied.

6 It is further ordered that Petitioner's motion for stay and abeyance (ECF No. 28) is  
7 denied.


8 It is further ordered that Petitioner will have thirty (30) days to either: (1) inform this  
9 court in a sworn declaration that he wishes to formally and forever abandon the  
10 unexhausted grounds for relief in his federal habeas petition and proceed on the  
11 exhausted ground; or (2) inform this Court in a sworn declaration that he wishes to dismiss  
12 this Petition without prejudice in order to return to state court to exhaust his unexhausted  
13 claims.

14 It is further ordered that if Petitioner elects to abandon his unexhausted grounds,  
15 Respondents will have thirty (30) days from the date Petitioner serves his declaration of  
16 abandonment in which to file an answer to Petitioner's remaining ground, ground 5(a), for  
17 relief. The answer must contain all substantive and procedural arguments as to the  
18 surviving ground and must comply with Rule 5 of the Rules Governing Proceedings in the  
19 United States District Courts under 28 U.S.C. §2254.

20 It is further ordered that Petitioner will have thirty (30) days following service of  
21 Respondents' answer in which to file a reply.

22 It is further ordered that if Petitioner fails to respond to this order within the time  
23 permitted, this case may be dismissed.

24 DATED THIS 20<sup>th</sup> day of September 2018.

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28 MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE