

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 03 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MARVIN AVILA,

Petitioner - Appellant,

v.

RICHARD KIRKLAND, Warden,

Respondent - Appellee.

No. 06-55479

D.C. No. CV-05-05675-CJC

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted September 24, 2007
Pasadena, California

Before: T.G. NELSON, IKUTA, and N.R. SMITH, Circuit Judges.

Avila's unexhausted claim in his habeas petition was meritless. Avila claimed that the California trial court violated his federal constitutional rights by failing to instruct the jury that simple possession of a controlled substance is a lesser-included offense of "giving away" a controlled substance. *Compare* Cal.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Health & Safety Code § 11350(a) *with id.* § 11352(a). On direct appeal, the California Court of Appeal rejected Avila’s argument that possession is a lesser-included offense of “giving away.” *See People v. Thomas*, 49 Cal. Rptr. 2d 856, 859 (Cal. Ct. App. 1996) (citations omitted). This state law determination is not reviewable in federal habeas corpus proceedings. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Moreover, the state trial court’s failure to instruct on a lesser-included offense in a non-capital case fails to present a federal constitutional question. *See Solis v. Garcia*, 219 F.3d 922, 928–29 (9th Cir. 2000); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984).

Because Avila’s unexhausted claim was meritless, the district court correctly refused to stay Avila’s habeas petition to permit Avila to exhaust this claim. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Therefore, we need not address whether counsel’s failure to state the federal basis for a claim on direct appeal in state court constitutes good cause for purposes of the stay and abeyance procedure outlined in *Rhines*.

AFFIRMED