UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

________________,	§	
	§	
Petitioner,	§	**CIVIL NO.**
	§	
V.	§	
	§	
NATHANIEL QUARTERMAN, Director Texas Department of Criminal Justice, Correctional Institutions Division,	§ § § § §	
Respondent.	§	

ORDER GRANTING MOTION FOR STAY AND ABEYANCE

The matters before this Court are (1) petitioner's motion, filed September 20, 2007, docket entry no. XX, requesting that this Court stay all proceedings and hold this cause in abeyance so petitioner may return to state court and exhaust available state court remedies on petitioner's currently unexhausted claim that he is mentally retarded and, thereby, exempt from the death penalty pursuant to the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and (2) respondent's opposition thereto, filed October 4, 2007, docket entry no. 21.

The Nature of *Atkins* Claims

In *Atkins*, the Supreme Court held the Eighth Amendment proscribes the execution of mentally retarded capital murderers.

Atkins v. Virginia, 536 U.S. at 321, 122 S.Ct. at 2252. Petitioner admits that he has not presented his *Atkins* claim to any state court but argues that, pursuant to the Supreme Court's holding in *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), it is appropriate for this Court to hold this case in abeyance while petitioner returns to state court to exhaust available state court remedies on his currently unexhausted *Atkins* claim. In *Rhines*, the Supreme Court held a federal habeas court should stay and hold in abeyance a federal habeas corpus proceeding where the petitioner has asserted both exhausted and unexhausted claims so as to permit the petitioner to return to state court to exhaust available state remedies on his unexhausted claims where (1) the petitioner has good cause for his failure to exhaust, (2) his unexhausted claims are potentially meritorious, and (3) there is no indication the petitioner engaged in intentionally dilatory litigation tactics. *Rhines v. Weber*, 544 U.S. at 278, 125 S.Ct. at 1535.

As cause for his previous failure to exhaust available state court remedies on his *Atkins* claim, petitioner argues that, as of the date of the Supreme Court's opinion in *Atkins*, petitioner was represented by a state habeas counsel who abjectly refused to meet with petitioner, failed to adequately investigate petitioner's mental health and background, and made no effort to ascertain whether the holding in *Atkins* applied to petitioner.
Petitioner argues further that he was placed in special education courses while in school yet neither his trial counsel nor his state habeas counsel made any inquiry into whether petitioner's placement

in such courses was necessitated by a mental defect such as mental retardation.[1] Petitioner alleges further that preliminary mental health examinations of petitioner conducted during the pendency of petitioner's federal habeas corpus proceeding have raised serious questions as to whether petitioner is mentally retarded within the meaning of the Supreme court's holding in *Atkins*.

In *Ex parte Soffar*, 143 S.W.3d 804, 807 (Tex. Crim. App. 2004), the Texas Court of Criminal Appeals abandoned its previous "two-forum rule" in favor of one which permits Texas habeas courts to address the merits of *Atkins* claims when those claims have been presented in a successive state habeas corpus application *provided* the federal court in which the same claim is proceeding has stayed the federal proceedings and held the claim in abeyance in that forum. Thus, granting petitioner's motion for stay will eliminate a procedural impediment to state habeas review of the merits of petitioner's *Atkins* claim.

Respondent's Procedural Default Argument

Respondent's primary opposition to petitioner's motion for stay arises from the fact petitioner had adequate opportunity to investigate, develop, and present an *Atkins* claim during petitioner's state habeas corpus proceeding. Because petitioner's *Atkins* claim is currently unexhausted, respondent argues, this Court should summarily dismiss petitioner's unexhausted and

[1] This Court recognizes that students are often placed in special education courses for reasons wholly unrelated to their intellectual capabilities, such as their need for assistance in dealing with physical disabilities, emotional problems, and learning disabilities.

procedurally defaulted *Atkins* claim.

Federal law recognizes an exception to the procedural default doctrine in situations in which a federal habeas court's refusal to address the merits of a federal constitutional claim would work a fundamental miscarriage of justice. More specifically, the Supreme Court has recognized exceptions to the doctrine of procedural default where a federal habeas corpus petitioner can show "cause and actual prejudice" for his default or that failure to address the merits of his procedurally defaulted claim will work a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. at 750, 109 S.Ct. at 2565; *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). In order to satisfy the "miscarriage of justice" test, the petitioner must supplement his constitutional claim with a colorable showing of factual innocence. *Sawyer v. Whitley*, 505 U.S. 333, 335-36, 112 S.Ct. 2514, 2519, 120 L.Ed.2d 269 (1992). In the context of the punishment phase of a capital trial, the Supreme Court has held that a showing of "actual innocence" is made when a petitioner shows by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under applicable state law. *Sawyer v. Whitley*, 505 U.S. at 346-48, 112 S.Ct. at 2523. The Supreme Court explained in *Sawyer v. Whitley* this "actual innocence" requirement focuses on those elements which render a defendant *eligible* for the death penalty and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed

constitutional error. *Sawyer v. Whitley*, 505 U.S. at 347, 112 S.Ct. at 2523. Simply put, a showing by petitioner that he is mentally retarded would necessarily establish that the execution of petitioner would work a fundamental miscarriage of justice and mandate federal review on the merits of petitioner's *Atkins* claim.

Thus, any potential procedural default arising from petitioner's failure to exhaust available state remedies on his currently unexhausted *Atkins* claim could be surmounted by a showing that petitioner's execution would work a fundamental miscarriage of justice. Under the Supreme Court's holding in *Atkins*, by its very nature a showing of mental retardation renders a criminal defendant constitutionally ineligible for the death penalty. Assuming petitioner can establish that he is, in fact, mentally retarded, petitioner's procedural default on his currently unexhausted *Atkins* claim will *not* serve as the impenetrable barrier to federal habeas review of petitioner's *Atkins* claim which respondent argues currently exists.

The Proper Venue for Litigation of Petitioner's *Atkins* Claim

Furthermore, the adoption of the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"] radically altered the standard of review by this Court in federal habeas corpus proceedings filed by state prisoners pursuant to Title 28 U.S.C. Section 2254. Under the AEDPA's new standard of review, this Court cannot grant petitioner federal habeas corpus relief in this cause in connection with any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141, 125 S.Ct. 1438, 161 L.Ed.2d 334 (2005); *Williams v. Taylor*, 529 U.S. 362, 404-05, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000); 28 U.S.C. § 2254(d).

Before seeking federal habeas corpus relief, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' *federal* rights. *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 1349, 158 L.Ed.2d 64 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728, 1731, 144 L.Ed.2d 1 (1999); *Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995); 28 U.S.C. § 2254(b)(1). To provide the State with this necessary "opportunity," the prisoner must "fairly present" his claim to the appropriate state court in a manner that alerts that court to the federal nature of the claim. *See Baldwin v. Reese*, 541 U.S. at 29-32, 124 S.Ct. at 1349-51 (rejecting the argument that a petitioner "fairly presents" a federal claim, despite failing to give any indication in his appellate brief of the federal nature of the claim through reference to any federal source of law, when the state appellate court could have discerned the federal nature of the claim through review of

the lower state court opinion); *O'Sullivan v. Boerckel*, 526 U.S. at 844-45, 119 S.Ct. at 1732-33 (holding comity requires that a state prisoner present the state courts with the first opportunity to review a federal claim by invoking one complete round of that State's established appellate review process); *Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S.Ct. 2074, 2081, 135 L.Ed.2d 457 (1996)(holding that, for purposes of exhausting state remedies, a claim for *federal* relief must include reference to a specific constitutional guarantee, as well as a statement of facts that entitle the petitioner to relief and rejecting the contention that the exhaustion requirement is satisfied by presenting the state courts only with the facts necessary to state a claim for relief). The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts and, thereby, to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S.Ct. 2134, 2138, 153 L.Ed.2d 260 (2002); *O'Sullivan v. Boerckel*, 526 U.S. at 845, 119 S.Ct. at 1732.

The AEDPA reflects the same underlying policy concerns with comity that furnished the rationale for the exhaustion doctrine. Under the AEDPA, federal courts lack the power to grant habeas corpus relief on unexhausted claims. *See Kunkle v. Dretke*, 352 F.3d 980, 988 (5th Cir. 2003), *cert. denied*, 542 U.S. 954 (2004)("28 U.S.C. § 2243(b)(1) requires that federal habeas petitioners fully

exhaust remedies available in state court before proceeding in federal court.”); *Henry v. Cockrell*, 327 F.3d 429, 432 (5th Cir. 2003)(“Absent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief.”), *cert. denied*, 540 U.S. 956 (2003). The exhaustion of *all* federal claims in state court is a fundamental prerequisite to requesting federal collateral relief under Title 28 U.S.C. Section 2254. *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001); *Sterling v. Scott*, 57 F.3d 451, 453 (5th Cir. 1995), *cert. denied*, 516 U.S. 1050 (1996); 28 U.S.C. § 2254(b)(1)(A).

Resolving the issue of whether petitioner is mentally retarded requires making a factual determination. The exhaustion doctrine was adopted, in part, for the purpose of permitting the state courts the first opportunity to address federal constitutional claims. The AEDPA significantly restricts the scope of federal habeas review of state court fact findings, requiring that a petitioner challenging state court factual findings establish by clear and convincing evidence that the state court's findings were erroneous. *Rudd v. Johnson*, 256 F.3d 317, 319 (5th Cir. 2001)("The presumption is particularly strong when the state habeas court and the trial court are one and the same."), *cert. denied*, 534 U.S. 1001 (2001); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000)(state court fact findings are presumed correct and the petitioner has the burden of rebutting the presumption by clear and convincing evidence), *cert. denied*, 531 U.S. 849 (2000); *Hicks v. Johnson*, 186 F.3d 634, 637 (5th

Cir. 1999)(holding the AEDPA requires federal habeas courts to accept as correct state court factual determinations unless the petitioner rebuts same by clear and convincing evidence), *cert. denied*, 528 U.S. 1132 (2000); *Williams v. Cain*, 125 F.3d 269, 277 (5th Cir. 1997)(recognizing that under the AEDPA, state court factual findings "shall be presumed correct unless rebutted by 'clear and convincing evidence'"), *cert. denied*, 525 U.S. 859 (1998); *Hernandez v. Johnson*, 108 F.3d 554, 558 & n.4 (5th Cir. 1997)(holding, under the AEDPA, the proper forum for the making of all factual determinations in habeas cases will shift to the state courts "where it belongs" and recognizing that the AEDPA clearly places the burden on the federal habeas petitioner "to raise and litigate as fully as possible his potential federal claims in state court"), *cert. denied*, 522 U.S. 984 (1997); 28 U.S.C. § 2254(e)(1).

The AEDPA also greatly restricts the ability of a petitioner to obtain factual development of claims in a federal habeas corpus proceeding. *See Williams v. Taylor*, 529 U.S. 420, 433-34, 120 S.Ct. 1479, 1489, 146 L.Ed.2d 435 (2000)(prisoners who are at fault for the deficiency in the state court record must satisfy a heightened standard to obtain an evidentiary hearing); *Clark v. Johnson*, 202 F.3d 760, 765-66 (5th Cir. 2000)(holding the same), *cert. denied*, 531 U.S. 831 (2000); 28 U.S.C. §2254(e)(2). "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor*, 529 U.S. at 437, 120 S.Ct. at 1491.

Both the principles underlying the exhaustion doctrine and the policies reflected in the AEDPA's highly deferential standard of federal habeas review support a practice which permits the state courts the first opportunity to determine whether a state prisoner is exempt from execution under the Supreme Court's holding in *Atkins*.

Under these circumstances, it appears the best course available to this Court is to (1) grant petitioner's requested stay, (2) hold this case in abeyance pending petitioner's expeditious return to state court to exhaust available state remedies on his *Atkins* claim, and (3) assuming petitioner's state-court efforts prove unsuccessful, review petitioner's *Atkins* claim pursuant to the deferential standard set forth in the AEDPA.

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's motion requesting a stay, filed September 20, 2007, docket entry no. XX, is **GRANTED** as set forth hereinafter.

2. On or before sixty (60) days from the date of this Order, petitioner shall file in the appropriate state court his successive state habeas corpus application, motion for appointment of counsel, and any other pleading or motion necessary to initiate his efforts to seek state habeas review of petitioner's currently unexhausted *Atkins* claim. Petitioner shall present the state habeas court with all the factual allegations, evidentiary support therefor, and legal arguments supporting his *Atkins* claim that petitioner wishes to present to this Court upon petitioner's return to this Court.

3. Petitioner's current federal habeas corpus counsel is directed to monitor petitioner's state habeas corpus proceeding and to advise this Court and respondent's counsel of record in writing *immediately* upon (a) the filing of petitioner's successive state habeas corpus application asserting petitioner's *Atkins* claim and (b) the Texas Court of Criminal Appeals' rendition of a final ruling on petitioner's soon-to-be-filed *Atkins* claim.

4. Pending further Order of this Court, all proceedings in this cause shall be held in **ABEYANCE.**

5. All currently pending motions and deadlines are **DISMISSED** without prejudice to their being re-urged after the period of abeyance established by this Order is terminated.

6. Upon receipt from petitioner's federal habeas counsel of the advisory described in numbered paragraph 3(b) above, this Court will issue a new Scheduling Order setting forth the deadlines for the completion of the remaining proceedings in this cause.

7. The Clerk shall send a copy of this Order to (1) all counsel of record, (2) petitioner, and (3) the Texas Court of Criminal Appeals in Austin.

SIGNED and ENTERED this ______ day of October, 2007.

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[NAME]

United States District Judge