

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

John Edward Kirby v. Warden Brietenbach

Kirby · No. 3:24-cv-00002-ART-CSD · Decided November 25, 2025

OPINION

Kirby

PER CURIAM.

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3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 JOHN EDWARD KIRBY, Case No. 3:24-cv-00002-ART-CSD 6 Petitioner, ORDER v. 7

WARDEN BRIETENBACH,

8 Respondents. 9

10 Petitioner John Edward Kirby has filed a counseled first amended petition 11 (ECF No. 20) and now requests a stay while he litigates his second state habeas 12 petition. ECF No. 42. Also pending are Respondents’ Motion to Dismiss (ECF No. 13 39) and Motion to Seal (ECF No. 36) as well as Kirby’s Motion to Extend (ECF No. 14 44.) 15 I. Background 16 Kirby challenges a conviction pursuant to guilty pleas for burglary, grand 17 larceny, property value greater than \$3,500 or greater, and possession of stolen 18 motor vehicle, properly value greater than \$3,500 or greater. The state court 19 sentenced Kirby to an aggregate term of 56 to 144 months. 20 Kirby filed a state habeas petition, and the state court denied relief and the 21 Nevada Court of Appeals affirmed the denial of relief on appeal. Kirby filed his 22 federal habeas petition. (ECF No. 1-1.) Following appointment of counsel, Kirby 23 filed his first amended petition. (ECF Nos. 17, 20.) Respondents move to dismiss 24 Ground Three as unexhausted. (ECF No. 39.) Kirby now moves for a stay to return 25 to state court to exhaust Ground Three. (ECF No. 42.) 26 II. Discussion 27

a. Motion to Stay 28 A district court is authorized to stay an unexhausted petition in “limited 1 circumstances,” to allow a petitioner to present unexhausted claims to the state 2 court without losing his right to federal habeas review due to the relevant one- 3 year statute of limitations. Rhines v. Weber, 544 U.S. 269, 273–75 (2005); Mena 4 v. Long, 813 F.3d 907, 912 (9th Cir. 2016) (holding that district courts have 5 authority to stay and hold in abeyance both mixed petitions and “fully 6 unexhausted petitions under the circumstances set forth in Rhines”). Under the 7 Rhines test, “a district court must stay a mixed petition only if: (1) the petitioner 8 has ‘good cause’ for his failure to exhaust his claims in state court; (2) the 9 unexhausted claims are potentially meritorious; and (3) there’s no indication that 10 the petitioner intentionally engaged in dilatory litigation tactics.” Wooten v. 11 Kirkland, 540 F.3d 1019, 1023 (9th Cir.2008) (citing Rhines, 544 U.S. at 278). 12 Courts in this district have declined to prescribe the strictest possible 13 standard

for issuance of a stay. See, e.g., *Riner v. Crawford*, 415 F. Supp. 2d 14 1207, 1210 (D. Nev. 2006). “[G]ood cause under *Rhines*, at least in this Circuit, 15 should not be so strict a standard as to require a showing of some extreme and 16 unusual event beyond the control of the defendant.” *Id.* For example, “petitioner’s 17 reasonable confusion about whether a state filing would be timely will ordinarily 18 constitute ‘good cause’ for him to file in federal court.” *Pace v. DiGuglielmo*, 544 19 U.S. 408, 416 (2005). 20 Kirby asserts that he can overcome the procedural default of Ground Three 21 in state court because his claim is based on newly discovered information that 22 was not previously available. Respondents oppose, arguing that Kirby’s alleged 23 new evidence does not justify a stay. In addition, Respondents argue that a stay 24 would be futile and wasteful because he cannot develop the record under *Shinn* 25 v. *Ramirez*, 566 U.S. 366 (2022). They assert that Kirby is “do[ing] nothing more 26 than present[ing] his documents in the state court and then return[ing] to this 27 Court and alleg[ing] he was diligent in developing the state-court record.” (ECF 28 No. 43 at 4.)

1 The Court finds that Kirby has established good cause for a stay and 2 abeyance of this proceeding as he has a colorable argument that he can make to 3 the state courts to overcome the procedural bars of his unexhausted claim. The 4 Court is unable to conclude that all of his claims are plainly meritless without 5 conducting a merits analysis, including review of the trial transcripts and alleged 6 new evidence. Accordingly, it is not perfectly clear whether Kirby has no hope of 7 prevailing on at least one of his claims. *Dixon v. Baker*, 847 F.3d 714, 722 (9th 8 Cir. 2017) (“In determining whether a claim is ‘plainly meritless,’ principles of 9 comity and federalism demand that the federal court refrain from ruling on the 10 merits of the claim unless ‘it is perfectly clear that the petitioner has no hope of 11 prevailing.’”) The Court notes that *Ramirez* does not concern the good cause 12 requirement for a *Rhines* stay. The Court need not determine at this time whether 13 it will entertain new evidence upon Kirby’s return to this Court following a stay. 14 There is also no indication that Kirby has intentionally engaged in dilatory 15 litigation tactics. Accordingly, the Court grants Kirby’s Motion to Stay these 16 proceedings while he litigates his claim in state court. 17 The Court denies Respondents’ Motion to Dismiss without prejudice to 18 Respondents reasserting any and all defenses then applicable in a renewed 19 motion to dismiss, following upon a scheduling order directing a response. 20 b. Motion to Seal 21 Respondents seek leave to file under seal (ECF No. 36): Exhibit 10, Mental 22 Health Evaluation (ECF No. 37-1) and Exhibit 11, Salvation Army Program 23 Information and Acceptance (ECF No. 37-2). The exhibits were sealed in the 24 underlying criminal proceedings. Having reviewed and considered the matter in 25 accordance with *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th 26 Cir. 2006), and its progeny, the Court finds that a compelling need to protect the 27 petitioner’s safety, privacy, and/or personal identifying information outweighs 28 the public interest in open access to court records. Accordingly, Respondents’ 1 Motion to Seal is granted,

and Exhibits 10 and 11 are considered properly filed 2 under seal. 3 c. Motion to Extend 4 Kirby seeks an extension of time to file his reply in support of his motion 5 to stay. (ECF No. 4.) The Court finds that the request is made in good faith and 6 not solely for the purpose of delay, and therefore, good cause exists to grant the 7 motion. 8 III. Conclusion 9 It is therefore ordered that John Edward Kirby's Motion to Stay Case (ECF 10 No. 42) is GRANTED.

11 It is further ordered that Respondents' Motion to Dismiss (ECF No. 39) is 12 denied without prejudice to the reassertion of any and all defenses then 13 applicable following the stay, following upon a scheduling order directing a 14 response. 15 It is further ordered that this action is STAYED pending exhaustion of the 16 unexhausted claims in the amended petition. 17 It is further ordered that the grant of a stay is conditioned upon Petitioner 18 filing, if same is not already pending, a state post-conviction petition or other 19 appropriate proceeding in state district court and returning to federal court with 20 a motion to reopen within forty-five (45) days of issuance of the remittitur by the 21 Supreme Court of Nevada at the conclusion of all state court proceedings. 1 22 It is further ordered that the Clerk of Court is directed to 23 ADMINISTRATIVELY CLOSE this action until such time as the Court grants a 24 motion to reopen the matter. 25 26 27 1 If certiorari review will be sought or thereafter is being sought, either party may move to extend the stay for the duration of such proceedings. Cf. Lawrence v. 28 Florida, 549 U.S. 327, 335 (2007). 1 It is further ordered that the Court will reset the briefing schedule upon 2 || reopening the case and lifting the stay. 3 It is further ordered that Petitioner's unopposed first Motion for 4 || Enlargement of Time (ECF No. 44) is granted nunc pro tunc. 5 It is further ordered that Respondents' Motion to Seal (ECF No. 36) is 6 || granted. Exhibits 10 and 11 are considered properly filed under seal. 7 DATED THIS 25th day November, 2025.

9 ANNE R. TRAUM

10 UNITED STATES DISTRICT JUDGE

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